

No. 17-6416

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IN THE SUPREME COURT OF THE UNITED STATES

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RAUL CARRIZALES-MENCHACA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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#### QUESTION PRESENTED

Whether, after the district court held petitioner's counsel in contempt at sentencing for refusing to respond to the court's questions, the court erred in denying counsel's motion to withdraw from representing petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 693 Fed. Appx. 368.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2017. The petition for a writ of certiorari was filed on October 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of illegally reentering the United States following removal, in violation of 8 U.S.C. 1326(a) and (b). The district court sentenced petitioner to 24 months of imprisonment, to be followed by one year of supervised release. Pet. App. B1-B5. The court of appeals affirmed. Pet. App. A1-A3.

1. Petitioner is a Mexican citizen and has no legal status in the United States. Presentence Investigation Report (PSR) ¶ 35. Prior to the instant case, petitioner had been removed from the United States four times. PSR ¶ 9. Petitioner had been convicted six times of various crimes in the United States as an adult, in addition to a number of juvenile arrests that either were dismissed or resulted in a supervisory caution. PSR ¶¶ 28-36. Three weeks after petitioner's fourth removal in May 2014, he reentered the United States. PSR ¶ 13. In November 2015, petitioner was arrested in Arlington, Texas, for a bodily-injury assault when he attacked two patrons at a bar. PSR ¶ 36. Petitioner pleaded guilty to the bodily-injury assault. Ibid.

2. A federal grand jury in the Northern District of Texas charged petitioner with illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a), (b)(1), and (b)(2). Indictment 1. After serving his state-court

sentence for the bodily-injury assault conviction, petitioner pleaded guilty without a plea agreement to the illegal reentry offense. C.A. ROA 80.

3. The Probation Office determined that petitioner's total offense level under the Sentencing Guidelines was six and his criminal history category was IV. PSR ¶¶ 24, 37. The resulting advisory guideline range was 6-12 months of imprisonment. PSR ¶ 72. The Probation Office suggested either that an upward departure from the Guidelines range might be appropriate under Section 4A1.3 because petitioner's criminal history score substantially under-represented the seriousness of his criminal history, or that an above-Guidelines sentence might be warranted in consideration of the factors in 18 U.S.C. 3553(a). PSR ¶¶ 86-88.

Petitioner filed two motions objecting to the PSR and its addendum, addressing both the suggested upward departure and the suggested above-Guidelines sentence. C.A. ROA 132-139, 146-147. The government opposed both objections. Id. at 140-142, 149-151. The district court issued an order tentatively concluding that petitioner's objections were without merit, stating that an above-Guidelines sentence was appropriate, and urging the parties to "take such tentative conclusions into account in making decisions as to what presentations to make at the sentencing hearing." Id. at 37. Three days before the sentencing hearing, petitioner

attempted to file an "Objection to Sentence Imposed by Court." Id. at 44-45, 105-106 (capitalization altered). The document was not docketed because the court had not yet imposed a sentence. Id. at 96.

4. At the sentencing hearing, the district court attempted to clarify petitioner's objections with petitioner's counsel. C.A. ROA 91. The following dialogue ensued:

THE COURT: Okay. Let's see. There were some -- there were two objections filed, and I believe both of them were related to the possibility of a sentence above the top of the advisory guideline range. Did I read those correctly, [counsel]?

[PETITIONER'S COUNSEL]: Your Honor, I think they have more to do with legality of whether such a sentence would be permissible or appropriate.

THE COURT: I'm sorry, I was wondering if I'm correct in thinking that both of the objections have to do with the possibility of a sentence above the top of the advisory guideline range. What is the answer to that?

[PETITIONER'S COUNSEL]: Your Honor, just what I said.

THE COURT: I'm not sure I understood how that answered my question. I've asked the question again. Would you please answer the question either yes or no.

[PETITIONER'S COUNSEL]: Your Honor, I would stand on what I previously said. Thank you.

THE COURT: [Counsel], you get very close to being held in contempt of court. Would you answer my question?

[PETITIONER'S COUNSEL]: I have no further response, Your Honor.

THE COURT: Okay. [Counsel], I've ordered you to answer my question, and you've refused to answer it. I consider that you're in civil contempt of court, and also in violation of

one of the local rules that requires attorneys to appropriately conduct themselves and to respond and answer orders of the Court. I'm going to give you another opportunity to answer my question. And if you would like, if you decline to answer my question, I'll give you an opportunity at this time to respond to my suggestion that you will be held in civil contempt of court and held in violation of the local rule concerning the conduct of attorneys, if you refuse to answer my question. You may proceed.

(Pause in proceedings)

THE COURT: Okay. Apparently you're not going to respond. I'm ordering that you are in violation of the local rule. Let me get the exact number of it.

[PETITIONER'S COUNSEL]: Your Honor, at this point I would move to withdraw from the representation of [petitioner] given the indications that the Court has made. [Petitioner] needs an attorney that's not under the threat of civil contempt or whatever sort of contempt that the Court is indicating at this point.

THE COURT: I deny that motion.

Id. at 91-93.

After a discussion of the PSR, petitioner's counsel "reiterate[d] [his] request for being allowed to withdraw from the case before proceeding with [his] statements [regarding sentencing] for the same reasons that [he] initially stated." C.A. ROA 96. The district court denied the motion. Ibid.

After hearing argument from petitioner's counsel regarding the length of the sentence, the district court imposed a sentence of 24 months of imprisonment, to be followed by one year of supervised release. C.A. ROA 42, 46. On the same day, the

defendant refiled his objection to the sentence imposed by the court, and the court received the filing. Id. at 44-45.

5. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A3. Petitioner argued on appeal that the district court had neglected a duty to inquire whether his counsel had a conflict of interest between himself and petitioner arising from his having been held in contempt during the sentencing hearing. See id. at A2. The court of appeals explained that the duty of inquiry is "not formalistic and may be fulfilled if the parties have volunteered all the relevant information for a court to determine that no substantial conflict exists." Ibid. (citation omitted). And here, the court found that in light of "the [district] court's familiarity with the facts, legal issues, and counsel's arguments about the purported conflict, the [district] court had sufficient relevant information to determine that no such conflict existed." Ibid. The court stated that petitioner "ha[d] not shown that the [district] court would have learned anything material from greater inquiry." Id. at A3 (brackets and citation omitted). Moreover, the court of appeals found "no evidence supporting a claim that counsel was laboring under an actual conflict of interest." Id. at A2.\*

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\* The court of appeals also rejected petitioner's challenge to his sentence. Petitioner does not renew that claim in this Court.

## ARGUMENT

Petitioner contends (Pet. 5-9) that the court of appeals should have vacated his sentence because the district court did not ask petitioner's counsel to explain counsel's basis for attempting to withdraw from representing petitioner. But petitioner does not dispute that the court of appeals cited the correct legal rule regarding a district court's obligation to evaluate an attorney's potential conflict of interest, and the factbound application of that rule in this case does not warrant this Court's review. In any event, the district court correctly denied petitioner's counsel's motion, because no conflict of interest existed. The court of appeals' decision does not conflict with any decision of this Court or any other circuit court. Moreover, even if the question presented otherwise warranted review, this case would be an unsuitable vehicle because petitioner will soon complete his term of imprisonment and will likely be removed from the United States at that point.

1. This Court has held that a criminal defendant's Sixth Amendment right to counsel may be violated where his counsel's concurrent representation of a co-defendant or another party creates a conflict of interest. See Mickens v. Taylor, 535 U.S. 162, 166-170 (2002) (collecting cases). And when a "trial court knows or reasonably should know that a particular conflict exists" arising from counsel's "multiple representation," then the court

has a "duty to inquire into the propriety of a multiple representation." Id. at 168-169 (quoting Cuyler v. Sullivan, 446 U.S. 335, 347 (1980)).

"Not all attorney conflicts present comparable difficulties," however, Mickens, 535 U.S. at 175, and this case does not involve an attorney who concurrently represented multiple parties. The court of appeals here correctly held that petitioner's counsel had no actual conflict of interest in his representation of petitioner at sentencing. Petitioner suggests (Pet. 7-8) that a lawyer cannot represent his client when the lawyer is threatened with discipline for zealous advocacy. But petitioner does not contend that the conduct that led to counsel's contempt order reflected any conflict between counsel's interest and his own. Even after the contempt, nothing prevented counsel from zealously advocating for petitioner's interests at sentencing. None of the cases cited by petitioner involved comparable instances of attorney discipline. See United States v. Merlino, 349 F.3d 144, 151 (3d Cir. 2003) (attorney was disqualified for potential professional or criminal misconduct after attempting to influence a witness's testimony before a grand jury or the witness's decision to cooperate with federal authorities), cert. denied, 541 U.S. 965 (2004); Beets v. Scott, 65 F.3d 1258, 1260 (5th Cir. 1995) (en banc) (rejecting a claim that defense counsel had an impermissible conflict even though counsel committed arguable ethical violations by obtaining

a contract for media rights to his client's story and by failing to withdraw and testify regarding exculpatory information known to counsel), cert. denied, 517 U.S. 1157 (1996); Walberg v. Israel, 766 F.2d 1071, 1072-1075 (7th Cir.) (the defendant was denied a fair trial where the trial judge repeatedly criticized appointed defense counsel's motions and questions to witnesses, and stated that he would not appoint defense counsel again in future cases, that counsel should not expect to receive pay from the court for the representation, and that the defendant would receive a fair trial "but not if you [counsel] keep bringing motions"), cert. denied, 474 U.S. 1013 (1985).

The court of appeals also correctly determined that, in light of the district court's familiarity with all of the facts and circumstances of the case, the district court had no need to inquire further before denying counsel's motion to withdraw. Petitioner faults the district court (Pet. 6) for not asking about the arguments counsel "would have presented on behalf of petitioner but for the conflict"; "how the pending contempt citation would affect counsel's readiness to defend" petitioner; "counsel's mental state as he faced both" the impending contempt proceeding and petitioner's sentencing proceeding; and "how counsel would resolve a perceived conflict of interest between his own professional reputation and petitioner's interests." But

petitioner does not attempt to explain how any of those questions would have substantiated his claimed conflict of interest.

2. Petitioner acknowledges (Pet. 6-7) that the court of appeals' decision is consistent with decisions in the First, Third, Fourth, and Seventh Circuits. But he contends that the Ninth Circuit disagrees and "does not permit a district court to summarily dismiss a substitution motion." Pet. 7 (citing Plumlee v. Masto, 512 F.3d 1204, 1211 (9th Cir.) (en banc), cert. denied, 553 U.S. 1085 (2008), and Schell v. Witek, 218 F.3d 1017, 1025-1026 (9th Cir. 2000) (en banc)). That contention is incorrect.

The Ninth Circuit's decisions in Plumlee and Schell did not involve an attorney's potential conflict of interest. Rather, each involved a criminal defendant who sought a substitution of appointed counsel, based either on a subjective distrust of the public-defender's office (Plumlee) or a disagreement over defense strategy (Schell). The Ninth Circuit held in Plumlee that the district court had conducted an appropriate inquiry to determine that the defendant was not entitled to substitute counsel, 512 F.3d at 1211, whereas the court of appeals held in Schell that the district court had erred by leaving the defendant's motion unaddressed, 218 F.3d at 1021. But neither case suggests that the court of appeals here was wrong to conclude that the district court did not need any more information to deny petitioner's counsel's motion to withdraw. Petitioner's challenge to the court of

appeals' application of settled law to the facts of this particular case does not warrant this Court's review. See Sup. Ct. R. 10.

3. Even if the question presented otherwise warranted review, this case would not be a suitable vehicle for addressing it. Petitioner's sentence will expire next month, in January 2018 (Pet. 8), thereby mooting his challenge to his term of imprisonment. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

Petitioner asserts (Pet. 8) that he will still be subject to a term of supervised release and additional penalties for subsequent reentry, and that he was entitled to "zealous" representation regarding those matters. But those conditions have little, if any, practical consequences, because the judgment instructs that "upon completion of the sentence of imprisonment [petitioner] shall be surrendered by the Federal Bureau of Prisons to a duly authorized immigration official for deportation." Pet. App. B2. While he remains outside the United States, petitioner will have no obligation to report to a probation officer and will not be under the supervision or control of the United States Probation Office. See Pet. App. B2-B3. And although petitioner will have a continuing obligation to "remain outside the United States" until his one-year term of supervised release expires, id.

at B2, petitioner is already subject to the same prohibition by operation of law. See 8 U.S.C. 1182(a)(9)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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