IN THE SUPREME COURT OF THE UNITED STATES

22-5790

ORIGINAL

No. _____

DAVID DELVA
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

David Delva
Register No. 69084-054
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P.O. Box 1032
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QUESTION PRESENTED

Petitioner raised in the district court with an 18 U.S.C. Section 2255 motion that appellate counsel was ineffective on direct appeal for failing to argue in Petitioner's petition for panel rehearing on en banc review that Petitioner's Fifth Amendment right to be heard and due process were violated when the Court of Appeals affirmed Petitioner's conviction by creating new precedent with the warrantless seizure requirement sua sponte without any party presentation or any fair notice. The district court denied the 2255 motion in its entirety and denied a Certificate of Appealability ("COA"). Petitioner then filed a COA in the Second Circuit Court of Appeals, which was denied with one page (see Appendix A). Petitioner then filed a Petition for Rehearing of the denial of the COA in the court of appeals which was subsequently denied also with one page (see Appendix B). Due to existing law at the time that merited Petitioner relief and intervening cases such as United States v. Evelyn Sineneng-Smith, 140 S. Ct. 1575 (2020) which reinforced the principle of party presentation in the appellate forum, and the split of the courts on the party presentation issue, the Supreme Court should consider granting writ of certiorari.

This case therefore raise an important question for the Court's consideration:

Did the Court of Appeals err in denying Petitioner's COA claim; whether a reasonable jurist would debate if appellate counsel was ineffective for failing to argue the party presentation principle after the appellate court affirmed Movant's conviction on grounds never raised or argued by any party and never published by any court without fair notice?

LIST OF PARTIES

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Petitioner, Pro se

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Related Cases

1) United States v. Delva, 13 F. Supp.3d 269 U.S. Dist. LEXIS 36845, (S.D.N.Y. 2014)

2) United States v. Delva, No. 12-CR-802(KBF), 2014 U.S. Dist. LEXIS 14930 (S.D.N.Y. Jan. 27, 2014)

3) Delva v. United States, 138 S. Ct. 1309 (2018)

4) Delva v. United States, 2020 U.S. LEXIS 80844, 2020 WL 2214801 (S.D.N.Y. May 7, 2020)

5) Delva v. United States, 2020 U.S. Dist. LEXIS 156524 (S.D.N.Y. Aug. 28, 2020)

6) United States v. Delva, 858 F.3d 135 (2d Cir. 2017)

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The unreported order of the United States Court of Appeals for the Second Circuit denying Petitioner's request for en banc review or petition for panel rehearing was docketed as Docket no. 78 of case no. 20-4253; Dated May 3, 2022-(see Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on December 29, 2021, and the order denying Petitioner's petition for rehearing was entered on May 3, 2022. Justice Sotomayor granted petitioner's application to extend his time to file a petition for a writ of certiorari until September 30, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and person or things to be seized.

U.S. Const. Amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecution, 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In October 2013, Petitioner was charged in the Southern District of New York which later resulted in an eight-count indictment for petitioner's alleged participation in a robbery/kidnaping and for weapons and narcotic offenses (Criminal Docket "C.R. Doc." no. 5, case no. 1:12-CR-802-JMF). After the indictment was filed, Movant moved to suppress the drugs and gun seized from the apartment during the execution of an arrest warrant for Accilien (co-operating witness) (CR. Doc. 75, 78-80). On January 21, 2014, a suppression hearing was held in order to suppress the gun and drugs seized without a warrant. Officer Deloren and Reynolds testified for the government as arresting officers and as the ones who executed the arrest warrant for Accilien.

During the hearing Movant's counsel (Ira D. London) brought out new evidence to be suppressed through testimony of the officers (CR. Doc. 97, pgs. 99-100). Officer Deloren stated that he recovered two letters in the bedroom which were used as evidence at Movant's trial while he was conducting a general search (CR. Doc. 97, pg. 90).

Officer Reynolds stated that he seized the cellphones in the bedroom after he secured the residence (CR. Doc. 97, pg. 90). Both Deloren and Reynold testified that they got consent from Accilien in order to search the whole premises (id. at pgs. 31-32, 71, 84, 87); which Accilien later denied giving at petitioner's trial while testifying as a government witness (CR. Doc. 210, pgs. 444-46). The government declined to proffer the evidence through the alleged consent of Accilien, instead the government depended on the "protective sweep" doctrine and "plain view" doctrine, claiming that when the officers conducted a "protective sweep"of the premises all items used at petitioner's trial were found in "plain view" (CR. Doc. 85, 114).

After hearing these testimonies by the officers, counsel expanded the motion to include the cellphone (CR. Doc. 95). Trial counsel stated in that motion that there was no exigent circumstances, which the government never contested or made any objection to. Petitioner expressed dissatisfaction with counsel (Ira D. London) so the court granted

Petitioner's motion to appoint new counsel (Jeffrey G, Pittell, Esq.) who further supplemented the motion London put in by including the two letters that were seized without a warrant during a general search (CR. Doc. 114).

The district court primarily denied movant's motion to suppress the drugs and guns adopting the government's contention that the drugs and guns were seized from petitioner's bedroom in plain view during the course of a "protective sweep" (CR. Doc. 92). However, the court later made a similar finding regarding the cellphone and letters, looking over the fact that at the time they were seized the apartment had already been secured and the "protective sweep" had concluded (CR. Doc. 126).

At Petitioner's trial the evidence of the letters and cellphone became critical. Movant was acquitted of all substantive counts pertaining to the kidnaping/robbery and got convicted of the conspiracy to those counts. The jury asked questions through their jury notes during deliberation that indicated that the evidence of the letters and cellphone was a major factor in their decision making (CR. Doc. 218, pgs. 1403-22, 1427).

At trial at the suggestion of the District Court the government withdrew its attempt to offer other items seized on the same day and instant as the cellphone and letters precisely because they had been seized that day (arrest of Accilien) during a general search which was never authorized (CR. Doc. 212, pgs. 808-12). The court conceded that the items would bring issues (id. at pg. 809). The same evidence that was withdrawn falls within the same general search that the letters were seized according to Deloren.

After trial Petitioner appealed the suppression hearing decision by the district court pertaining to the letters and the cellphone that was seized without a warrant. United States v. Delva, 858 F.3d 135 (2d Cir. 2017) (see Appendix C). Petitioner was given a new lawyer (Steven Y. Yurowitz) who represented the petitioner on direct appeal, panel rehearing or en banc petition, and writ of certiorari petition. On direct appeal counsel brought out the fact that the District Court's finding were clearly erroneous. The district court made a ruling pertaining to the letters and cellphone that was no where

to be found in the record.

It was then up to the Court of Appeals to rectify the error which was clearly not harmless. The majority in a 2-1 opinion came to the conclusion that the district court was clearly erroneous in ruling that the warrantless seizure of the letters and cellphone was covered under the protective sweep doctrine. The majority proceeded to creating new precedent to the exigent circumstances exception to justify the seizures sua sponte without any adversarial process or fair notice; ruling in favor of the government. The majority ruled that it was "Exigent Circumstances" that allowed the re-entry of movant's room to interview Accilien, even though everyone was secured at the time of re-entry.

After the ruling the appellate counsel (Yurowitz) for Petitioner filed a petition for panel rehearing or en banc review (appellate docket no. 15-683-cr). In counsel's petition counsel argued two points pertaining to the "exigent circumstances" ruling by the majority:

Point I: The panel should grant rehearing because the district court committed clear error when it determined that the letter and cellphone were found during the Accilien interview the sin qua non of the exigent circumstances.

Point II: The court should grant en banc review of the panel's decision which creates a dangerous new exception to the Fourth Amendment's warrant requirement, i.e., exigent circumstances based on a purported need to interview a witness.

The petition was denied without opinion. After the petition was denied, appellate counsel filed for a petition for a writ of certiorari using a waiver/forfeiture argument. See Delva v. United States, 138 S. Ct. 1309 (2018). The petitioner informed counsel about a Fifth Amendment due process claim (right to be heard) via email, but reasons unbeknown to petitioner these claims were ignored (see Appendix D). The petition for writ of certiorari was denied also without opinion.

Petitioner then filed a timely 18 U.S.C. Section 2255 in the district court claiming counsel was ineffective for failing to raise the Fifth Amendment due process violation the Second Circuit Court of Appeals committed by denying petitioner a right to be heard and denying him fair notice on the dispositive issue. On May 7, 2020, (same day Sineneg-Smith was decided) the district court denied petitioner stating: This argument fails

because it is clearly established that the Court of Appeals can "affirm the denial of a suppression motion on any basis for which there is a record sufficient to permit conclusion of law, including grounds upon which the district court did not rely," (quoting United States v. Tropiano, 50 F.3d 157, 161 (2d Cir. 1995) (internal quotation marks omitted), and the "failure to make a meritless argument does not amount to ineffective assistance," United States v. Regaldo, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (see Delva v. United States, 2020 U.S. Dist. LEXIS 80844) (Appendix E). A COA was not issued on any claim. Petitioner then filed a Fed. R. Civ. P. 59(e) motion for reconsideration which was denied without opinion on August 28, 2020 (See Delva v. United States, 2020 U.S. Dist. LEXIS 156524) (see Appendix F).

Petitioner subsequently filed a motion in the Second Circuit Court of Appeals requesting for a certificate of appealability with the same argument; due process violation, but with the reinforcement of the Supreme Court case United States v. Evelyn Sineneng-Smith, 140 S. Ct. 1575 (2020). The motion was denied with one page on December 29, 2022 (See Appendix A).

Petitioner subsequently filed a petition for rehearing en banc which was also denied with a one page denial (see Appenix B).

REASON FOR GRANTING THE WRIT

This Court has previously noted in United States v. Evelyn Sineneng-Smith, 140 S. Ct. 1575 (2020) one of Justice Ginsburg's final opinions, "In our adversarial system of adjudication, we follow the principle of party presentation. As this court stated in Greenlaw v. United States, 554 U.S. 237, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008)("in both civil and criminal cases, in the first instance and on appeal ... We rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matter the parties present." Id. at 243 ... Sineneng-Smith, 140 S. Ct. at 1579. Ginsburg go on to opine quoting Samuels, "In short: ("Courts are essentially passive instruments of government." United States v. Samuel, 808 F.2d 1298, 1301 (CA8, 1987)

... They "do not, or should not, sally forth each day looking for wrong to right. They wait for cases to come to them, and when cases arise, courts normally decided only questions presented by the parties." Sineneng-Smith at 1579. This Court held that the Ninth Circuit panel's drastic departure from the principle of party presentation constituted an abuse of discretion.

This case at bar raises the same question through the thicket of channels used to grant Petitioner relief. Covered by layers of vehicles from Petitioner's suppression motion to this writ of cert. Petitioner contends a writ of certiorari should be granted in order to consider granting a COA in accordance with the standard set forth in Slacks v. Daniels, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) and Buck v. Davis, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017).

Under those standards, a certificate of appealability may issue a "substantial showing of the denial of a constitutional right." 28 U.S.C. Sec. 2255(c)(2). Where a petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or jurists could conclude the issue presented are adequate to deserve encouragement to proceed further." Slack, id. at 484.

Where a petitioner's constitutional claims are dismissed on procedural ground, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) that jurists of reason would find it debatable whether the petition (or motion) states a valid claim of denial of constitutional right and (2) that jurists of reasons would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484.

At the COA stage, the only question to be decided is whether the petitioner has shown that "jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issue presented are adequate to

deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). This threshold question should be decided without "full consideration of the factual or legal basis adduced in support of the claim." Id. at 336. During this process the court's inquiry ends there.

That is because "when a court side steps (the COA) process by first deciding the merits of an COA request, and then justify its denial of the COA based on its adjudication of the actual merits, it is in essence deciding a COA request without jurisdiction." Id. at 336-37. When determining whether a COA should be issued, court must not presume that all jurists would not find the claim reasonably debatable. See e.g., Miller-El v. Cockrell, 537 U.S. 322, 338 (2003). "A claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration that petitioner will not prevail.")

Here, reasonable jurists would debate whether the Court of Appeals erred in denying petitioner's COA. In support thereof, the petitioner states as followed:

This is a case where petitioner's Fourth, Fifth, and Sixth Amendments of the U.S. Constitution have been violated. Petitioner's Fourth Amendment was violated when the officers conducting an arrest warrant seized a letter and a cellphone in a bedroom where they re-entered after exiting and securing the residence with a protective sweep; they found the evidence during a general search as the officer testified to. Petitioner's Fifth Amendment was violated when petitioner brought the Fourth Amendment claim to the Court of Appeals and that court vitiated the adversarial process and raised a ground sua sponte that no party argued and was never published in any circuit.

The Court of Appeals affirmed Movant's conviction with this new ground (the need to interview a witness as "exigent circumstances") even though it was the government's burden to prove, without giving the petitioner any fair notice or opportunity to be heard. Petitioner's Sixth Amendment was violated when appellate counsel after reading the dissent by Justice Jacobs (see United States v. Delva, 858 F.3d 135, 161 (2d Cir. 2017)) failed to argue the Court of Appeals' abuse of discretion by violating Movant's Fifth Amendment

sua sponte affirming petitioner's conviction on grounds never briefed or argued without fair notice or an opportunity to be heard to the en banc panel or on a petition for rehearing.

A. Fourth Amendment Violation

The Fourth Amendment violation is the initiator of these litigations, the beginning that accumulated multiple other violations of petitioner's substantial right. Petitioner's claims that in the record the arresting officer (Deloren) during a suppression hearing testified to finding two letters during a general search at 832 South Oak Dr. (CR. Doc. 97, pg. 90). The only other officer to testify, testified he found the cellular phones after securing the residence but could not recall a specific time; only that it was before he left the residence (id. pg. 99-100).

Both officers claim they received verbal and written consent from the co-operating witness and submitted consent forms to verify their claims (id. pgs. 31-32, 71, 84, 87) (see Appendix G) (Government Exhibit 3501-K last page). However, when confronted with the consent form, the co-operating witness' signature was not on the form so Officer Deloren changed his story to only receiving verbal consent. At trial, the letter and cellphone were used as circumstantial evidence to convict Movant of kidnaping conspiracy, 18 U.S.C. Sec. 1201, Hobbs Act conspiracy, 18 U.S.C. Sec. 1951, conspiracy to distribute narcotics, 21 U.S.C. Sec. 846, and firearm offenses, 18 U.S.C. Secs. 924(c) and 922(g). However, during trial the co-operating witness (Accilien) was asked if he ever gave consent to search the apartment, his response was "No" twice and "I never did" (CR. Doc. 210, pgs. 444-46).

The government's theory never rested on the co-operating witness consent; it claimed it was the "protective sweep" doctrine that allowed the officers to seize those evidence (CR. Doc. 102). The district court accepted that theory and denied the suppression; however, when it reached the Court of Appeals the Court said the district court's ruling was clearly erroneous and went on to sua sponte affirming Movant's conviction on the purported "Exigent Circumstances" doctrine without fair notice or an opportunity to be

heard on the dispositive ground. Delva, 858 F.3d 135, 152 (see Appendix C).

The Court explained the exigency the officers had was the need to interview a witness about ownership of drugs and guns found in the bedroom belonging to petitioner. Id. However, the residence had already been secured at the time, all adult males were in handcuffs at the time on the floor and there was no reason why the officers couldn't get a search warrant over the phone or interview the witness in an area not protected by the Fourth Amendment. The Court of Appeals' affirmation was affirmed on clearly erroneous grounds due to no officer testifying to finding the letter or cellphone during the interview of the cooperating witness in the bedroom.

That being the exigency could have never justified the seizure because in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the Supreme Court made clear that when an entry into a home is justified by emergency circumstances a warrant must be obtained for any search exceeding the scope of the exigency, and "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation ..." Id. 98 S. Ct. at 2413, quoting Terry v. Ohio, 392 U.S. 1, 25-26, 88 S. Ct. at 1868, 20 L. Ed. 2d 889 (1968); Florida v. Royer, 460 U.S. 491, 500 (1983); Cupp v. Murphy, 412 U.S. 291, 295 (1973).

That being said, Officer Deloren testifying he found the letter during a subsequent general search does not coincide with the district court's erroneous findings that they found them during the interview of Accilien (see CR. Doc. 126, facts section). The majority on petitioner's direct appeal adopted the erroneous findings and affirmed Movant's conviction, thus upholding a Fourth Amendment violation.

B. Fifth Amendment Violation

The Court of Appeals violated petitioner's Fifth Amendment in United States v. Delva, 858 F.3d 135 (2d Cir. 2017) when the majority sua sponte affirmed petitioner's conviction on grounds never published in any circuit without fair notice or an opportunity to be heard on the dipositive ground. The majority relief on Headley v. Tilghman, 53 F.3d 472, 476

(2d Cir. 1995) stating "We are free to affirm on any ground that find support in the record, even if it was not the ground upon which the trial court relied," to justify its sua sponte ruling. Delva, 858 F.3d at 152. However, Headley relied on this Court's decision in Helvering v. Gowran, 302 U.S. 238 (1937), which would have supported a remand in petitioner's direct appeal to challenge the factual determination of the district court which was clearly erroneous. Gowran, 302 U.S. at 247 ("If the Court of Appeals had accepted the theory, it would have been open to the taxpayer to urge, in view of the new issue presented, that he should have the opportunity to establish before the Board additional facts which would affect the result. As we accept the new theory, leave is granted Gowran to apply to the lower court for that purpose.").

The lack of notice and opportunity to be heard deprived the petitioner of the effective assistance of counsel as that right is articulated in United States v. Cronic, 466 U.S. 648 (1984), and the right to present his own defense as articulated in Crane v. Kentucky, 476 U.S. 683 (1986), and Chambers v. Mississippi, 410 U.S. 284 (1973). "The opportunity to be heard is an essential requisite of due process of law in judicial proceeding." Richardson v. Jefferson, 517 U.S. 793, 797 n. 4 (1996). "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the changes made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party, of benefit of notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had

better be omitted altogether." Windsor v. McVeigh, 93 U.S. 274, 277-78 (1876).

The majority claimed that it affirmed movant's conviction because it was supported by the record through Headley v. Tilghman; this Court holds that "A respondent is entitled, however, to defend the judgment on any ground supported by the record. See Ponte v. Real, 471 U.S. 491, 500 (1985); Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 378, n. 5 (1996); also see Armstrong v. Manza, 380 U.S. 545, 550 (1965).

Recently, on May 7, 2020, this Court reinforced the principle of party presentation in the appellate forum and a COA should have been granted to determine the effects this Court's ruling in United States v. Evelyn Sineneng-Smith, 140 S. Ct. 1575 (2020) has on petitioner's claim. In Sineneng-Smith the Court vacated and remanded the case back to the Ninth Circuit in order to rule on the ground that the party presented, the Ninth Circuit panel interviewed and ordered further briefing from three organization on three areas of inquiry neither party raised. The Ninth Circuit gave the parties an opportunity to the new inquiry interjected by the Court of Appeals. The Supreme Court nonetheless still found that the Ninth Circuit abused its discretion by drastically departing from the principle of party presentation. In this case at bar, the Second Circuit's abuse of discretion was far more egregious. The Second Circuit not only interjected its own ground sua sponte, it affirmed movant's conviction without giving any party a chance to support or defend the issue. The majority did this without fair notice or giving the parties an opportunity to be heard, thus violating movant's Fifth Amendment.

Even with the exception to sua sponte rulings the Court of Appeals still abused its discretion. The practice of sua sponte interjection without any party presentation was circumscribed when there was "extraordinary circumstances (Sineneng-Smith, 140 S. Ct. at 1581) and when the resolution was "beyond a reasonable doubt." Singleton v. Wulff, 428 U.S. 106, 121 (1976). In Delva, 858 F.3d 135, the majority did not cite any extra-ordinary circumstances and the resolution was not beyond a reasonable doubt, due to the fact that the need to interview a witness was never published as exigent circumstances

in any federal court circuit of the United States. The one Justice (Jacobs) who dissented raised doubt and summarized that the petitioner never had an opportunity to be heard. Delva, 858 F.3d at 161. The majority thus abused its discretion and violated petitioner's "right to be heard" and failed to give petitioner "fair notice" on the dispositive ground through "judicial issue creation." The dissent written by Justices Newsom and Jordan explains the due process violation when a Court of Appeals sua sponte decide an unargued issue and make it dispositive without fair notice or an opportunity to be heard. See United States v. Campbell, 26 F.4th 860 (11th Cir. 2022); also see Perelta v. Heights Medical Center, Inc., 485 U.S. 80 (1988) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to apprise interested parties of the action ..." (quoting Mullane v. Cen. Hanover Bank of Trust Co., 339 U.S. 306, 314 (1950). The majority in petitioner's direct appeal violated his Fifth Amendment due process right when the Court failed to give notice on the dispositive issue the majority created without giving the petitioner an opportunity to be heard.

C. Sixth Amendment Violation

Petitioner claimed in his initial 18 U.S.C. Sec. 2255 motion that appellate counsel (Steven Y. Yurowitz) was ineffective in accordance with Strickland v. Washington, 466 U.S. 688 (1984) due to counsel's failure to raise the party presentation issue violating petitioner's Fifth Amendment right in his petition for en banc review or panel rehearing. Counsel did not take heed to the only Justice to side with the petitioner. Justice Jacob stated:

> The government did not argue exigent circumstances in the district court; the district court did not rule on exigent circumstances; and the government did not argue exigent circumstances on this appeal. It follows that Delva's counsel has not had an opportunity to argue the point, which has become crucial. It is not as though there would have been nothing for Delva's counsel to say: no published circuit opinion has found exigent circumstances in a case analogous to this one ....

Justice Jacobs ends with:

> Rather than affirm, I would remand this case to the district court for briefing and for a finding as to whether the exigent circumstances exception ... applies.

Delva, 858 F.3d at 161.

In summary what Justice Jacobs was iterating was that the petitioner never had an opportunity to be heard and would have remanded giving the petitioner fair notice and an opportunity to be heard.

Counsel's failure to bring the party presentation issue rendered counsel's performance deficient due to it being a due process issue, which would have been the strongest issue at hand due to its support by one of the Justices. The Supreme Court has advised appellate lawyers to focus their briefing on their strongest, most pertinent arguments, even if they have many "colorable claims!" Jones v. Barnes, 463 U.S. 745, 750-54 (1983). The Sixth Circuit granted en banc for the same issue and remanded due to lack of an adversarial process in the dispositive ground the majority ruled on.

> In short, the panel majority erred in ruling on grounds not raised by the parties ... We granted en banc review ... to vacate the panel majority's sua sponte determination of those unbriefed issues.

Citizen Coal Counsil v. U.S.E.P.A., 447 F.3d 879, 905 (6th Cir. 2006)(en banc).

Had counsel argued the party presentation principle he would have countless precedential cases to bolster his argument coming out of this court, e.g., Singleton v. Wulff, 428 U.S. 106, 119-121 (1976); Wood v. Milyard, 566 U.S. 463, 472 (2012); Arizona v. California, 530 U.S. 392, 412-13 (2000) ; Nasa v. Nelson, 562 U.S. 134, 147 n. 10 (2011); Greenlaw v. United States, 554 U.S. 237, 243 (2008); Helvering v. Gowran, 302 U.S. 238, 247 (1937); Castro v. United States, 540 U.S. 375, 386 (2003); McNeil v. Wisconsin, 501 U.S. 171, 181 n. 2 (1991); United States v. Burke, 504 U.S. 229, 246 (1992); Mackey v. Montrym, 443 U.S. 1, 13 (1979); and D.C. Circuit case Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)(Scalia, J.) ... Counsel had a myriad of cases to draw from with Justice Jacobs supporting that position; by counsel failing to raise the party presentation issue counsel conceded that the majority's sua sponte ruling was lawful and merited.

Counsel's concession prejudiced petitioner with the denial of en banc review and a

petition for panel rehearing and caused petitioner's 360 month sentence to be upheld. If petitioner had an opportunity to be heard he could have pointed out that the majority's ruling was based on clearly erroneous findings. No officers testified to finding any evidence during an interview of Accilien as the majority came to the conclusion from the conclusion from the district court's clearly erroneous factual findings. See Second Circuit Appellate case No. 20-4253, Docket no. 39, pgs. 4-6 (Argument if given an opportunity to be heard).

Certificate of Appealability

Petitioner asserts a COA should have been granted because a reasonable jurist would have debated whether counsel was ineffective when he failed to bring a due process violation for en banc review or for a petition for rehearing. Counsel failed to argue that the majority in the direct appeal failed to give fair notice on its dispositive issue it decided, especially because it was a question of first impression; and the majority never gave petitioner an opportunity to be heard on the dispositive ground it decided. A jurist would also find debatable that United States v. Sineneng was ruled on unanimously reinforcing the party presentation principle which petitioner asserted bolstered whether or not a jurist would find this issue debatable due to the analogous circumstances.

Due to the split of the courts on the issue of party presentation the Supreme Court should intervene and interpret when and how is the adversarial process is to be bypassed by the Appellate Court. For if petitioner brought the same issue in the Fourth, Sixth, or Seventh Circuit, the case would have been remanded due to lack of an adversarial process: See United States v. Oliver, 878 F.3d 120, 126 (4th Cir. 2017); Citizen Coal Council v. EPA, 447 F.3d 879, 905 (6th Cir. 2006)(en banc); Horne v. Electric Eel. Mfg. Co., 987 F.3d 704, 727 (7th Cir. 2021); U.S. Sup. Ct. Rule 10(c).

The appellate court's ruling was in direct conflict with other appellate courts and has so far departed from the accepted and usual course of judicial proceeding. Id. Rule 10(a). Because this case is a suitable vehicle for resolving the entrenched conflict

among the Court of Appeals, the petitioner requests for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Mr. Delva, the petitioner, respectfully requests that the Petition for Writ of Certiorari be granted.

Dated this 28 day of September, 2022.

Respectfully Submitted,

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