Saunders v. ROP, 8 ROP Intrm. 90 (1999)
SAMUEL SAUNDERS
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 1-97
Criminal Case No. 131-96

Supreme Court, Appellate Division
Republic of Palau

Argued: November 23, 1999
Decided: December 14, 1999

Counsel for Appellant: Marvin Hamilton

Counsel for Appellee: Janine R. Udui, Assistant Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

Samuel Saunders was convicted of first-degree murder by a three-judge panel convened pursuant to 4 PNC § 309. The sole issue he raises in this appeal is whether he was denied his right to effective assistance of counsel at trial. For the reasons that follow, we hold that his claim is not cognizable on direct appeal.

Palau's Constitution affords criminal defendants "the right to counsel." ROP Const. art. IV, § 7. To give effect to this guarantee, courts have construed it to confer a right to *effective* assistance of counsel, *see McMann v. Richardson* , 90 S.Ct. 1441, 1449 ⊥91 n.14 (1970),[1] and to give rise to a constitutional claim where counsel's performance was deficient and the deficiency prejudiced the defense. *See Republic of Palau v. Decherong* , 2 ROP Intrm. 152, 168 n.8 (1990); *Strickland v. Washington*, 104 S. Ct. 2052, 2063-64 (1984).

Because many ineffective-assistance-of-counsel claims rely on facts outside the trial record, it is often difficult to review such claims on direct appeal, as an appellate court lacks a mechanism for developing a factual record regarding counsel's decisions and actions. In recognition of these concerns, this Court has previously admonished in dictum that most ineffective-assistance claims should be raised in habeas corpus proceedings where the relevant

[1] The *McMann* Court was interpreting a right-to-counsel provision that was substantially similar to Palau's. *See* U.S. Const. Amend 6 (affording a right to "Assistance of Counsel").

evidence can be adduced. *See Decherong* , 2 ROP Intrm. at 167. As the *Decherong* Court explained:

> [g]enerally, claims of ineffective assistance of counsel are brought before a court on collateral attack, using a motion for writ of habeas corpus, and not on a direct appeal. This is so because usually such a claim cannot be advanced without the development of facts outside the record. Challenge by way of habeas proceeding is preferable because it permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted.

Id.

Saunders does not dispute the soundness of the general presumption against litigating ineffective-assistance claims on direct review, but contends that the ineffectiveness in his case was sufficiently apparent to warrant adjudication on direct appeal. Accordingly, in this case we must adopt an appropriate standard for determining when an ineffective-assistance-of-counsel claim may be adjudicated on direct appeal.

Neither Palau's habeas corpus statutes nor this Court's procedural rules directly address procedures for adjudicating ineffective-assistance-of-counsel claims. Although the Palau National Code's habeas corpus provisions authorize evidentiary hearings, they do not require that claims be litigated exclusively in such proceedings rather than on direct appeal. [2] Likewise, our appellate rules are silent concerning when an ⊥92 issue may be adjudicated on direct appeal, [3] versus when it should initially be raised in habeas proceedings. Thus, we must formulate an approach that will best serve the policy concerns at stake in the adjudication of ineffective-assistance claims.

We begin by noting our agreement with *Decherong*'s observation that ineffective assistance of counsel claims generally require factual findings. *See Decherong*, 2 ROP Intrm. at 167. Because the critical factual issues concerning the "reasons for counsel's decisions, the extent of trial counsel's alleged deficiencies, and the asserted prejudicial impact on the outcome at trial" generally are not litigated at trial, *see United States v. Gallegos* , 108 F.3d 1272, 1279-80 (10th Cir. 1997), a rule mandating proper development of such factual issues prior to appeal is necessary to enable an appellate court to make a reasoned assessment of counsel's performance and its likely effect on the trial.

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[2] *See* 18 P.N.C. § 1107 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or in the discretion of the court . . . by written statement under oath."); 18 P.N.C. § 1106 (authorizing court to "determine the facts" based on Common Pleas Court's report and recommendation or any "further hearing or . . . submission of such further evidence as . . . law and justice require"). The Trust Territory Code, in language virtually identical to 18 P.N.C. § 1107, likewise provides for evidentiary hearings in habeas corpus proceedings but does not mandate that certain claims must be litigated exclusively in habeas corpus proceedings. *See* 9 TTC § 107.

[3] *See* ROP R. App. P. 3-4 (governing initiation of appeals).

Yet, countervailing interests in finality and judicial efficiency weigh in favor of ensuring that ineffective assistance of counsel claims are conclusively resolved as expeditiously as the circumstances permit. For these reasons, the interests of justice would be ill served by a rule requiring claimants to initiate habeas corpus proceedings in order to adduce additional evidence when the relevant facts are already present in the record. [4] Based on these concerns, some courts have adopted a standard that permits appellate courts to adjudicate ineffective-assistance-of-counsel claims "if the record is sufficiently developed." *United States v. Camacho*, 40 F.3d 349, 355 (11th Cir. 1994); *accord United States v. Gallegos*, 108 F.3d 1272, 1279-80 (10th Cir. 1997) (permitting direct review where relevant facts were "adequately developed . . . prior to appeal"); *United States v. Fry*, 51 F.3d 543, 545 (5th Cir. 1995) (allowing adjudication on direct appeal where "the record [allows the court] to evaluate fairly the merits of the claim").

The "sufficiently developed record" standard strikes an appropriate balance between the dual goals of meaningful review and judicial efficiency, ensuring that ineffective-assistance claims are resolved both equitably and expeditiously. [5] We therefore hold that ineffective-assistance-of-counsel claims may be raised on direct appeal only when the record is sufficiently developed to permit meaningful appellate review of the claims.

We now turn to the question of whether the record in this case is sufficiently developed to satisfy this standard. According to Saunders, because the *actus reus* of homicide was undisputed and *mens rea* was the critical issue at trial, his own testimony was so essential to any viable defense that counsel was plainly deficient for failing to call ⊥93 him as a witness. Thus, Saunders argues, the fact that counsel failed to call him as a witness, which is readily apparent on the record, is sufficient to establish both the deficient performance and the resulting prejudice required to sustain an ineffective assistance of counsel claim. *See Strickland*, 104 S.Ct. at 2064. We disagree.

Although it is not challenged here that a defendant has a fundamental right to testify in his own defense, *see Rock v. Arkansas*, 107 S.Ct. 2704, 2708-10 (1987), many criminal defendants waive this right in the exercise of their right *not* to testify, for reasons of sound trial strategy. *See Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) ("[i]t is extremely common for criminal defendants not to testify, and there are good reasons for this"). Thus, an ineffective assistance of counsel claim cannot arise from the mere fact that the defendant did not testify, but rather requires an analysis of whether counsel competently discharged his duty to "advis[e] the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992).

The record in this case is devoid of any indication that counsel discharged this duty incompetently. In the only portion of the record pertaining to the decision not to call Saunders,

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[4] In some instances the necessary facts are plainly apparent on the trial record, such as where counsel jointly represented actually conflicting interests. *See, e.g., Ting Hong Oceanic Enters. Co., Ltd. v. Federated States of Micronesia*, 7 FSM Intrm. 471, 480 (1996).

[5] To the extent that *Decherong* proposed a different and more restrictive "plain error" standard, *see* 2 ROP Intrm. at 167-68, we decline to follow this dictum.

counsel stated his intent to confer with Saunders, and then, after a recess stated in Saunders' presence that Saunders "elects not to testify." Tr. at 494-96. These statements, which implicitly reflect counsel's awareness of the duty to consult with Saunders and to permit Saunders ultimately to elect whether or not to testify, do not on their face reveal any deficiency in counsel's performance. In the absence of any extrinsic evidence regarding counsel's communications with Saunders, the strategic considerations that may have informed counsel's decisions and actions, the content of Saunders' possible testimony, or the impact of counsel's decisions on the trial as a whole, we cannot find the record sufficiently developed to permit meaningful review of Saunders' claim.[6]

We therefore conclude that Saunders' ineffective assistance of counsel claim is not cognizable on direct appeal.

For the foregoing reasons, the instant appeal is DISMISSED.

[6] The fact that counsel, by presenting a *mens rea* defense through the testimony of Saunders' friends, relatives, and psychiatrist, averted the risk of exposing Saunders to potentially damaging cross-examination, underscores the need for a proper factual record upon which to assess the possible strategic considerations behind counsel's decisions. Saunders suggests that when the record is inconclusive, the trial court should inquire on the record whether the defendant has voluntarily waived his right to testify based on competent advice from counsel. While this practice may be appropriate in some circumstances, it holds the potential to intrude upon attorney-client communications and to dissuade the defendant from asserting his constitutional right *not* to testify. *See United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995). Thus, we decline to adopt a rule requiring a colloquy on the record regarding the right to testify, and instead commit this decision to the sound discretion of the presiding trial judge.