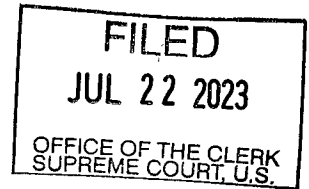


23-5295

ORIGINAL

No:

In the
Supreme Court of the United States



CUSTODIO CARRASCO GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Custodio Carrasco-Garcia
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QUESTIONS PRESENTED FOR REVIEW

In light of the facts of this case, was the defense counsel ineffective in light of this court's precedent in *Strickland v. Washington*, 466 U.S. 668 (1984), in not automatically filing a notice of appeal, where there was impediment to the right to file an appeal.

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Custodio Carrasco Garcia, Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, was entered on March 10, 2023, an unpublished decision in *United States v. Carrasco Garcia* , No. 22-20496 (1st Cir. April 26, 2023), is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court from the Southern District of Texas Circuit, whose judgment is herein sought to be reviewed, was entered on March 10, 2023, an unpublished decision in *Carrasco Garcia v. United States*, No. 21-2238 (S.D. Texas, August 11, 2022), is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on August 26, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

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 or 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.

Id. Fifth Amendment.

STATEMENT OF THE CASE

On July 29, 2021, a complaint was filed against Carrasco Garcia charging Conspiracy to possess with the intent to distribute over 500 grams of methamphetamine; knowingly, intentionally, and unlawfully possessing with the intent to distribute over 500 grams of methamphetamine, a Schedule II substance. (Dkt. 1).

The indictment charged that Carrasco Garcia knowingly and intentionally conspire[d] and agree[d] with other persons known and unknown to the Grand Jurors to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance in violation of Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(1)(A) and a notice of forfeiture, Title 21, United States Code, Section 853(a). (Dkt.

9). After originally pleading not guilty on September 9, 2019, Carrasco Garcia eventually changed his plea to guilty without the benefit of a plea agreement. (Dkt. 18). On August 5, 2020, Carrasco Garcia was sentenced to 360 months of incarceration followed by 5 years of supervised release. (Dkt. 40). Judgment was executed on August 7, 2020. (Dkt. 41).

STATEMENT OF THE FACTS

On August 29, 2019, in Houston, Texas, Carrasco Garcia was indicted by a grand jury on a single count of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine. On February 21, 2020, Carrasco Garcia pleaded guilty, without a written plea agreement. As a result, on August 5, 2020, the Court sentenced him to 360 months of imprisonment and five years of supervised release. After the sentencing, no appeal was filed on his behalf.

Subsequently, on August 9, 2021, Carrasco Garcia, representing himself (pro se), filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Following this, on April 26, 2022, the Court held a hearing and granted Carrasco Garcia an opportunity to file a direct appeal.

A. Offense Conduct and Sentencing

On August 29, 2019, Carrasco Garcia was indicted by a grand jury in Houston, Texas, on one count of conspiracy to possess with intent to distribute a controlled substance, which is a violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (Doc. 9). On February 21, 2020, Carrasco Garcia appeared in court for a re-arraignment, with representation by a federal public defender named Darryl Austin (referred to as "Counsel") (Doc. 62, Rearraignment Transcript). Throughout the proceedings, Carrasco Garcia opted not to enter into a plea agreement (Doc. 62, p. 7). Instead, he pleaded guilty to a single count, as specified in the indictment (Id. at 13). Following Carrasco Garcia's guilty plea, a Presentence Investigation Report (PSR) was prepared on May 27, 2020. Initially, the Base Offense Level for Carrasco Garcia's conspiracy to possess with intent to distribute was set at 36. Additional points were then added to the offense level: two points were added because the offense involved methamphetamine, another two points were added because Carrasco Garcia maintained a premise used for manufacturing or distributing a controlled substance, and four points were added for his

role as an organizer or leader in the conspiracy. These additional points brought the total offense level to 41.

These additional points brought the total offense level to 41. He had a criminal history category of IV. The guideline range for imprisonment was calculated to be 360 months to life. The statutory minimum was ten years and the statutory maximum allowed was life. (Doc. 57 at 9-10, 15). After objections to the Presentence Investigation were filed, Carrasco Garcia was sentenced on August 5, 2020, by video due to the COVID-19 Pandemic. (Doc. 60 at 8). The Court sentenced Carrasco Garcia to a within-guideline sentence of 360 months of imprisonment.

The Court further sentenced Carrasco Garcia to five years of supervised release. (Doc. 60 at 8). On August 7, 2020, the Court entered a judgment on Carrasco Garcia. (Doc. 41). No notice of appeal was filed, although Carrasco Garcia requested a notice of appeal be filed. On August 9, 2021, Carrasco Garcia moved, *pro se*, to vacate, set aside, or correct her sentence pursuant to § 2255. (Doc. 45). Carrasco Garcia alleged, in an affidavit (“Affidavit”) submitted in support of his § 2255 motion, Counsel ignored his request to file a notice of appeal on his

behalf. (Id. at p. 30). Based on the allegations raised, the court conducted an evidentiary hearing.

During the hearing, Carrasco Garcia provided testimony. He stated that after his sentencing, he had a phone call with his counsel, although the exact timing of this call was unclear. During that call, he expressly requested that his counsel file an appeal on his behalf (Doc. 66 at 10).

On cross-examination, Carrasco Garcia's testimony appeared inconsistent. He mentioned that he was informed by his counsel through a letter that they would not be filing an appeal on his behalf. This letter was sent by his counsel to him (Id. at p. 13). The court recognized the inconsistencies in Carrasco Garcia's testimony but acknowledged that nervousness during the hearing might have contributed to this uncertainty. It was apparent that Carrasco Garcia might not have fully understood the specific dates and events.

Based on Carrasco Garcia's testimony and his supporting affidavit, there appear to be some discrepancies regarding his attempts to contact his counsel after sentencing. Initially, during the hearing, Carrasco Garcia testified that he did not ask anyone to contact his counsel regarding his desire to file an appeal. However, his affidavit, which

accompanied the § 2255 Motion, indicated that he made several attempts to contact his counsel after sentencing but received no response, and the same was true for calls made by his family members.

When the Government pointed out these inconsistencies between his affidavit and testimony, Carrasco Garcia's testimony changed. He then admitted that he did try to call his counsel after receiving the letter while he was at FCI Three Rivers (Id. p. 21). He clarified that this particular call was unrelated to his previous attempts immediately after sentencing to file a direct appeal. Instead, it was related to the letter he had received from his counsel.

The court likely considered these inconsistencies and changes in testimony during its decision-making process. It may analyze the credibility of Carrasco Garcia's statements and evaluate the overall context of the case to determine the accuracy of his claims and whether his counsel was indeed ineffective or not.

Based on Counsel's testimony during the hearing, it was revealed that after Carrasco Garcia's sentencing, they had a post-sentencing conversation. During this conversation, Counsel explained to Carrasco Garcia that his sentence was at the bottom of the guideline range and

provided the basis for the judge's decision. In response to this explanation, Carrasco Garcia allegedly expressed that he did not wish to file an appeal.

Following the conversation, Counsel sent a Letter to Carrasco Garcia, confirming the contents of their post-sentencing discussion (Doc. 66 at 28). Counsel testified that their standard operating procedure is to promptly file a notice of appeal if a client requests an appeal (Id. at 29). However, as Carrasco Garcia reportedly stated that he did not want to pursue an appeal, Counsel did not initiate the appeal process. After considering the evidence and testimony presented at the hearing, the court determined that Carrasco Garcia's counsel was not ineffective. As a result, the court denied Carrasco Garcia any relief, meaning his § 2255 Motion was unsuccessful. Subsequently, Carrasco Garcia is now seeking a petition for writ of certiorari, which asks the U.S. Supreme Court to review the lower court's decision in the hope of obtaining a favorable outcome.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

IN LIGHT OF THE FACTS OF THIS CASE, WAS THE DEFENSE COUNSEL INEFFECTIVE IN LIGHT OF THIS COURT'S PRECEDENT IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), IN NOT AUTOMATICALLY FILING A NOTICE OF APPEAL, WHERE THERE WAS IMPEDIMENT TO THE RIGHT TO FILE AN APPEAL.

The current application is seeking a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b)(1). The purpose of this certificate is to establish that the District Court's decision on the merits of the ineffectiveness claim is at least "debatable" among reasonable jurists. This standard was reaffirmed in *Buck v. Davis*, 580 U.S. —, 137 S.Ct. 759, 773–75 (2017), as well as in other cases such as *Tennard v. Dretke*, 542 U.S. 274, 282–83 (2004); *MillerEl v. Cockrell*, 537 U.S. 322, 335–38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

To obtain a COA, the defendant must demonstrate that reasonable jurists could debate whether the issues presented in the case should have been resolved differently or if the issues are substantial enough to deserve further consideration (*Sorto v. Davis*, 672 F. App'x 342, 346 (5th Cir. 2016)). The severity of the penalty, in this case, the sentence imposed, may also be taken into account in determining whether to grant

the COA (*Rosales v. Dretke*, 133 F. App'x 135, 137 (5th Cir. 2005)). In any doubt regarding whether to grant the COA, it is generally resolved in favor of the petitioner (defendant) (*Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997)). In summary, the application seeks a certificate of appealability by arguing that the District Court's decision on the ineffectiveness claim is subject to debate among reasonable jurists and therefore warrants further review by the appellate court.

To obtain a certificate of appealability (COA), it is not necessary for the petitioner to conclusively show an error. As stated in *Miller-El*, a claim can be debatable even if not every jurist of reason agrees that the petitioner will ultimately prevail after the COA is granted and the case receives full consideration (537 U.S. at 338). In other words, § 2253(c) sets a low threshold for granting a COA, as reiterated in *Buck v. Davis*, 137 S.Ct. at 773–75. At the COA stage, the court of appeals should limit its examination to a threshold inquiry into the underlying merits of the claims and only assess if the District Court's decision was debatable (*Buck v. Davis*, 137 S.Ct. at 774, quoting *Miller-El*, 537 U.S. at 327, 348).

In this case, the District Court addressed the merits of the § 2255 motion and conducted a hearing, but it allegedly overlooked the

fundamental constitutional guarantee afforded to every defendant: the right to an appeal post-judgment. This contention raises a question about whether the District Court's decision on this matter was debatable, warranting further review by the appellate court through the granting of a COA.

1. Summary Hearing Testimony

Indeed, the core of the claim, in this case, revolves around the conflicting testimonies of Carrasco Garcia and his counsel regarding whether an appeal was desired. Carrasco Garcia testified that he wanted to file an appeal, while his counsel testified that he did not want to pursue one. The solution to avoid this issue could have been relatively straightforward. If Carrasco Garcia had expressly instructed his counsel to file a notice of appeal, and counsel disregarded those instructions, it would be deemed professionally unreasonable, as stated in *Roe v. Flores-Ortega* (528 U.S. 470, 477, 2000). By filing the notice of appeal and presenting a simple *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967) brief, the appeal process could have been initiated, and Carrasco Garcia's desire for an appeal could have been properly addressed.

The filing of the notice of appeal and the *Anders* brief is a standard procedure when appointed counsel believes there are no meritorious grounds for appeal. This procedure ensures that the defendant's right to appeal is protected and allows the appellate court to review the case to determine if any potential appellate issues exist.

Given the conflicting testimonies and the Supreme Court's precedent on the matter, it appears that Carrasco Garcia's claim raises significant questions about the reasonableness of counsel's actions and the denial of his right to appeal. These issues may justify further review by granting a certificate of appealability. Contrary to counsel's position, during the hearing counsel testified he was not sure if Carrasco Garcia wanted to appeal or not:

BY MR. VAZQUEZ (2255 Appointed Counsel):

Q. So did you tell him not to appeal?

A. No. No.

Q. But *you can't recall* if he said he wanted to or not?

A. I don't -- no, *I think* he said, "No."

Q. You think he said, "No"?

A. Yeah, that's what I believe. He said, "No."

Q. But he's testifying today he did tell you to appeal, correct?

A. That's what he said. And you would agree that a 30-year sentence is a pretty hefty sentence?

A. I would agree.

Q. And you would also agree that he didn't waive his right to appeal with the plea agreement?

A. Correct. Correct.

Q. If he at some point said he wanted to appeal and you just don't remember it, that could have very well been possible, correct?

A. I mean, I guess; but I don't believe he talked to me after that. The basis I'm going off of was the conversation the day of. I don't -- I don't -- I didn't talk to him after that, so if he -- I mean, he said he spoke to me. I didn't have that conversation with him the next day.

(Doc. 66, p 31).

Based on the testimony presented during the hearing, two relevant points emerge: A) Carrasco Garcia wanted to appeal, and B) Counsel's response was uncertain, stating, "I don't -- no, I think he said, 'No.'" (Doc. at p. 31). This uncertainty created enough doubt regarding whether Carrasco Garcia declined the appeal, warranting further consideration of his claims.

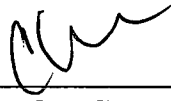
Given this testimony alone, it is reasonable for the Appeals Court should have agreed that Carrasco Garcia should have been granted the opportunity to further present his claims. Counsel's uncertainty regarding whether Carrasco Garcia declined the appeal

adds weight to the argument that the District Court's decision was debatable (*Buck v. Davis*, 137 S.Ct. at 774). In line with *Sorto v. Davis*, 672 F. App'x 342, 346 (5th Cir. 2016), where reasonable jurists could debate whether the petition should have been resolved differently or whether the issues presented deserve further consideration, a certificate of appealability should be granted in this case. As such, the uncertainties arising from the conflicting testimonies between Carrasco Garcia and his counsel create sufficient doubt to justify the grant of a certificate of appealability. This certificate would allow Carrasco Garcia to pursue his appeal and present his claims more comprehensively before the appellate court. Because a reasonable jurist could disagree with the District Court's conclusion, a Certificate of Appealability was required on the constitutional issues identified in his motion.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Fifth Circuit.

Done this 22 day of July 2023.



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