No. 22-7034

IN THE

SUPREME COURT OF THE UNITED STATES

Earnest Gibson, IV — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Earnest Gibson, IV #24390-379
(Your Name)
Federal Correctional Institution-Three Rivers
P.O. Box 4200
(Address)

Three Rivers, Texas 78701
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. Whether pursuant to Medicare regulations defining the terms "off-site," "campus," "remote location," and "satellite facility," established that Petitioner's PHP was not operation in violation of Medicare's requirement that treatment must have occurred under a licensed physicians "direct supervision"?

2. Whether the appellate court's opinion denying COA was in error pursuant to Strickland v. Washington and Slack v. McDaniel?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 31, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

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.

STATEMENT OF THE CASE

This case presents a complex examination of alleged Medicare fraud involving Partial Hospitalization Programs ("PHPs") and the often confusing application of when and where Medicare regulations apply to fraud cases on the district court level at trial. PHPs are outpatient programs designed to provide daily, intensive treatment for patients suffering from an "acute exacerbation" of a chronic mental disorder. As alleged by the government, Houston's Riverside General Hospital ("Riverside") ran PHPs-both on-site and at satellite locations. Riverside's Chief Executive Officer, president and administrator was Gibson III. Importantly, Petitioner, Gibson IV, operated a PHP-Riverside General's Devotions Care Solutions ("Devotions"). At trial, the government characterized Devotions at times as an off-site PHP, and at other times, as a satellite location.[1] The government's crux of their case stood on the argument that Gibson IV committed Medicare fraud because he failed to meet Medicare regulations that required the daily presence of a medical doctor at his facility.

On October 20, 2014, a jury convicted Petitioner of Conspiracy to Commit Healthcare fraud (Count 1), and Conspiracy to Defraud the government and violate the Anti-

1. As will be fully briefed, Gibson IV disputes that Devotions was a satellite facility or an off-site location.

Kickback Statute (AKS) (Counts 2 & 3) and of two substantive kickback offenses (Counts 11 and 12). The district court sentenced Gibson IV to a 240-month prison term and $7,518,480.11 in restitution. Soon thereafter, Petitioner appealed his conviction and sentence. The Fifth Circuit affirmed his convictions and sentences in November 2017. (Appendix A). United States v. Gibson, 875 F.3d 179 (5th Cir. 2017), cert. denied, 138 S. Ct. 2664 (2018). He then filed a motion to vacate, set aside, or correct his conviction and sentence under 28 U.S.C. § 2255. The district court denied the motion. (Appendix B). Petitioner then moved for reconsideration of his motion, which the district court construed as a motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure. In his motion, Petitioner contended that the district court failed to address his claim that his counsel rendered ineffective assistance of counsel when he failed to challenge the government's characterization of Devotions as an off-site PHP. Specifically, Petitioner argued that Devotions was neither an off-site PHP nor a satellite facility and thus, because of his status as an onsite PHP, Devotions was exempt from the Medicare regulations that required the daily presence of a medical doctor at his facility. Furthermore, Petitioner contended that because of his status as an on-site PHP, the allegations/acts alleging that he conspired to commit healthcare fraud because of his alleged failure to meet such regulation would not be sustained, had his counsel properly challenged the characterization at trial or on appeal.

In an Memorandum Opinion and Order, the district court acknowledged that it had indeed failed to answer Petitioner's claim in his original § 2255 motion and proceeded to address his claim pursuant to Rule 60(b)(1) of the Fed.R.Civ.P. The district court denied Petitioner's claim stating that "[t]he court now explicitly finds that Hennessy's conclusion is consistent with relevant regulations, citing 42 C.F.R. § 413.65(a)(2) (defining a hospital's campus as "the physical area immediately adjacent to the provider's main buildings, [and] other areas are located within 250 yards of the main buildings...).

Soon thereafter, Petitioner appealed the district court's decisions via application for certificate of appealability. On October 31, 2022, the Fifth Circuit denied Petitioner's application for certificate of appealability regarding the issue.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's refusal to grant Petitioner's COA regarding whether the district court erred in finding that Petitioner's counsel did not render ineffective assistance of counsel in violation of his Sixth Amendment right when he failed to challenge the government's characterization of Devotions as an off-site PHP and its argument that Medicare regulations required the daily presence of a medical doctor at the facility is in conflict with the decision of another United States Court of Appeals regarding the same matter and is in conflict with the Supreme Court precedents of Strickland v. Washington and Slack v. McDaniel.

Because Petitioner is accused of Conspiracy to Commit Medicare fraud, Medicare fraud, and the Anti-Kickback statute (AKS), the government had to prove-as alleged in the indictment (Appendix C)- that his hospital, inter alia: (1) did not meet the definition of an "on-campus" facility and (2) he did not have a licensed physician on "direct supervision." If the government met its burden, then Gibson IV is indeed guilty of Medicare fraud and the AKS counts. At trial, a jury, after hearing the evidence in the case, confirmed via its guilty verdict, that Petitioner committed the crimes via its guilty verdict, that Petitioner committed the crimes alleged in the indictment. However, Petitioner contended in his § 2255 motion that his trial counsel provided ineffective assistance

of counsel where he failed to challenge the government's assertion at trial that his facility was: (1) a satellite facility; and (2) was not located "on-campus." The appellate court did not agree with Petitioner's assessment of the issue and denied Petitioner's COA regarding the claim. However, the appellate court's decision was in error.

Statutory and Regulatory Definition of On-Site/On-Campus

To determine when a location qualifies as an on-site/on-campus facility, one would have to examine the Federal Statutes and Regulations governing Medicare site status. Pursuant to 42 U.S.C. § 13951(t)(21)(B), Payments of benefits, off-campus is defined in pertinent part as:

"(B) Off-campus outpatient department of a provider.

(i) In general. For the purpose of paragraph (1)(B)(v) and this paragraph, subject to clause (ii), the term "off-campus outpatient of a provider" means a department of a provider (as defined in 413.65(a)(2) of Title 42 of the Code of Federal Regulations as...that is not located -- (1) on the campus (as de3fined in 413.65(a)(2) of such provider; or (II) within the distance (described in such definition of campus) from a remote location of a hospital facility (as defined in such section 413.65(a)(2))."

Consistent with the controlling statute, we must turn to 42 C.F.R. § 413.65 to determine the definitions of campus and remote location. 42 C.F.R. § 413.65 defines the following terms:

"Campus means the physical area immediately adjacent to the provider's main buildings, other areas and structures that are

not strictly contiguous to the main buildings but are located within 250 yards of the main buildings, and any other areas determined on an individual case basis, by the CMS regional office, to be part of the provider's campus"; and

"Remote location of a hospital means a facility or an organization that is either created by, or acquired by, a hospital that is a main provider for the purpose of furnishing inpatient hospital services under the name, ownership, and financial and administrative control of the main provider; in accordance with the provisions of this section. A remote location of a hospital comprises both the specific physical facility that serves as the site of services for which separate payment could be claimed under the Medicare or Medicaid program, and the personnel and equipment needed to deliver the services at that facility. The Medicare conditions of participation do not apply to a remote location of a hospital as an independent entity. For the purposes of this part, the term, "remote location of a hospital" does not include a satellite facility as defined in § 412.22(h)(1) and § 412.25(e)(1) of this chapter."

Turning next to 42 C.F.R. §§ 412.22(h)(1) and 412.25(e)(1) which both define a satellite facility as:

"part of a hospital that provides inpatient services in a building also used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital."

It is abundantly clear from this definition that Edith Irby

Jones (henceforth "EIJ"), and Houston Recovery Campus (henceforth "HRC") (and thus Devotions), are not "satellite facilities." The only ;way for Devotions to be a satellite facility is if it was "a part of a hospital that provides inpatient services in a building also used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital." Id.

Devotions only provided outpatient services, and therefore, by definition, it could not be a satellite PHP, Riverside owned and operated entirely both EIJ and HRC, and no other hospital or entity operated out of the buildings of either location. Indeed, both EIJ and HRC can, at worst, be classified as remote locations, and again, based on Federal Statutory and Regulatory definitions, would still not be considered off-site/off-campus facilities. See 42 U.S.C. § 13951 and 42 C.F.R. § 413.65 (a)(2).

Based on the plain language of the Federal statute and Regulations, Devotions was located on-campus/on-site. All parties implicitly agree that Riverside Hospital was the main provider for all of the PHPs and specifically Devotions. There can also be no dispute that both EIJ Riverside, and HRC Riverside were providers, as the term is defined. There can also bne no dispute that Devotions was located in the provider's main buildings, consistent with the definition of "campus." It should be noted that the definition of campus states specifically that it is "the provider's main buildings," it does not say "the main provider's buildings."

See, Anna Jacques Hospital v. Burwell, 797 F.3d 1155 (D.C, App. 2015) (Explaining these terms extensively). The Fifth Circuit's decision to deny Petitioner's COA is contrary to the decision rendered in Burwell.

Thus, counsel's ill-fated excursion from the two hospitals owned and operated by Riverside, does not change the factual and legal conclusion that they would both still qualify as being part and parcel, Riverside's "main buiildings" on Riverside's campus. Counsel's contentions to the contrary are refuted by the statutory language. Again, the only way for Devotions to be a satellite facility is if EIJ or HRC were "a part of a hospital that provides inpatient services in a building also used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital." See, § 412.22(h)(1) and 412.25(e)(1). Neither building housed another hospital. Further, Devotions only provided outpatient services, and therefore, by definition, could not be a satellite PHP. It should be nothed

Counsel did not investigate the federal statutes and regulations which applied to Devotions. The failure to investigate controlling statutes and regulations which are material to the defense is the quintessential definition of ineffectiveness and in spite of the Government's attempts to house counsel's failures in the more impenetrable folds of the cloak of a strategic decision, counsel can never make the strategic decision to remain consciously ignorant of the law while representing a defendant in a felony federal case and then still be said to have met the minimal requirements of the

Sixth Amendment's right to the effective assistance of counsel. Indeed, as previously stated, neither former counsel, or the government addressed or acknowledged the plain language of the federal statutes or regulations. Petitioner contends maintains that a fair and impartial reading of the controlling federal statute and regulations will show that Devotions was on-site/on-campus, and therefore subject to the regulations governing that statute, and that counsel failed to investigate, rendering him ineffective. See, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denies a COA on the merits, the movant must demonstrate that "reasonable jurists would find the district court's assessment debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (200). In the instant case, Petitioner has shown that the Fifth Circuit's decision to deny his COA was not only based on an incorrect reading of Medicare statutory regulations, but it is also contrary to precedent of another circuit which has interpreted the aforementioned terms in agreement with Petitioner's reading of the statute. Reasonable jurists would find the district court's assessment debatable or wrong, and allowing such a ruling to stand would cause a circuit split regarding the interpretation of these terms in Medicare fraud cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ernest L. Hall IV

Date: Jan 28, 2023