No. _____

IN THE

Supreme Court of the United States

ISRAEL SANCHEZ,

Petitioner,

v.

CHRISTIAN PFEIFFER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is California's stringent pleading standard to allege a claim of ineffective assistance of counsel during plea negotiations contrary to the governing law set forth in Supreme Court cases?

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Israel Sanchez, a California state inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I. ORDERS AND OPINIONS BELOW

The memorandum opinion of the Ninth Circuit of Appeals in *Sanchez v. Pfeiffer*, No. 17-55066 (August 13, 2018), was not published. Petitioner's Appendix ("Pet. App.") 1. The order of the U.S. District court denying relief is also unreported. Pet. App. 6.

II. JURISDICTION

The Ninth Circuit affirmed the district court's dismissal of Sanchez's habeas corpus petition filed pursuant to 28 U.S.C. § 2254 challenging his judgment of sentence by the California state court on August 13, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VI

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IV. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Petitioner is in state custody at Kern Valley State Prison, in Delano, California. He filed a habeas petition under 28 U.S.C. § 2254 challenging the constitutionality of his conviction. The district court dismissed the petition on the merits with prejudice. Pet. App. 6. The Ninth Circuit reviewed pursuant to 28 U.S.C. § 2253 and affirmed. Pet. App. 5.

B. Facts Material to the Consideration of the Question Presented

1. State Proceedings

Sanchez was charged with attempted willful, deliberate, and premeditated murder. The court appointed the Office of the Alternate Public Defender as Sanchez's lawyer. Pet. App. 318. On November 4, 2010, Louisa Pensanti ("trial counsel") substituted in for the Alternate Public Defender. Pet. App. 318.

a. Pre-trial Proceedings

On January 6, 2011, when the court inquired about the status of the case, Deputy District Attorney ("DA") Eugene Hanrahan conveyed that the parties had "spoken in an effort to settle the case." Pet. App. 191. The prosecutor explained that "defense has conveyed an offer and I'm just discussing that with my supervisors to see if that's acceptable or whether the People are going to make a counteroffer." Pet. App. 192. Stand-in counsel for trial counsel explained that the defense made an offer of 14 years. Pet. App. 192. The matter was then continued to January 18, 2011.

The record before the state court shows that trial counsel requested numerous continuances in Sanchez's case because she was involved in numerous other trials. Pet. App. 228-29; 367-90.

On June 22, 2011, a week before Sanchez's trial started, the parties were still engaged in plea negotiations. Stand-in counsel conveyed to Judge Schnegg that the parties were "hopefully discussing an offer that was conveyed to Mr. Hanrahan and hopeful for consideration from his Supervisor." Pet. App. 186. While the DA represented that the offer was "probably not" within striking distance, he did not indicate negotiations had ended. Pet. App. 186. Judge Schnegg granted trial counsel's motion for continuance and set trial for June 28, 2011. Pet. App. 339.

On June 28, 2011, before Judge Schnegg, trial counsel and the DA announced ready for trial and the case was transferred to Department 120 for trial. Pet. App. 341. The reporter's transcript does not include information as to the status of plea negotiations. Pet. App. 195-98.

The transcripts available for the morning session before Department 120, when the case was transferred to Judge Craig Richman for trial, did not transcribe the entire proceedings. Pet. App. 219. The transcript shows Sanchez was not present in the courtroom when Judge Richman first called the case for trial. Pet. App. 200. Once Sanchez entered the courtroom, the court announced it had engaged in "mandatory pretrial discussion with counsel" and the parties then commenced jury selection. Pet. App. 205-06; 343. The mandatory pretrial discussions were not reported. Pet. App. 219-20. Jury selection began on June 28. Pet. App. 224. On June 30, 2011, a jury was impaneled and trial commenced. Pet. App. 231-32.

b. Trial Proceedings

Multiple instances during trial show trial counsel was ignorant of the charges her client was facing and ignorant of points of law that were fundamental to Sanchez's case. *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (finding deficient performance and lack of strategic choices when counsel operates under the mistaken belief as to what is required under state law).

For example: during trial, while an officer testified he retrieved a bullet from an apartment building, trial counsel tried to elicit testimony that the bullet had not been fired into an inhabited dwelling, just to be reminded by the court Sanchez was not facing those charges. Pet. App. 246-47.

Trial counsel's ignorance of the law as applicable to Sanchez was also apparent from discussions concerning jury instructions. On Friday, July 8, 2011, when the trial court asked trial counsel if she was "going to ask for any lessers,"

trial counsel responded "Oh, Yes. . . . All of the lessers that I can." Pet. App. 260-61. When trial counsel requested "assault with a deadly weapon" and was told by the trial court that "assault with a deadly weapon is not a lesser included of attempted murder," trial counsel moved on and stated "Okay. Then it would be attempted manslaughter." Pet. App. 261. The trial court then welcomed counsel to research the law over the weekend, so they could address *People v. Braverman*, 19 Cal. 4th 152 (1998), which "deals with attempted murder." Pet. App. 261-62.

On Monday, July 11, 2011, the trial court and the parties resumed their discussion on jury instructions. Pet. App. 269. After giving trial counsel "the opportunity to be heard further on the "lesser of attempted voluntary manslaughter," the trial court declined to instruct the jury with that instruction. Pet. App. 272. The court also declined to give, sua sponte, "any type of involuntary manslaughter instruction as a lesser included of attempted murder" which would have been "the only lesser included that applies based upon the charges in this case." Pet. App. 272.

After the trial court asked trial counsel, once again, if she was asking "for any other instructions", trial counsel responded "Yes . . . But I don't know what else is available." Pet. App. 273.

The Court then continued explaining to trial counsel the law applicable to Sanchez's case:

> You do not need to use a firearm to commit the crime of attempted murder. So it is not a lesser included of attempted murder. You are not to consider enhancement in deciding whether there's a lesser included. So the

> firearm allegations do not trigger assault with a firearm as a lesser included. Unfortunately.

Pet. App. 273.

Trial counsel began closing argument by conceding her client's guilt: "We know that this is not a whodunit. It's a how." Pet. App. 283. She then urged the jury that this case was overcharged and "should have been an attempted voluntary manslaughter." Pet. App. 283. Trial counsel's brief argument (only six pages of transcript) focused primarily on urging the jury that petitioner shot the victim on impulse, so the jury should find the allegation of premeditation not true. Pet. App. 285-87.

The jury began deliberations on Monday, July 11, 2011. Pet. App. 296. On July 12, 2011, with stand-in counsel appearing for trial counsel, the jury summited a question concerning the requirement for unanimity to find true a special allegation. Pet. App. 297-98.

Soon thereafter, the jury announced it had reached a verdict. Pet. App. 302. The jury found Sanchez guilty of attempted murder. The allegation of premeditation was found not true. The jury found true the allegations of discharge of a firearm resulting in great bodily injury and commission of the offense for gang purposes as alleged. Pet. App. 303-04; 357. When the verdicts were read, stand-in counsel told Sanchez: "At least we beat life." Pet. App.144 ¶ 18.

On January 31, 2012, the parties submitted the matter for sentencing based on the prosecutor's sentencing memorandum and the defense sentencing brief. Pet. App. 309. Sanchez's application for probation was denied and he was ordered to

serve an aggregate term of seven years plus 25 years to life. The court selected the middle term of seven years for attempted murder. The term of 25 years to life was imposed for the use of a firearm in the commission of the offense resulting in great bodily injury. Pet. App. 310-11; 364-65. As trial counsel requested, the court "stayed" the gang enhancement. Pet. App. 311.

c. Direct Appeal and State Habeas Petition

Sanchez timely filed his opening brief on direct appeal. In his opening brief, Sanchez explicitly pointed the reviewing court to the petition for writ of habeas corpus submitted contemporaneously. Pet. App.95; 97, n.8; 98. In particular, counsel argued that the court should not have to prove prejudice because, as the documents submitted in habeas showed, "appellant contends that due to the numerous errors by defense counsel during critical stages of the proceedings, there has been a complete breakdown of the adversarial process and counsel's deficient performance is reversible error per se without the necessity to demonstrate prejudice under the second prong of *Strickland*." Pet. App. 97 n.8.

On December 3, 2012, appellate counsel filed a state habeas petition. She asked the court to consider the record on appeal in conjunction with the habeas petition because the issues overlapped, in particular as to the claims of ineffective assistance of counsel during plea bargaining and that counsel's performance was so deficient that it amounted to a deprivation of counsel and a complete breakdown of the adversarial process. Pet. App. 125-131. The petition included a sworn declaration by Sanchez, where Sanchez declared that trial counsel had conveyed to him the prosecutor's offer of 39 years, and that he rejected the plea offer as too long

based on the misadvice he had received from trial counsel. Pet. App. 142-43. The petition included a sworn declaration by appellate counsel, in which appellate counsel declared that when she first asked trial counsel about plea bargaining, trial counsel had admitted the prosecutor had extended an offer for 39 years. Pet. App.139 ¶ 20. The sworn declaration also stated that trial counsel subsequently denied that the prosecutor had extended an offer when appellate counsel pressed trial counsel for more information. Pet. App. 137-39; 160.

The court of appeal granted appellate counsel's motion to consider the petition and the direct appeal concurrently. Pet. App. 71, n.2. As to Sanchez's claim that Sanchez had been deprived of effective assistance of counsel at sentencing, the court "agree[d] that the trial court erred by failing to either strike or impose the gang enhancement" and remanded for the trial judge to decide either to strike or impose the gang enhancement. Pet. App. 71-72.

On the same day, the court of appeals denied Sanchez's habeas petition, stating that "Petitioner's claim of ineffective assistance of counsel is rejected. The petition is denied." Pet. App. 99.

After the California Court of Appeal denied Sanchez's appeal and petition, Sanchez filed a petition for review and a duplicative petition for writ of habeas corpus before the California Supreme Court ("CSC"). Pet. App. 58-69. On December 18, 2013, the CSC declined to review the court of appeal's decision on direct appeal. Pet. App. 57. On March 26, 2014, the CSC summarily denied the habeas petition. Pet. App. 56.

2. Federal Proceedings

Although the Magistrate court originally found credibility issues concerning whether Sanchez had received ineffective assistance of counsel during plea bargaining that needed to be resolved through an evidentiary hearing, the court subsequently recommended vacating the hearing. It then found Sanchez had not shown, without a hearing, that an offer of 39 years had been made. The district court ultimately denied Sanchez's federal habeas relief as to all his claims.

On appeal, the Ninth Circuit Court of Appeal affirmed. Relying on a Ninth Circuit case analyzing California's pleading requirement to state a claim of ineffective assistance of counsel, the panel found that Sanchez's statement regarding why he rejected the plea offer as explained to him by trial counsel was not enough to plead prejudice for counsel's misadvice, finding that:

> [Sanchez] self-serving statement that his trial counsel advised him otherwise does not create a constitutional infirmity. *See Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002) ('Turner's self-serving statement, made years later, that [his counsel] told him that 'this was not a death penalty case' is insufficient to establish that Turner was unaware of the potential of a death verdict.').

Pet. App. 4-5.

V. REASONS FOR GRANTING THE WRIT

The Court should grant review under this Court's Rule 10(c) because the Ninth Circuit Court of Appeal's decision is based on the premise that a state may impose a stricter pleading requirement to assert a federal right by requiring that a petitioner show conclusive evidence of prejudice from counsel's deficient performance at the pleading stage, rather than what is required under Federal law.

To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that he was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). It is clearly established federal law that a defendant has "a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (citing *Missouri v. Frye*, 566 U.S. 134 (2012), *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010), and *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)).

When a petitioner alleges ineffective advice led to the rejection of a plea offer,

> A defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.,* that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 163-64. As the Supreme Court has stated, "*Frye* and *Lafler* articulated a *different* way to show prejudice, suited to the context of pleas not accepted, not an additional element to the *Hill* inquiry." *Lee v. United States*, 137 S. Ct. 1958, 1975 n.1. (2017).

Sanchez alleged the kind of prejudice from the incompetent advice of counsel that would have entitled him to a hearing. *See Hill*, 474 U.S. at 60 (holding that the prejudice requirement under *Strickland* focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process,

and that petitioner meets the second prong when petitioner alleges he relied upon counsel's advice in evaluating whether or not to go to trial).[1]

Here, Sanchez alleged that his counsel told him the prosecutor's deal offer was 39 years and that, had counsel informed him adequately, he would not have rejected the plea offer for 39 years. Pet. App. 143. *Cf. Hill*, 474 U.S. at 59-60 (finding petitioner's allegations were insufficient to satisfy the second prong of *Strickland* because Hill did not allege in his habeas petition that, had counsel correctly informed him of the plea consequences, he would have pleaded not guilty and insisted on going to trial). Here, Sanchez alleged he relied upon counsel's advice in deciding to go to trial. Pet. App. 142-43. Thus, the state court's decision to deny Sanchez post-conviction relief without a hearing was contrary to clearly established federal law.

Contrary to the courts' decisions below, Sanchez presented more than what the Ninth Circuit characterized as "self-serving statements" during his state habeas proceedings. Sanchez plead sufficient facts to show he was prejudiced by his trial counsel's misadvice during plea negotiations as required by Federal law.

Here, the trial record shows that the parties continued plea negotiations up to at the minimum, a week before trial, and that the "mandatory pretrial discussion" between the court and counsel were not transcribed. Pet. App. 223-24.

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[1] That *Hill* presents a challenge to a guilty plea based on ineffective assistance of counsel, rather than a rejection of a plea does not alter the basic pleading requirement as laid out by clearly established federal law. *See Lee v. United States*, 137 S. Ct. at 1965 n.1.

Yet, despite the trial record, both the state courts and the Ninth Circuit demanded more evidence from Sanchez at the pleading stage.

During post-conviction, the record before the state court shows that Sanchez, under penalty of perjury, stated that right before jury selection, his counsel told him the prosecutor had offer him 39 years. Pet. App. 143, ¶ 14. Sanchez further declared that he considered the offer too long in comparison to the sentence his trial counsel had advised him he was facing if he went to trial. Pet. App., ¶ 15. He also declared that had his trial counsel advised him accurately, he would not have rejected the plea offer for 39 years. Pet. App. 143, ¶ 16. The record before the state court also shows that when first approached by appellate counsel, trial counsel confirmed an offer had been made. Pet. App. 138, ¶ 20.) The record further shows that State appellate counsel declared that trial counsel vacillated from her original admission only when confronted with further questions concerning her representation of Sanchez. Pet. App. 138-40.

Yet, the Ninth Circuit concluded there had been no plea offer. Pet. App. 4. Such a conclusion, however, is not supported by substantial evidence in the state court record when: the trial record shows the parties continued engaging in plea bargaining up to the time trial commenced, Sanchez himself declares his trial counsel told him the DA had made an offer of 39 years, and state appellate counsel declared trial counsel had first acknowledged such an offer had been made. *Cf Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (finding the state court's decision reflected an unreasonable determination of the facts in light of the evidence

presented when the court assumed the documents reviewed by trial counsel contained the mitigating information of sexual abused presented during post-conviction.) No fairminded jurists could conclude it was "clear" that the discussion with the parties before trial did not include information concerning plea negotiations, when, in fact, a few days before trial, the record before the calendaring judge reveals discussions between the prosecution and the defense were ongoing.

Further, as this Court stated, unlike claims involving whether there was ineffective assistance of counsel leading to acceptance of a plea offer,

> [w]hen a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged.

Missouri v. Frye, 566 U.S. 134, 143 (2012).

Given the record before the state court, no reasonable jurist would conclude that Sanchez failed to allege sufficient facts that his counsel was ineffective; that a plea offer had been made; and that he would have accepted the offer had his counsel informed him adequately.

Given the record before the state courts, it was also objectively unreasonable for the state court to infer no offer was made. As this Court has stated, the "reality is that plea bargains have become so central to the administration of the criminal justice system," that plea bargaining has become the criminal justice system. *Frye*, 566 U.S. at 143-44. At the time Sanchez's trial took place, this Court explained,

> [n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . To a large extent . . . horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.

Id. at 143-44 (internal citations and alterations omitted.)

Given that this Court has noted the prevalence of plea bargaining in our criminal justice system, it was objectively unreasonable for the Ninth Circuit to infer the prosecution made no offer when the record before the state court showed that: (1) the parties were engaged in plea negotiations; (2) Sanchez declared his trial counsel told him the people had offered a sentence of 39 years in exchange for his guilty plea; and (3) trial counsel initially confirmed the offer to appellate counsel. No fairminded jurist could conclude, based on the record before the state court, that the people made no plea offer in Sanchez's case.

A. Certiorari Review is Necessary Because the Ninth Circuit's Decision is in Conflict with This Court's Guidance That States Cannot Require More Than Federal law Requires to Assert a Federal Right

Almost 70 years ago, the Court granted certiorari in *Brown v. Western R. Co. of Ala.*, "because the implications of the dismissal [in that case] were considered important to a correct and uniform application of [federal law] in the state and federal courts." 338 U.S. 294, 295 (1949). This Court then held that:

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of

> local practice.' . . . Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.

Id. at 298–99 (internal citations omitted.)

This Court reiterated this holding less than ten years ago in *Walker v. Martin*, 562 U.S. 307, 321 (2011), when it held that "[t]oday's decision . . . leaves unaltered this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." (citing *Brown v. Western R. Co. of Ala.*, 338 U.S. at, 298-299 and *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923)).

In arguing that Sanchez failed to meet his burden to plead that he was prejudiced by counsel's deficient performance, the Ninth Circuit underscores the unreasonableness of the state court's denial of Sanchez's IAC claim.

It is contrary to, and an unreasonable application of, clearly established federal law to require that Sanchez prove his claim with absolute certainty at the pleading stage, where clearly established federal law recognizes the difficulty in alleging these claims given the informal nature of the plea-bargaining process. *Frye*, 566 U.S. at 143 (recognizing that the plea-bargaining process is informal and often in flux.)

As required under state law, Sanchez stated fully and with particularity the facts on which he sought relief when his counsel was ineffective during plea negotiations, and provided reasonably available documentary support for his allegations to the state court.

The Ninth Circuit Court of Appeal and the courts below held Sanchez to a higher pleading standard than what federal law requires when the panel found that Sanchez's statement regarding why he rejected the plea offer as explained to him by trial counsel was not enough to plea prejudice for counsel's misadvice, finding that "[Sanchez] self-serving statement that his trial counsel advised him otherwise does not create a constitutional infirmity." Pet. App. 4-5. Thus, the Ninth Circuit and the courts below failed to heed this Court's holding that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."

The state court's denial of Sanchez's claim of ineffective assistance of counsel during plea negotiations, at the pleading stage, by holding him to a higher pleading standard than what state and federal law require, and by resolving factual disputes against Sanchez without an evidentiary hearing, was also based on an unreasonable determination of the facts in light of the evidence Sanchez presented at the state level. *Wiggins*, 539 U.S. at 528.

Having surmounted the procedural hurdles the Antiterrorism and Effective Death Penalty Act of 1996 imposes, Sanchez was entitled to an opportunity to further develop the record so that he can prove he is entitled to relief. *Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015). The courts below erred by concluding otherwise.

VI. CONCLUSION

For the reasons stated above, Israel Sanchez respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: November 11, 2018

By _____
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**Counsel of Record*

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4,323 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 11, 2018.

C. PAMELA GÓMEZ*

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