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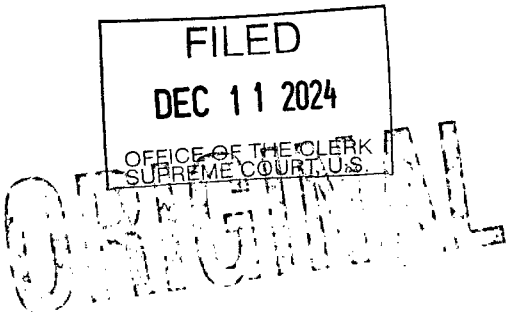

IN THE

Supreme Court of the United States

JOHN XAVIER PORTILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a defendant claims ineffective assistance of appellate counsel for failing to pursue an issue on appeal and appellate counsel acknowledges that the issue was potentially strong but that he or she failed to raise it based upon a misunderstanding of the law, must the court review the merits of the omitted issue before determining whether appellate counsel performed deficiently under the first prong of *Strickland* for failing to raise the issue?

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Fifth Circuit, is John Xavier Portillo.

Respondent, who was the Appellee in the Fifth Circuit, is the United States.

RELATED PROCEEDINGS

United States v. Portillo, No. 6:20-5:15-cr-00820-DAE-1, U.S. District Court for the Western District of Texas. Order entered on September 29, 2022.

United States v. Portillo, No. 22-51012, U.S. Court of Appeals for the Fifth Circuit. Opinion entered on August 13, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John Xavier Portillo, respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On September 29, 2022, the United States District Court for the Western District of Texas issued an opinion denying Mr. Portillo's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. (Appx. B) On August 13, 2024, the United States Court of Appeals for Fifth Circuit affirmed the District Court's denial. (Appx. A)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the denial of Mr. Portillo's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 on August 13, 2024. (Appx. A)

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides *inter alia*:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Proceedings Below

John Xavier Portillo was charged in a Fourth Superseding Indictment with:

- Rico Conspiracy, in violation of 18 U.S.C. § 1962(d) (Count 1)
- Murder in Aid of Racketeering, in violation of 18 U.S.C. §§ 1956(a)(1 and 2) (Count 2)
- Murder in Aid of Racketeering, in violation of 18 U.S.C. §§ 1956(a)(1 and 2) (Count 3)
- Conspiracy to Commit Murder in Aid of Racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count 4)
- Conspiracy to Commit Assault with a Dangerous Weapon in Aid of Racketeering, in violation of 18 U.S. C. § 1956(a)(6) (Count 5)
- Assault with a Dangerous Weapon in Aid of Racketeering, in violation of § 18 U.S.C. § 1952(a)(3) (Count 6)
- Assault with a Dangerous Weapon in Aid of Racketeering, in violation of § 18 U.S.C. § 1952(a)(3) (Count 7)

- Use and Discharge of a Firearm During and in Relation to a Crime of Violence, in violation of § 18 U.S.C. § 924 (j) (Count 8)

- Use and Discharge of a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924 (j) (Count 9)

- Conspiracy to Distribute and Possession with Intent to Distribute 500 grams or more of methamphetamine and cocaine, in violation of 21 U.S.C. §§ 846 and 841 (Count 10)

- Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. § 841 (Count 11)

- Conspiracy to Interfere with Commerce by Threats or Violence, in violation of 18 U.S.C. § 1952 (Count 12)

- Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 13)

He was convicted on all counts following a jury trial. He was sentenced to 240 months imprisonment on Counts 1, 6, 7, 11 and 12; Life Imprisonment on Counts 2 and 3; 120 months imprisonment on Counts 4, 8, 9, 10 and 13; and 36 months imprisonment on Count 5.

This United States Court of Appeals upheld Mr. Portillo's conviction and sentence in *United States v.*

Portillo, 969 F.3d 144 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 1275 (2021).

On January 25, 2022, Mr. Portillo filed his Motion to Vacate Under 28 U.S.C. § 2255 in the United States District Court. On September 28, 2022, the District Court entered a Sealed Order denying the Motion. (Appx. B)

On November 11, 2022, Mr. Portillo filed his Notice of Appeal from the denial of his Motion to Vacate Under 28 U.S.C. § 2255. On August 13, 2024, the United States Court of Appeals for the Fifth Circuit affirmed the denial of Mr. Portillo's Motion to Vacate Under 28 U.S.C. § 2255. (Appx. A)

B. Statement of Relevant Facts

In Mr. Portillo's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255, he argued that he was denied his Sixth Amendment right to counsel-of-choice prior to his trial when his original trial counsel was disqualified. He further argued that, if the court determined that this issue should have been raised on direct appeal, his appellate counsel was ineffective for not raising the issue. Toward that end, he submitted a declaration from his appellate counsel in which appellate counsel, John Carroll, stated that he thought the disqualification issue "might be a strong issue" but that he did not believe the record had been "sufficiently developed to allow [him] to raise the disqualification issue on direct appeal." (Appx. C at ¶ 5) In other words, Mr. Portillo's appellate counsel disclaimed any "strategy reason" for not raising the issue on direct appeal.

The District Court denied the § 2255 motion and found that trial counsel had been properly disqualified. (Appx. B at 9-12) It did not, however, reach the question of whether Mr. Portillo's appellate counsel had been ineffective for failing to raise the issue on direct appeal, finding such resolution "not necessary" because it had "denied the choice-of-counsel claim on the merits." (Appx. B at 12)

On appeal from the trial court's denial of the § 2255 motion, the Fifth Circuit did not reach the merits of Mr. Portillo's choice-of-counsel claim because it found that the claim had been procedurally defaulted not having been raised on direct appeal. (Appx. A at 6-8) Then, despite not reaching the merits of the issue and despite acknowledging that Mr. Portillo's appellate counsel admitted that he did not have a strategy reason for not raising the issue on direct appeal, it found that Mr. Portillo's appellate counsel had not been ineffective for failing to raise the issue on direct appeal because Mr. Portillo did not show that this claim was "clearly stronger" than the claims appellate counsel *did* raise on direct appeal. (Appx. A at 8-11)

In sum, the Court of Appeals did not decide Mr. Portillo's choice-of-counsel claim had no merit or that his appellate counsel had a strategy reason for not raising it on direct appeal. Instead, it simply found that Mr. Portillo did not show that the issue was "clearly stronger" than the issues that appellate counsel had raised. It made this finding despite the fact that appellate counsel acknowledged that the choice-of-counsel claim may very well have been a strong issue and the issue would likely have been raised had he not incorrectly believed that the appellate record had not been fully developed so as to allow the issue to be raised on direct appeal.

REASONS FOR GRANTING THE WRIT

The Court should grant the Petition for Writ of Certiorari to clarify the standard for determining ineffective assistance of counsel in the appellate context and make the law consistent with the Court's *Strickland* jurisprudence.

I.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court announced the test for determining whether a defendant has received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. The now well-known two-pronged *Strickland* test requires a defendant to show, first, that counsel's performance was deficient. *Id.* at 687, 104 S.Ct. at 2064. Second, the test requires a defendant to show that counsel's deficient performance prejudiced the defendant in that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Applying the first prong of the *Strickland* test to claims of ineffective assistance of *appellate* counsel, the Court later held that an appellate attorney had no duty to raise a claim where the attorney believed that claim would be foreclosed under the current state of the law. *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). Moreover, the Court had previously recognized that effective appellate advocacy emphasizes "the important of winnowing out weaker arguments on

appeal." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983).

Specifically, the Court has concluded that appellate counsel cannot be ineffective where an omitted issue in an appeal is not shown to be "clearly stronger than issues that counsel did present." *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 766, 145 L.Ed.2d 756 (2000).

Consistent with this requirement, the United States Court of Appeals for the Fifth Circuit held that Mr. Portillo was required to show that "his choice-of-counsel claim was 'clearly stronger' than any of the claims Carroll raised or that Carroll did not maximize Portillo's chance of success on appeal with his choices." (Appx. A at 11) The Fifth Circuit also quoted from this Court's opinion in *Murray v. Carrier*, 477 U.S. 478, 486, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397 (1978) in which the Court found that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for procedural default." (Appx. A at 11)

II.

Nevertheless, a requirement that a defendant show that the omitted claim was "clearly stronger" than the claims actually raised is an impossible standard to apply when a court declines to analyze the merits of the omitted claim. Here, for example, the Court of Appeals did not even attempt to analyze the merits of Mr. Portillo's choice-of-counsel claim. While it did recognize that "Carroll filed a 67-page brief and raised eleven claims," it made no attempt to analyze the merits of the choice-of-counsel claim viz-a-viz these other eleven failed claims.

In sum, it is impossible to apply the first prong of *Strickland* in the appellate context without first determining whether the appellate issue omitted was sufficiently meritorious that it had a probable likelihood of success had it been raised it on appeal. Here, of course, the eleven claims raised by Carroll in Mr. Portillo's direct appeal failed. Had the Court of Appeals reviewed the merits of the omitted choice-of-counsel claim and found it was not likely to succeed on appeal, then Carroll's failure to raise it could not be viewed as deficient under *Strickland*. On the other hand, if the Court of Appeals had reviewed the merits of the omitted choice-of-counsel claim and found there as a probability that it would have succeed on appeal, then Carroll's failure to raise it could be viewed as deficient under *Strickland* unless he had a strategic reason for not raising it.

III.

Strickland, of course, often excuses the decisions made by counsel when such decisions are strategic in nature. *Strickland*, 466 U.S. at 280, 104 S.Ct. 2061. Indeed, similar to appellate advocacy, trial " advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.* Nevertheless, the Court's *Strickland* jurisprudence makes equally clear that an attorney's strategic decisions cannot be based upon a misunderstanding of the law. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In fact, a misunderstanding of the law resulting in counsel's failure to take a particular action (*e.g.,* include meritorious issue on appeal) would be "a quintessential

example of unreasonable performance under *Strickland*" assuming the failure prejudiced the client. *Hilton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014).

Here, Carroll submitted a Declaration admitting that the choice-of-counsel claim was a potentially "strong issue" and that his failure to raise it was based solely upon his belief that the appellate record was not sufficiently developed. (Appx. C at ¶¶ 4-5) Nevertheless, as demonstrated by the opinion below, Carroll had access to all of the documents necessary to raise the claim. (Appx A at 7-8) "Portillo's appellate counsel had access to the relevant documents from the record and could assess whether a choice-of-counsel claim could be raised." (Appx. A at 8) In other words, Carroll did *not* make a strategic decision consistent with a correct understanding of the law.

In sum, the Court should review its jurisprudence in connection with ineffective assistance of counsel claims in the appellate context to make clear that, while appellate counsel may not be ineffective for making informed strategic decisions as to the issues to be raised on appeal, such strategic decisions cannot be based upon a misunderstanding of the law any more so than in the trial court context.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the denial of Mr. Portillo's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 by the United States Court of Appeals for the Fifth Circuit in *United States v. Portillo*, No. 22-51012.

Respectfully submitted,

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