No. _____

IN THE

Supreme Court of the United States

MARK A. HARRIS,

Petitioner,

v.

SUZANNE M. PEERY, WARDEN,

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

Extending *Strickland v. Washington*'s general prejudice standard for ineffective assistance of counsel claims to ineffective assistance of counsel stemming from bad advice during a plea, this Court affirmed the denial of an evidentiary hearing because a habeas petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). Even though Harris did allege special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty, he was denied an evidentiary hearing based on credibility. The first question is whether the standard for reviewing a petitioner's allegations of special circumstances is subjective or objective. The second question is, if the standard is subjective, whether an evidentiary hearing is required before a court can reject the allegations.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Mark A. Harris ("Harris") petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

In the Appendix, Harris includes the Ninth Circuit's Unpublished Amended Memorandum denying relief (Pet. App. 1); the Ninth Circuit's order granting a Certificate of Appealability ("COA") on Harris' ineffective assistance of counsel claim (as well as two others that are not raised in this petition) (Pet. App. 7-8); the district court's order adopting the magistrate judge's report and recommendation (Pet. App. 9-10); the district court's judgment (Pet. App. 11); and the magistrate judge's report and recommendation to dismiss the petition (Pet. App. 12-40).

On collateral review, the Los Angeles County Superior Court issued a reasoned, unpublished decision denying Harris' ineffective assistance of counsel ("IAC") claim based on *Strickland v. Washington*, 466 U.S. 668 (1984). (Pet. App. 41-42.) The California Court of Appeal and California Supreme Court summarily denied Harris' IAC claim on the merits. (Pet. App. 43; Pet. App. 44.)

JURISDICTION

Harris is in state custody at the California Correctional Center in Susanville, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 in federal district court challenging the constitutionality of his conviction and sentence. The district court denied the petition with prejudice on the merits. (Pet. App. 9-10.) The Ninth Circuit granted a COA but affirmed the district court's denial of relief. (App. C, A.) This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 90 days after the denial of rehearing pursuant to Supreme Court Rule 13(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. Section 2254(d) provides, in pertinent part: "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."

STATEMENT OF THE CASE

In 1986, the State charged Harris with first and second-degree murder along with two firearm enhancements. Harris faced a prison sentence of 25-years-to life for the first degree murder, 15-years-to-life on the second degree murder, and a combined three years for the firearm enhancements. In 1989, Harris pled guilty pursuant to a settlement offer to receive a total prison term of 26-years-to-life. (Pet. App. 21-24; 41; 56-71.)

A. Plea Colloquy.

At his plea hearing in 1989, the judge told Harris three times that he would be on parole for five years. Then the judge asked if Harris conferred extensively with his attorney on the issue. (Pet. App. 66.) (Is it correct that you "talked this [issue of a five-year parole term] over at length a lot with Mr. McKinney. . .?") In the presence of his attorney, William McKinney, Harris said yes and accepted the plea. (*Id.*)

At a parole hearing in 2010, Harris discovered for the first time that he was subject to a life term of parole, not just five years. (Pet. App. 52.) Four months later he initiated habeas litigation in the state courts, alleging ineffective assistance of counsel based on receiving erroneous information about parole term. (Pet. App. 48-52.) In support of his claim, he stated "but for the error (regarding parole length) I would not have entered a plea of guilty nor consummated it afterwards," because it was paramount to him that his family suffer only "the lowest amount of residual

effect" to allow them to move on with their lives "as soon as possible." (Pet. App. 49.) To further support his claim, he submitted declarations from his mother as well as his own (Pet. App. 45-47; 48-55) explaining why parole term was particularly important to him: he was only nineteen when charged, he had previous experience with parole as a youth, and he knew that indefinite "limitation[s] on employment and housing opportunities," and being "permanently exposed to reincarceration for slights normally of insignificance when done by citizens of a non-parole statute, at any time for the rest of [his] life" was worse than risking several years more in state prison. (Pet. App. 54.) The declarations also reflected that Harris had explicitly communicated his priorities to his mother and to his attorney in 1989. (Pet. App. 53.)

B. State Court Decisions

Ten days after Harris filed his petition—before the State could file a response brief, and without any order to show cause or evidentiary hearing—the Los Angeles County Superior Court rejected his claim because Harris had "made an insufficient showing that if a reasonable attorney would have advised him differently[,] [Harris] would not have entered into the same plea bargain." (Pet. App. 41-42.) The court's first reason was that the difference between a five-year parole term and a life term of parole "is inconsequential in comparison to the severity of consequences had [Harris] been tried and convicted." (*Id.*) The second reason was that Harris' "representations . . . that he would not have entered into the bargain if he had known . . . are, both on their face and in combination with [Harris'] supporting exhibits, wholly unbelievable." (*Id.*)

Harris exhausted his claim in the state appellate courts which summarily denied relief on the merits. (Pet. App. 43-44.) *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (requiring a state prisoner to give state courts an opportunity to act on his claims before presenting them to a federal court). The Los Angeles County Superior Court is the only state court to issue a reasoned decision in this case.

C. Federal Court Decisions

On September 12, 2011, Harris filed a pro se federal habeas petition in district court. Reviewing his claim under 28 U.S.C. Section 2254, a magistrate judge recognized that Harris alleged he did not want to plead guilty and "his greatest concern was putting the matter completely behind him as quickly as possible." (Pet. App. 35.) However, the magistrate judge found the state court's rejection was not objectively unreasonable because 1) Harris avoided a potential maximum sentence of 48 years to life, 2) he knew it was possible he would be in prison for life, and 3) his parole term could be as short as seven years. (Pet. App. 35.) Therefore the magistrate judge found it was "not reasonably likely" that Harris would have done what he alleged. (Pet. App. 35 (Harris "fails to show that he was prejudiced.")) The magistrate's recommendations were adopted by the district court. (Pet. App. 9-10.) The Ninth Circuit affirmed the district court's denial based on *Hill v. Lockhart*, 474 U.S. 52 (1985). (Pet. App. 3-4.)

THIS COURT SHOULD GRANT THE WRIT

A. The Ninth Circuit's decision conflicts with *Hill v. Lockhart*

Supreme Court Rule 10(c) provides that this Court may grant the writ where the United States court of appeals has decided an important federal question in a

way that conflicts with relevant decisions of this Court. The Ninth Circuit's decision in this case conflicts with this Court's decision in *Hill*.

The *Hill* Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. The *Hill* Court also held "[b]ecause petitioner in this case *failed to allege* the kind of 'prejudice' necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim." *Hill*, 474 U.S. at 60 (emphasis added). *Hill* established that a habeas petitioner must allege "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty" that would entitle him to a hearing. *Id.*

The federal courts allowed Hill to rectify the defect in a second habeas petition alleging the right "kind of prejudice," to receive a hearing. *Hill v. Lockhart*, 877 F.2d 698, 701 (8th Cir. 1989). At his hearing, "Hill and an expert witness testified about . . . the prejudicial impact of [counsel's] erroneous advice" on parole eligibility. *Id.* At that point, the federal district court made a favorable credibility determination and invalidated the plea; that decision was affirmed by the Eighth Circuit. *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc).

Harris faithfully followed *Hill* and provided the threshold allegations that entitled Hill (and every other petitioner to allege the right kind of prejudice) to a

hearing. Rather than afford Harris his hearing, however, the Ninth Circuit upheld the improper rejection of his allegations—without a hearing in any court.

Implicitly recognizing the difficulty in showing prejudice in a plea case (that lacks the expansive records that come with trial) the *Hill* Court effectively created a two-step process to show prejudice (threshold allegation of prejudice including special circumstances + evidentiary hearing) when it extended *Strickland's* application to the guilty plea context. The existence of those two distinct steps and what they entail is the linchpin in Harris' case. But every court to issue a reasoned decision on Harris' allegation of prejudice rejected his claim on the basis of an inadequate "showing" under *Strickland* and *Hill*. The courts conflate showing with allegation, in contravention of *Hill* which made clear that a showing of prejudice is different from the threshold allegation of prejudice.

B. Lower courts agree that *Hill's* threshold requirement is subjective but are split on whether prejudice is ultimately analyzed through a subjective or objective lens

The language of *Hill* which highlights a petitioner's allegations of "special circumstances" and his own "particular emphasis" suggests that the threshold inquiry into whether an evidentiary hearing is warranted involves a subjective assertion that proper lawyering would have affected the plea outcome. *Hill*, 474 U.S. 52, 60 ("He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.") Indeed, even where courts diverge on whether the *Strickland/Hill* prejudice test is subjective, objective, or both, they agree that "[t]he threshold *Hill* showing demands a petitioner's affirmative *subjective* assertion that

proper lawyering would have affected the plea outcome." *Compare Cloud v. Beckstrom*, 555 F. Supp. 2d 777, 800 (E.D. Ky. March 17, 2008)("The concept of reasonable probability involves both a subjective and objective component.") *to Smith v. McKinney*, 2014 U.S. Dist. LEXIS 157656, *26 (N.D. Iowa Nov. 7, 2014)("Under the *Strickland/Hill* prejudice test, the analysis of whether or not the defendant would have plead guilty is subjective, not objective.") (citing *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001)).

C. The Ninth Circuit's decision conflicts with *Lee v. United States*

Certiorari is also warranted because the Ninth Circuit's decision in this case conflicts with this Court's decision in *Lee v. United States*, 137 S. Ct. 1958, 1963 (2017); Supreme Court Rule 10(c). In *Lee*, this Court referenced *Hill* and called for a defendant-centric lens to weigh prejudice: "the inquiry we prescribed in *Hill v. Lockhart* focuses on a *defendant's* decisionmaking" looking at the consequences of a plea from the "*defendant's* perspective." 137 S. Ct. at 1966 (emphasis added). The possibility of "even a highly improbable result may be pertinent" to the extent it would have affected "an individual defendant['s]" decisionmaking. *Lee*, 137 S. Ct. at 1967. "Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." *Lee*, 137 S. Ct. at 1968-69.

Lee goes even further than *Hill*, to suggest on the merits that prejudice allegations in a plea context are necessarily subjective and can be properly tested only through an evidentiary hearing. But Harris' petition was denied because the Ninth Circuit did not follow *Lee*.

D. The Ninth Circuit's decision conflicts with the D.C. Circuit

Supreme Court Rule 10(a) provides that this Court may grant the writ where the United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

The Ninth Circuit's decision conflicts with the D.C. Circuit's decision in *United States v. Aguiar*, 894 F.3d 351 (D.C. Cir. 2018) on how IAC prejudice can be alleged and proven in a plea context. The Ninth Circuit held that "[i]n light of . . . the lack of contemporaneous evidence that parole was a significant concern to Harris, the state court's conclusion was not an 'unreasonable determination of the facts.'" (Amended Mem. at 2-3 *citing* 28 U.S.C. § 2254(d)(2).) However, the D.C. Circuit found it would be wrong to hold that a habeas petitioner "has not established *Strickland* prejudice for lack of contemporaneous evidence"; doing so "misreads" *Lee* because one petitioner had received an evidentiary hearing while the other had not. *Aguiar*, 894 F.3d at 361-62 (citing *Lee*, 137 S. Ct. at 1967.) The D.C. Circuit explained "[t]he question now is whether [the petitioner] has made sufficient allegations to warrant an evidentiary hearing to prove his claim, not whether he has satisfied his ultimate burden of proof." *Id.* ("The Supreme Court did not suggest in *Lee* that a defendant must hypothesize his counsel's advice might be erroneous and state contemporaneously that his plea decision would differ if that were so.") *See also Avila v. Richardson*, 751 F.3d 534, 535 (7th Cir. 2014) ("The state court's reasoning was flatly contrary to *Hill v. Lockhart* . . . Because there has been no opportunity for factual development of the issue, all we can say about the merits of Avila's claim at this point is that he is entitled to make it.") But the Ninth Circuit

seems to think Harris was required to offer something *more* than "sufficient allegations to warrant an evidentiary hearing," for his chance to have a hearing in state or federal court.

Because the decisions of the Ninth and D.C. Circuits are in conflict on this important matter, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: May 29, 2019

By: */s/ Saivandana Peterson*
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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,455 words, excluding the parts of the document 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 May 29, 2019

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