

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST MILTON GLOVER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' counsel rendered ineffective assistance, in violation of the Sixth Amendment, by failing to move to suppress recordings of conversations intercepted with court authorization under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq., where petitioners were not parties to the conversations and the conversations did not occur on petitioners' premises.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 872 F.3d 625. The opinion of the district court is reported at 174 F. Supp. 3d 431.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2017. A petition for rehearing was denied on December 15, 2017. (Pet. App. A20-A21). The petition for a writ of certiorari was filed on March 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of conspiracy to distribute and to possess with intent to distribute one kilogram or more of phencyclidine (PCP), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iv), and 846. Pet. App. A2. Both petitioners were sentenced to life imprisonment, ibid., the court of appeals affirmed, 681 F.3d 411, and this Court denied certiorari, 568 U.S. 988, 995. Petitioners subsequently filed motions under 28 U.S.C. 2255 to vacate their convictions, which the district court denied. 174 F. Supp. 3d 431. The court of appeals affirmed. Pet. App. A1-A18.

1. Petitioners conspired with Lonnell Glover (petitioner Glover's brother) and Anthony Suggs to distribute PCP, and their activities attracted the attention of federal investigators. Pet. App. A3, A17-A18. In 2007, the government filed an application seeking authorization under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq., to install a listening device in Lonnell Glover's truck. 174 F. Supp. 3d at 442; see Pet. App. A3-A9. The affidavit in support of the application stated that the truck was parked at the Baltimore-Washington International Airport (BWI) in Maryland and identified petitioners as "persons who were 'participat[ing]' in an ongoing conspiracy to distribute PCP in the District of Columbia and who

'have used, are using, and will continue to use * * * [Lonnell Glover's truck] in connection with the above described offenses.'" 174 F. Supp. 3d at 442 (citation omitted; brackets in original); see Pet. App. A3. The affidavit asserted that there was probable cause to believe that petitioners and others were engaging in "cellular telephone conversations and oral communications in and within the vicinity of the target vehicle" to further their drug-trafficking activity and "probable cause to believe that the known likely interceptees" would include petitioners. 174 F. Supp. 3d at 442 (citations omitted).

A district court in the District of Columbia granted the application, finding probable cause to believe that petitioners and others were part of a conspiracy to distribute drugs in the District of Columbia and that the listening device would intercept incriminating oral communications relating to their roles in that conspiracy. Pet. App. A3; 174 F. Supp. 3d at 442. The court issued an order stating that the FBI could install the listening device in Lonnell Glover's truck in the District of Columbia, the District of Maryland, or the Eastern District of Virginia. Pet. App. A8. Law-enforcement agents installed the device while the truck was parked at BWI and used the device to record conversations over a period of 90 days, pursuant to the initial court order and two extensions. Id. at A3; 174 F. Supp. 3d at 442. The applications for the extensions again named petitioners as targets

of both the investigation and the interceptions. 174 F. Supp. at 442. Neither petitioner was a party to any of the recorded conversations, but several of the conversations incriminated petitioners. Pet. App. A4; 174 F. Supp. 3d at 443. In those conversations, Lonnell Glover and others alluded to petitioners' involvement in the drug-trafficking conspiracy. Pet. App. A4.

2. Petitioners were charged with conspiracy to distribute and to possess with intent to distribute one kilogram or more of PCP, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iv), and 846, and petitioners proceeded to trial on those charges. Pet. App. A2-A3.

At trial, the government introduced recordings of approximately 80 calls obtained via a wiretap on Suggs's cell phone, which had been authorized in an order separate from the one for the listening device in Lonnell Glover's truck. Pet. App. A4-A5. Although none of the conversations expressly mentioned PCP, "when viewed in context of the other evidence at trial that established that Suggs was a supplier of PCP to lower-level distributors, * * * a rational jury would have no trouble recognizing that what these calls were really about was Suggs supplying [petitioners] and others with PCP." 174 F. Supp. 3d at 450; see Pet. App. A17. There were "many calls," including calls with both petitioners, "where Suggs is talking to the other party about trying to arrange a meeting so that Suggs can make a delivery

of PCP.” 174 F. Supp. 3d at 450. “In one of the more highly incriminating series of calls,” Suggs and petitioner Price “abort[ed] their plan to meet due to suspicion that they [we]re under police surveillance.” Id. at 451; see Pet. App. A5. In other calls, petitioners and their confederates discussed money “in a way that strongly suggest[ed]” that petitioners were “in the business of selling PCP” that they had gotten from Suggs. Ibid.

The government also introduced five recordings from the listening device installed in Lonnell Glover’s truck. Pet. App. A4. In addition, the government presented evidence seized from petitioner Glover’s home, including \$985 in cash, a digital scale, a baggie containing heroin, bottles exhibiting the odor of PCP, and two firearms. Id. at A6. The heroin and weapons were admitted only against petitioner Glover, but the other evidence from petitioner Glover’s home was admitted against both petitioners. Ibid. The jury also heard stipulations, admissible only against petitioner Glover, describing petitioner Glover’s previous conviction for unlawful distribution of PCP. Ibid. And the government presented evidence of two controlled buys of PCP, one from Suggs and one from another co-defendant, as well as the seizure of “significant quantities of PCP and paraphernalia from the residences of various co-conspirators, including 7.7 kilograms of PCP from Suggs’s residence.” Id. at A7; see id. at A6-A7.

The jury found petitioners guilty, and the district court sentenced them (in light of their prior convictions) to mandatory minimum terms of life imprisonment. Pet. App. A7; see 174 F. Supp. 3d at 435 n.2. On direct appeal, the court of appeals affirmed, describing the evidence against petitioners as “extensive” and “voluminous.” Pet. App. A7 (quoting 681 F.3d at 417, 424). Seventeen months later, the court of appeals overturned Lonnell Glover’s conviction, which was the result of a separate trial, based on its conclusion that the order authorizing the listening device in his truck had been facially insufficient, and evidence collected pursuant to it subject to suppression under Title III, because it purported to authorize the installation of the listening device outside the district court’s territorial jurisdiction. United States v. Glover, 736 F.3d 509, 514-516 (D.C. Cir. 2013).

3. Petitioners filed motions to vacate their convictions, alleging that they had received ineffective assistance of counsel at trial and on appeal. 174 F. Supp. 3d at 435. As relevant here, petitioners claimed that their attorneys were ineffective for failing to move to suppress the recordings from Lonnell Glover’s truck. Pet. App. A9. Petitioners contended that they had statutory “standing” to seek suppression under Title III because they were targets named in the application for the truck’s listening device, even though the device did not actually capture their conversations. Ibid.

The district court denied the motion, finding that even if petitioners could show that counsel performed deficiently, they could not demonstrate the additional element of prejudice necessary to make out a constitutional ineffective-assistance-of-counsel claim. See 174 F. Supp. 3d at 442-452. The court declined to decide whether petitioners would have had statutory standing to seek suppression of the recorded conversations from the truck. Id. at 443-448. Instead, the court determined that, even if standing existed and the truck recordings were inadmissible, petitioners "cannot show that they were prejudiced by the admission of this evidence" because "a jury hearing only the admissible evidence would have reached the same verdict." Id. at 448. The court explained that "[t]his is not a case where the verdict is only 'weakly supported' by the admissible evidence." Id. at 449 (citation omitted). Rather, the court emphasized the "'voluminous evidence presented at trial,'" with "[t]he bulk of the evidence" against petitioners coming "from the wiretap on Suggs' cell phone." Id. at 449-450 (quoting 681 F.3d at 424). "Having closely reviewed the evidence" presented at petitioners' trial, the court was "satisfied that the admissible evidence strongly supported the verdicts against both [petitioners]." Id. at 452.

The district court also found that the truck recordings "were far from the best evidence against either [petitioner]," in part because neither petitioner "was a party to any of the * * *

conversations.” 174 F. Supp. 3d at 452. Although the conversations were “incriminating,” the court did “not believe that a jury would have given these relatively brief, out-of-court statements by other coconspirators the weight [petitioners] suggest” or that the truck recordings “would have had a ‘pervasive’ effect on the inferences that jury drew from all of the other admissible and incriminating evidence.” Ibid. “[C]onsidering the strength of the admissible evidence as compared to the excludable evidence,” the court was “persuaded that a jury hearing only the admissible evidence would have reached the same verdict as a jury that also heard the excludable evidence.” Ibid.

4. The court of appeals affirmed. Pet. App. A1-A18. As relevant here, the court determined that “the status of the law on target standing under Title III” resolved petitioners’ claim that their counsel provided ineffective assistance in failing to move to suppress the truck recordings. Id. at A13. The court perceived “an entrenched disagreement between jurisdictions” on the question of Title III target standing, id. at A10, and noted that the court “ha[d] never itself directly decided whether targets of surveillance have standing as such under Title III’s ‘aggrieved person’ definition,” id. at A12. The court likewise declined to “resolve the question of Title III target standing” in petitioners’ case. Id. at A9.

Instead, the court of appeals determined only that “counsel was not ineffective for failing to raise a challenge of uncertain merit based on unsettled law.” Pet. App. A10. The court reasoned that “[t]he inquiry for deficiency looks at performance ‘as of the time of counsel’s conduct’ and accordingly does not require counsel to propound vanguard arguments to meet the bare minimum required by the Sixth Amendment.” Id. at A13 (citation omitted). Given the absence of any “evidence in the record that counsel were ill-prepared or failed to research the law on this issue,” and “in light of the deeply unsettled law on the question of standing,” the court found that “trial counsel did not perform below the constitutional standard in electing not to challenge the Truck Bug, and appellate counsel was similarly not deficient in declining to raise the issue on appeal.” Ibid.

Because the court of appeals concluded that “counsel was not deficient for failing to challenge” the truck recordings, the court declined to address whether counsel’s performance prejudiced petitioners. Pet. App. A13.

ARGUMENT

Petitioners contend (Pet. 4-10) that this Court’s review is warranted to resolve a question the court of appeals did not decide below: whether they had standing under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq., to move to suppress recordings from Lonnell Glover’s truck.

Petitioners further contend (Pet. 10-14) that the court of appeals erred in determining that defense counsel were not constitutionally deficient in not challenging the truck recordings. The court of appeals' decision was correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, this case would be an unsuitable vehicle for addressing either issue petitioners seek to raise, because, in light of the otherwise overwhelming evidence, defense counsel's failure to seek suppression here did not prejudice petitioners and therefore did not constitute ineffective assistance, in violation of the Sixth Amendment. Further review is not warranted.

1. To establish ineffective assistance of counsel, a defendant must prove both (1) deficient performance and (2) prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Strickland's deficient-performance prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. A defendant must therefore "show that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and overcome the "strong presumption" that counsel's conduct fell "within the wide range of reasonable professional assistance." Id. at 688-689. And as this Court has explained, "[a] fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

Petitioners contend (Pet. 4-10) that their attorneys should have argued that petitioners had standing to move to suppress the truck recordings on the theory that they were named as targets in the Title III applications authorizing those interceptions, even though petitioners were not parties to the recorded conversations and the conversations did not occur on their premises. But petitioners identify no court that had adopted their view of Title III standing at the time of their trial and direct appeal. See Pet. 4-10. Indeed, by the time of petitioners' trial, several courts of appeals had determined that "only 'one who participated in the intercepted conversation or on whose premises the conversation occurred' had standing to challenge the fruits of an illegal wiretap" under Title III. United States v. Kelley, 140 F.3d 596, 604 n.7 (5th Cir.) (quoting United States v. Scasino, 513 F.2d 47, 50 (5th Cir. 1975)), cert. denied, 525 U.S. 880, and 525 U.S. 908 (1998); see United States v. Bagguley, 1987 WL 35045, at *4 (4th Cir. 1987) (per curiam) ("An 'aggrieved person' is defined by § 2510(11) to include only those persons whose conversations were overheard or those persons who had some rights in the premises where the conversations took place."); United States v. Bynum, 513 F.2d 533, 535 (2d Cir.) (determining that

defendants were not “aggrieved persons” within the meaning of Title III because they did not participate in the intercepted conversations and did not “have an interest in the premises” where the conversations took place), cert. denied, 423 U.S. 952 (1975); United States v. King, 478 F.2d 494, 506 (9th Cir.) (holding that, under Title III, “a defendant may move to suppress the fruits of a wire-tap only if his privacy was actually invaded; that is, if he was a participant in an intercepted conversation, or if such conversation occurred on his premises”), cert. denied, 414 U.S. 846 (1973), and 417 U.S. 920 (1974). The decision below perceived that some courts of appeals had “disagree[d]” on this issue, Pet. App. A11, but identified only decisions that came after petitioners’ trial and appeal, see ibid. (citing cases).

Given “the status of the law on target standing under Title III,” Pet. App. A13, which did not provide substantial support for petitioners’ standing to challenge the truck recordings, their counsel were not constitutionally deficient for forgoing such a challenge. Cf. United States v. Ruggiero, 928 F.2d 1289, 1303 (2d Cir.) (holding that defendants were not “aggrieved person[s]” under Title III even though they were named as targets of the surveillance), cert. denied, 502 U.S. 938 (1991). Petitioners’ attorneys were not ineffective for failing to “propound vanguard arguments” that no court of appeals had adopted at the time of petitioners’ trial or appeal. Pet. App. A13; see Maryland v.

Kulbicki, 136 S. Ct. 2, 4 (2015) (per curiam) (“Counsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis.”); Allen v. United States, 829 F.3d 965, 968 (8th Cir. 2016) (“[T]he failure of counsel to argue for an extension of the law or a novel interpretation of circuit precedent is not constitutionally deficient performance.”), cert. denied, 138 S. Ct. 59 (2017).

2. Petitioners contend (Pet. 4-10) that this Court should grant review to resolve an asserted disagreement in the courts of appeals regarding “whether, and to what extent, Title III statutory standing differs from Fourth Amendment standing.” Pet. 4 (capitalization altered; emphasis omitted). As an initial matter, this case is not a suitable vehicle for addressing that question because the courts below declined to decide whether petitioners had standing under Title III to challenge the truck recordings. See 174 F. Supp. 3d at 443-448; Pet. App. A9-A10. This Court is one “of review, not of first view,” Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and should not consider the issue in the first instance. And given that petitioners do not allege that the courts of appeals were divided at time of their trial or direct appeal, any resolution of this issue now would not suggest that counsel were ineffective then, see Strickland, 466 U.S. at 689, and would thus have no bearing on the issue that this case actually presents.

In any event, petitioners have identified no current disagreement in the courts of appeals that warrants this Court's review. Petitioners rest their claim of a circuit conflict on two decisions issued after the court of appeals affirmed petitioners' convictions on direct appeal. See Pet. 5 (citing United States v. Asker, 676 Fed. Appx. 447, 455 (6th Cir. 2017), and United States v. Oliva, 705 F.3d 390, 395 (9th Cir. 2012)). Neither decision shows that the courts of appeals are divided.

In Asker, an unpublished and thus non-precedential decision, see Sun Life Assurance Co. v. Jackson, 877 F.3d 698, 702 (6th Cir. 2017), cert. denied, 138 S. Ct. 2624 (2018), a Sixth Circuit panel concluded that Asker lacked standing to challenge the admission of intercepted conversations to which he was not a party. Asker, 676 Fed. Appx. at 454-455. In reaching that conclusion, the Sixth Circuit noted that Asker was not "a person against whom the interception was directed," 18 U.S.C. 2510(11), observing that someone else's phone "was the subject of the contested search" and that "the government's wiretap application listed eight 'Target Subjects' for monitoring," none of whom was Asker. Asker, 676 Fed. Appx. at 455. But the court of appeals did not hold that listing a person as a target in a wiretap application automatically confers Title III standing to challenge any communications intercepted as a result of that application. See ibid. To the contrary, Asker recognized that "wiretap searches are subject to

the same established principle that governs alleged Fourth Amendment violations: suppression of the product of a violative search can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." Ibid. (brackets and internal quotation marks omitted). Asker therefore does not show that the Sixth Circuit would necessarily have found that petitioners had Title III standing on the facts of this case.

The Ninth Circuit's decision in Oliva likewise does not show a conflict that warrants this Court's review. In that case, the Ninth Circuit determined that the affidavits in support of the Title III orders were sufficient to establish that Oliva was an "aggrieved person" -- "[i]rrespective of Oliva's refusal to admit that the voices in the conversations intercepted included his own or that any of the intercepts took place on his premises" -- because the affidavits "included investigators' statements certifying their beliefs that he was using the individual cellular phones at issue" and "Oliva's conversations were the target of the surveillance." 705 F.3d at 395. To the extent Oliva might be read to suggest that a defendant's identification as a target in a Title III application, without more, invariably confers Title III standing, it would be difficult to square with the Ninth Circuit's previous statement that "a defendant may move to suppress the fruits of a wire-tap only if his privacy was actually invaded;

that is, if he was a participant in an intercepted conversation, or if such conversation occurred on his premises.” King, 478 F.2d at 506. And any intracircuit conflict would not warrant this Court’s review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

3. Petitioners additionally contend (Pet. 10-14) that this Court should grant review to decide when a defense attorney’s failure to file a motion to suppress constitutes ineffective assistance of counsel. That contention does not warrant this Court’s review. As explained above, the court of appeals correctly determined that petitioners’ attorneys were not ineffective for failing to seek suppression of the truck recordings, and petitioners identify no court of appeals that would have reached a different outcome in this case.

Although some circuits place more emphasis on the prejudice component, as opposed to the performance component, in analyzing the absence of a motion to suppress, petitioners have not shown that any circuit would grant relief in these circumstances. In Thomas v. Varner, 428 F.3d 491 (2005), cert. denied, 549 U.S. 1110 (2007), for example, the Third Circuit concluded that “failure to move to suppress or otherwise object to an in-court identification by the prosecution’s central witness, when there are compelling grounds to do so, is not objectively reasonable representation, absent some informed strategy.” Id. at 501. Although the court

further noted that “it would not be objectively unreasonable for counsel to decline to make a motion to suppress during a trial when either the motion is plainly without merit or the evidence is of little probative value,” id. at 502, it does not follow that the Third Circuit would find petitioners’ attorneys ineffective for not advancing a suppression argument that no court of appeals had adopted. In any event, the Third Circuit recognized that, to satisfy Strickland’s prejudice component, a defendant “must show that he would likely have prevailed on the suppression motion” that he claims his counsel was deficient for failing to file. Ibid. Petitioners cannot satisfy that standard here.

The Fourth and Seventh Circuit’s analysis of ineffective-assistance-of-counsel claims also does not help petitioners. As petitioners note (Pet. 10, 13), the Fourth Circuit has stated that, “[u]nder the deficient performance prong of Strickland, it is enough to call into question counsel’s performance that an unfiled motion [to suppress] would have had ‘some substance.’” Grueninger v. Director, 813 F.3d 517, 524–525 (2016) (quoting Tice v. Johnson, 647 F.3d 87, 104 (4th Cir. 2011)). But the Fourth Circuit has also emphasized that Strickland’s prejudice prong requires a defendant to show “that the motion was meritorious and likely would have been granted.” Id. at 525. The Seventh Circuit has

articulated a similar requirement.* See Hicks v. Hepp, 871 F.3d 513, 526 (2017) ("To successfully advance a claim of ineffective assistance of counsel based upon the failure to file a motion to suppress, a petitioner must demonstrate that there was * * * a reasonable probability that he would have prevailed on the motion to suppress.") (citation and internal quotation marks omitted). Because petitioners cannot satisfy that requirement here, the Fourth and Seventh Circuits would conclude that their attorneys were not constitutionally ineffective.

4. In any event, this case would be a poor vehicle for addressing petitioners' contentions because petitioners would not be entitled to relief even if they prevailed on those issues. Even assuming petitioners' counsel were deficient in not filing a suppression motion, and even assuming that motion would have been granted, they cannot prevail on their ineffectiveness claim unless they show a "reasonable probability" that the ultimate outcome of

* Petitioners contend that "[t]he law in the Seventh Circuit is inconsistent on this issue." Pet. 10 n.3 (citing Rodriguez v. Young, 906 F.2d 1153 (7th Cir. 1990)), cert. denied, 498 U.S. 1035 (1991). In Rodriguez, the Seventh Circuit concluded that defense counsel was ineffective for failing to move to suppress testimony of "crucial importance" where there were "substantial arguments for its exclusion." 906 F.2d at 1161; see also id. at 1161 n.3 (noting that criminal defense lawyers should move to suppress "[o]nly evidence for which there are colorable grounds for exclusion"). Petitioners would not prevail under that test, and in any event, any intracircuit tension would not warrant this Court's review. See Wisniewski, 353 U.S. at 902.

the trial would have been different. Strickland, 466 U.S. at 694; see id. at 695. They cannot do so.

As the district court explained, “[t]his is not a case where the verdict is only ‘weakly supported’ by the admissible evidence.” 174 F. Supp. 3d at 449. Rather, “there was ‘voluminous evidence presented at trial,’ ” and “[t]he bulk of the evidence against [petitioners] came from the wiretap on Suggs’ cell phone,” which is not at issue here. Id. at 449–450 (quoting 681 F.3d at 424). Furthermore, the truck recordings “were far from the best evidence against either [petitioner].” Id. at 452. The district court therefore determined that, even if petitioners had standing and the truck recordings were inadmissible, petitioners “cannot show that they were prejudiced by the admission of this evidence” because “a jury hearing only the admissible evidence would have reached the same verdict.” Id. at 448. The district court’s analysis is correct, and because petitioners cannot overcome the prejudice prong of Strickland, granting further review in this case would not change the outcome of their cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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