

22-7497

No. _____

ORIGINIAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
APR 28 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Carlos Cantizano — PETITIONER
(Your Name)

vs.

Ninth Circuit Court of Appeals — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlos Cantizano : No. 68677-112
(Your Name)
Federal Correctional Institution
P.O. Box 9000
(Address)

Safford, AZ 85548
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

On federal criminal appellant's first appeal as of right to counsel, may the Ninth Circuit Court of Appeals refuse to provide counsel to both reply to the prosecution's response to the brief and to assist in filing a Rule 33 new trial motion to the District Court for indicative relief under Rule 37 based on newly discovered evidence pertaining to a Fifth Amendment due process violation that cannot be presented directly to the Court of Appeals, yet, the appellant is required to raise the constitutional violation before the end of the direct appeal?

Is not the filing of a constitutional violation for redress considered a critical stage that requires the assistance of counsel, regardless of the recipient court, on criminal appellant's first appeal?

LIST OF PARTIES

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:

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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 A 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 is unpublished.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 United States district 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 is unpublished.

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 **filed the order** was February 1, 2023.

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

The Sixth Amendment of the Constitution,

"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 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

- 1) Throughout the appeal my counsel misadvised me that newly discovered evidence could only be presented to the District Court in a 28 U.S.C. § 2255 motion after the direct appeal. Neither could my two issues be presented to the Court of Appeals because of the new evidence. Counsel identified my issues as Napue violations and provided documentation. To prevent default in not raising constitutional violations I asked counsel to present my two issues using only the court record without the new evidence.
- 2) On August 5, 2022 the opening brief was filed, (Docket Entry No. 53). The brief raised seven issues. I was upset that my counsel had failed to raise my two strongest issues.
- 3) On August 30, 2022, I filed a motion citing Supreme Court rulings *Anders v. California*, 386 U.S. 738 (1967); *Smith v. Robbins*, 528 U.S. 259 (2000), which closely identified my situation, yet, contained no procedure when the alleged frivolous matter involved new evidence. I requested of the court to void the current brief, that my counsel be removed, and that I be allowed to proceed pro-se so I could file a brief with my two issues, (Docket Entry No. 61).
- 4) On September 19, 2022, the court denied my motion to proceed pro-se, (Docket Entry No. 64). However, the Court permitted me to submit a pro-se supplemental opening brief, per *Smith v. Robbins*.
- 5) On December 5, 2022 I submitted my pro-se supplemental brief that raised my two issues using only the court record and reserved my right to present new evidence afterward, (Docket Entry No. 71).
- 6) My counsel's opinion on my pro-se brief lead to arguments where I accused my counsel of withholding the proper method of raising new evidence and my studying and discovery that proper procedure lay in a Rule 37 motion. On January 25, 2023, I called my counsel to discuss my discovery, he

answered by stating that he couldn't speak to me because he was considering withdrawing as my counsel and hung-up on me. My counsel filed to withdraw on January 27th without filing the reply brief which was due the same day, (Docket Entry No. 83). Preventively I had filed a motion where I told the Court that I disapproved of my counsels removal, (Docket Entry No. 79 at 4).

8) On February 1, 2023, based on my counsels declaration where he points to my outdated request to proceed pro-se, the Court of Appeals filed a one page ORDER granting my counsels motion to withdraw, forced pro-se status on me, and thereby the Court ruled that I had waived the optional reply brief, thus, ordered the brief submitted for review, see APPENDIX-A, (Docket Entry No. 84).

The Court of Appeals violated my due process right to counsel as set forth in *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811 (1963), which held that the Sixth Amendment guarantees a criminal appellant effective assistance of counsel on his first appeal as of right.

9) On February 27, 2023, I filed a motion to recall the mandate due to the Courts procedural error. I requested that the Court appoint counsel to finish filing the reply brief and assist in filing the Rule 33 motion.

And the Court was aware from my pro-se supplemental brief that I was trying to raise a constitutional violation to the correct court, (Docket Entry No. 86). My motion was denied without comment on March 1st, 2023, (Docket Entry No. 87). The Courts failure to provide counsel to raise a constitutional violation, regardless that it's to a different court violates my Sixth Amendment right to counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746 (2000); *Morrison v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992), (appellate counsels failure to raise an issue on appeal does not constitute ineffective assistance ... [unless] constitutional violation has been shown, and thus,

counsel had . . . [a] reasonable likelihood of success in arguing the issue).

10) On April 25, 2023, under forced pro-se status I filed my motion to the District Court requesting a ruling for indicative relief under Federal Rule of Criminal Procedure 37 for a new trial under Federal Rule of Criminal Procedure 33. On my brief I used my counsels words on the governing law, however, without an attorney's help I had trouble with the citations, which I felt weaken my petition, (District Court Docket Entry No. 283); (open case No. 4:23-cv-00196-JAS-PSOT).

On April 20, 2023 I mailed a motion to the Court of Appeals requesting a stay to the appeal pending the District Courts decision. I also requested appointment of counsel to assist me in consolidating the district courts decision to my current first appeal.

REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10(c), as it turns out, the Supreme Court has never held that a hearing on a motion for a new trial is a critical stage of a criminal proceeding. Indeed, in *Marshall v. Rodgers*, 569 U.S. 58, the Supreme Court was presented with the opportunity to rule that such a "post-trial, pre-appeal motion for a new trial is a critical stage of the prosecution", but specifically declined to do so. As a result I was negatively effected, as will many **more** appellants be effected for the foreseeable future, unless some procedure or rule is set forth to determine what matter in a new trial motion can be considered a "critical stage".

It is clear that not all new trial motions are the same. However, when the circumstance of the newly discovered evidence is a constitutional violation at trial which lead to the conviction, such as my issue, then the necessity of counsel to redress the matter could make the difference as to whether the issue is brought under the strongest legalese to the District Court for the first time on direct appeal. I believe that under this circumstance a constitutional violation establishes a critical stage of a criminal proceeding.

Similarly, I had to use in my appeal; *Smith v. Robbins*, 528 U.S. 259 (2000) which is good law, yet, contains no Supreme Court procedure for counsel to follow on newly discovered evidence. As it applies to; counsel contest it being the strongest issue, counsel believes it frivolous, or counsel wont investigate the new evidence because it cannot be presented on direct appeal anyways, and he's not obligated to present the constitutional violation to a different court.

Supreme Court direction on these matters would be helpful to many, as it may be to late for me.