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Resp rec'd 2/18/91: CA9 simply applied Strickland to these facts. Petr's trial counsel sought to undermine the govt's case by portraying petr as a reluctant participant who played a reluctant role. This strategy falls within the range of professional conduct. Counsel did not implicitly admit petr's guilt.

Still X AA 2.25.91

PRELIMINARY MEMORANDUM

March 15

January 11, 1991 Conference
List 2, Sheet 4 (Page 9)

No. 90-6356-CFY

MEJIA, Luis Antonio (ineffectively assisted by trial counsel?)

Cert to CA9 (Roney [by desig], Farris, Fernandez) (unpub p.c.)

v.

United States

Federal/Criminal

Timely

1. SUMMARY: Petr argues that he was denied effective assistance when his trial counsel made what amounted to vicarious admissions of guilt in opening and closing statements.

2. FACTS AND PROCEEDINGS BELOW: Fed and State agents investigated narcotics activity of Cabral and Castillo. The suspects responded to telephone calls to a paging number made by a confidential informant. They set up numerous drug transactions. After July 19, 1988, Castillo left Alaska, but he continued to deliver cocaine to Cabral. Petr was Cabral's roommate. In December 1988, petr returned calls to the telephone paging number. He told the informant that he was in charge of the operation while Cabral was out of state. In January, 1989, Cabral arranged a transaction to take place at the informant's house. Petr accompanied Cabral in Cabral's truck, and waited in the truck while Cabral delivered the cocaine. The next day, petr went to the same residence and rec'd $12,000 as partial payment for the delivery.

Petr was charged in the Dist. of Alaska (Marshall, J.) with consp. to distribute cocaine, and aiding and abetting cocaine distribution. He was tried together with Cabral, convicted and sentenced to 70 mos. confinement and 4 yrs. supervised release.

CA9 affd: Normally, claims of ineffective assistance are best resolved in habeas proceedings. United States v. Sanclemente-Bejarano, 861 F.2d 206 (CA9 1988). Here, the record is clear, so we have considered the issue. While counsel's opening and closing statements may not seem perfect in retrospect, petr is entitled only to a reasonably effective, not perfect, counsel. Petr did receive the representation to which he was entitled. [CA9 addressed other arguments not raised in the petn]

3. CONTENTIONS: Petr's defense was his "mere presence" or "lack of knowledge" of Cabral's cocaine transactions. Trial counsel destroyed these defenses by his opening and closing statements. In opening statement, petr's counsel indicated that:

> Basically, [petr] is tied to a conspiracy and aiding and abetting because he picked up a payment one day ... [Petr] realizes what's going on, and he wants out of the thing, but within the next several days, the government sets a trap to get [petr] there, and basically, it amounts to [the informant] calling and persuading [petr] to come to his house and pick up some money. And essentially, [petr] ends up going over and picking up the money ... if you look at the situation from [petr's] eyes, not through hindsight, you would find that he was persuaded, the evidence will show that he had a lot of reluctance, but was overcome.

Counsel thus appeared to invoke an entrapment defense. Yet he never again mentioned possible entrapment. Instead, he pursued a "mere presence" or "lack of knowledge" defense, contradicted by his opening statement.

CA9's rejection of petr's 6A claim conflicts with numerous decisions of other CAs where counsel makes unauthorized and tactically unjustified concessions of a deft's guilt. [petn at 15, citing cases]. Anderson, 858 F.2d at 19 (CA1 1989) is similar to this case: counsel conceded involvement, thereby irreparably damaging a deft's defense of mere presence and lack of knowledge. Counsel deprived petr of his right to have the issue of guilt or innocence presented to the jury as a controverted issue. See Wiley, 647 F.2d at 649 (CA6).

Counsel referred to Ben Franklin's statement that "it is better to be fat and thought a fool than to open your mouth and remove all doubt" in discussing petr's failure to testify. Counsel's reference to petr as a "fool" was unprofessional and could

only diminish petr's credibility. The jury might have implied that not only would petr have appeared a fool if he testified, he would also have appeared guilty! Petr also told the jury that he had been appointed to represent petr b/c petr was indigent. CA11 has considered such a reference, reminding a jury that counsel is undertaking service not by choice, but in service to the public, as evidence of a 6A violation. Goodwin v. Balkcom, 684 F.2d 794, 805-06 (CA11 1982).

Counsel's performance was not the result of legitimate tactical decision. The sheer number of errors evidence objectively unreasonable performance well below the range of competence demanded of criminal defense attys. Petr was prejudiced and his trial cannot be relied on as having produced a just result.

4. DISCUSSION: Petr's claim is factbound and of little merit. Although petr claims that his counsel raised an entrapment defense in his opening statement, but failed to carry through, counsel repeatedly referred to the govt trap in closing as well. Given the video taped meetings and taped phone conversations, petr could not claim complete ignorance of what was happening, but could only attempt, however possible, to diminish his apparent culpability. His counsel's opening and closing statements took this approach, claiming lack of knowledge until the events leading up to the final meeting, at which time petr was pressured into collecting a payment. Counsel's comment about petr's indigence fit with part of counsel's defense theory (that petr's lifestyle belied the govt's theory that he was a drug

dealer). Petr never develops the "prejudice" prong of Strickland v. Washington, 466 U.S. 668 (1984).

5. RECOMMENDATION: Deny.

There is no response.

IFP status appears proper.

December 22, 1990

David Litt
AMK, Chicago, Goodwin Opn in petn

This is the second unpublished order I've seen from CA9 (and I believe Judge Farris sat on both panels) in which CA9 has treated ineffective assistance claims on direct appeal. I hope that the SR in the Nevada case which Justice Kennedy is preparing puts CA9 on notice. In light of that SR, I think this petn should be denied. Petr here has a much less compelling claim.

X AA 1.7.91