No. 19-7825

IN THE SUPREME COURT OF THE UNITED STATES

GUSTAVO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly rejected petitioner's ineffective-assistance-of-counsel claim on the ground that petitioner failed to demonstrate a "reasonability probability," Lafler v. Cooper, 566 U.S. 156 (2012), that but for his trial counsel's erroneous advice, he would have accepted a plea agreement rather than proceed to trial.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

United States v. Gonzalez, No. 14-40065 (Nov. 12, 2014)

United States Supreme Court:

Gonzalez v. United States, No. 14-8363 (Mar. 9, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A26-A35) is reported at 943 F.3d 979. The memorandum opinion and order of the district court (Pet. App. B36-B62) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2019. The petition for a writ of certiorari was filed on February 26, 2020. 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 Southern District of Texas, petitioner was convicted of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. B39, B45. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Id. at A28-A29. The court of appeals affirmed, 584 Fed. Appx. 188, and this Court denied certiorari, 575 U.S. 907. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to set aside, reduce, or vacate his sentence. Pet. App. B36. The district court denied the motion, id. at B36-B62, and the court of appeals affirmed, id. at A26-A35.

1. In March 2013, petitioner was stopped at an immigration checkpoint in Sarita, Texas, while driving a tractor-trailer. Pet. App. B37; Presentence Investigation Report (PSR) ¶ 6. After a drug-detection dog alerted to the trailer, Border Patrol officials directed petitioner to a secondary inspection area. Ibid. A subsequent search of petitioner's trailer revealed more than 3500 kilograms of marijuana packed inside of moving boxes. Pet. App. B37; PSR ¶ 7.

In an interview the following morning, petitioner claimed that he had arrived at a Motorola loading facility in McAllen, Texas, and had remained in the truck while it was loaded. Pet. App. B37; PSR ¶ 8. Petitioner claimed that he had then traveled from McAllen to Los Fresnos, Texas, to retrieve his medical card,

and had then visited a convenience store in Combs, Texas, before traveling north to the checkpoint. Pet. App. B37-B38; PSR ¶ 8. He denied any knowledge of the marijuana found in his trailer. Pet. App. B38; PSR ¶ 8.

After further investigation, law-enforcement agents determined that, while the seal affixed to the trailer doors at the loading facility had not been disturbed after loading, someone had tampered with the hinges on petitioner's trailer to allow access to the trailer's interior without disturbing the seal. Pet. App. B38. They found that the original load of electronics from petitioner's trailer had been discarded along a highway. Ibid. And they found discrepancies in petitioner's log book. Id. at B44; PSR ¶ 10.

2. In April 2013, a grand jury charged petitioner with possession with intent to distribute over 1500 kilograms of marijuana. Pet. App. B39; PSR ¶ 1.

a. Two months later, petitioner appeared before the district court to plead guilty pursuant to a plea agreement. Pet. App. B39. At the hearing, the court explained to petitioner the elements of the charged offense. Id. at B40. The government recounted the facts that it could prove beyond a reasonable doubt if the case proceeded to trial. Ibid.; C.A. ROA 311-317. And petitioner confirmed the government could prove those facts. Pet. App. B40; C.A. ROA 317.

When the district court asked petitioner why he had 3500 pounds of marijuana in his truck, petitioner responded that

"[s]omeone forced me to do that." Pet. App. B41 (citation omitted); see C.A. ROA 317-319. Petitioner explained that he had family in Mexico, and he claimed that the owners of the marijuana had threatened "to do something to" his family if he did not transport the drugs for them. C.A. ROA 319; see Pet. App. B41. In the course of the exchange, petitioner told the district court he did not "know what to do" about his case; the court informed petitioner that he should obtain advice from his attorney, because the court did not represent him. C.A. ROA 320-321; see Pet. App. B41.

The district court questioned petitioner further about whether he wanted to plead guilty or proceed to trial. C.A. ROA 322-324. When petitioner told the court he was afraid to go to trial, be convicted, and then be sentenced to "the maximum," the court informed petitioner that it would not sentence him to "life in the penitentiary." Id. at 324. The court noted that, if petitioner elected to proceed to trial, he could tell the jury his "story" and the court would instruct the jury that to find petitioner guilty, the jury must conclude that he knew what he was doing, and that it was his "choice" to take the actions that he did. Id. at 325. The court further explained that the jury could consider whether petitioner should be found not guilty "by force or duress or * * * coercion." Id. at 326. Shortly thereafter, the court recessed the hearing for approximately an hour to allow petitioner to confer with his attorney. Pet. App. B41; C.A. ROA

330. After the recess, the court asked petitioner what he "wanted to do." C.A. ROA 330. Petitioner responded: "I want to go to trial." Ibid.; see Pet. App. B41.

Because petitioner had a prior drug conviction, the parties and the court then discussed whether the government intended to file an information under 21 U.S.C. 851, which would increase the minimum sentence if petitioner were convicted. C.A. ROA 331. The court urged the government not to file the information "just because someone wants a trial." Ibid. At the final pretrial conference three days later, the court asked the government to wait several days, until the morning of trial, to file any information under Section 851. Pet. App. A28, B42.

b. When petitioner arrived at the courthouse on the morning of trial, he informed the marshals that he wanted to speak to his attorney about changing his plea. Pet. App. A28, B42. During the morning, the government filed the Section 851 information. Ibid. Petitioner's attorney, who had mistakenly believed that trial was scheduled for later that week, did not arrive at the courthouse until the afternoon. Ibid. Trial began shortly thereafter. Ibid.

At trial, petitioner testified in his own defense. He claimed that a Mexican cartel member had threatened to harm his family in Mexico if he did not agree to transport drugs in his truck. Pet. App. A28, B42-B43. He explained that he owed the cartel a "debt" because law enforcement had intercepted a previous load of marijuana that he had been carrying. Id. at A28, B43. He relatedly

acknowledged that he had been convicted in 2006 for carrying 109 pounds of marijuana at a checkpoint, and that the marijuana in his truck in 2013 originated from the same source as the marijuana in his truck in 2006. Ibid. But petitioner claimed that he did not "have a clue what [he] was hauling" -- whether marijuana, cocaine, methamphetamines, or "illegals" -- when he was caught the second time, leading to the charge underlying this case. Ibid.

At the close of trial, the jury returned a guilty verdict. Pet. App. A28. The district court sentenced petitioner to 20 years of imprisonment, the statutory minimum. Ibid. On direct appeal, the court of appeals affirmed in an unpublished opinion, rejecting petitioner's claims that insufficient evidence supported his conviction; that his enhanced sentence resulted from prosecutorial vindictiveness; and that the enhancement under 21 U.S.C. 851 was either unconstitutional or improperly applied to him. 584 Fed. Appx. at 188-190. This Court denied certiorari. 575 U.S. 907.

3. Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255, asserting that his trial attorney rendered ineffective assistance by misadvising him on the elements of the charged offense and thereby preventing him from "making an intelligent decision regarding the plea agreement." Pet. App. B46. After a two-day evidentiary hearing, at which petitioner and his attorney testified, the district court denied the motion. Id. at B36-B62.

The district court recognized that a defendant's Sixth Amendment right to effective assistance of counsel "extends to the plea-bargaining process." Pet. App. B51 (quoting Lafler v. Cooper, 566 U.S. 156, 162 (2012)). The court explained that to prevail on a claim of ineffective assistance during plea bargaining, a defendant must demonstrate that his counsel's performance was both deficient and prejudicial. Id. at B47; see Strickland v. Washington, 466 U.S. 668, 687 (1984). And it explained that a demonstration of prejudice in that context requires the defendant to "show that but for the ineffective advice of counsel there is a reasonable probability that * * * the defendant would have accepted the plea * * * , 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." Pet. App. B55 (quoting Lafler, 566 U.S. at 164) (emphasis omitted).

The district court concluded that petitioner's attorney had rendered deficient performance by misinforming petitioner that conviction would require proof not only of petitioner's knowledge that he possessed a controlled substance, but of his knowledge that "he had more than 1000 kilograms of marijuana." Pet. App. B52. But the court determined that petitioner had failed to demonstrate that a reasonable probability that, had he been properly informed on that issue, he would have accepted the plea offer. Id. at B55-B61. The court observed that the evidence was

sufficient for the jury to find that petitioner, in fact, "knew that he was transporting marijuana, not just a controlled substance." Id. at B60. The court further observed that the court itself had correctly informed petitioner of the elements of the offense, Ibid. And it found petitioner's testimony that he proceeded to trial based on his attorney's misstatement of the elements not to be credible. Id. at B60.

The district court observed that, "[t]ime after time" during the postconviction evidentiary hearing, petitioner had "testified in ways that contradicted his previous statements and testimony." Pet. App. B60; see id. at B50 (noting the petitioner "only recalled events helpful to him"). And the court found "largely credible" the testimony of petitioner's attorney, who admitted that he had erred in describing the elements, but explained that he had advised petitioner about the enhancement under Section 851 and the "nature and problems" of a duress defense, and that he had recommended that petitioner accept the guilty plea. Id. at B60. The court determined that petitioner had "simply made a poor choice" when he elected to proceed to trial, and found that his Section 2255 motion was "an attempt to salvage his poor choice." Ibid.

4. The court of appeals affirmed. Pet. App. A26-A35. The court acknowledged that the testimony of petitioner and his attorney about the misadvise of the knowledge element of the offense provided some support for petitioner's ineffective-assistance claim. Id. at A30. But, in light of all of the

evidence, the court agreed with the district court that petitioner likely "refused the plea agreement not in reliance on the elements of the crime but in favor of mounting a duress defense." Ibid.

The court of appeals observed that "in two days of [postconviction] hearings," petitioner "never testified outright that he would have accepted the plea deal had he been properly informed as to the sufficient elements." Pet. App. A31. And it further observed that petitioner's attorney specifically testified that petitioner "wanted to go to trial . . . , [b]ecause he . . . wanted the jury to hear the [cartel's] threats and the possibility of his duress defense." Ibid. (brackets in original). The court also noted that at his rearraignment, petitioner had admitted that the government could prove its allegations, and the district court had correctly listed the elements the government had to prove. Ibid. The court of appeals additionally emphasized that the "bulk of the proceeding" and the "very reason the [district] court called a recess of nearly one hour" was for petitioner to discuss a duress defense with his attorney. Ibid. Given that evidence, the court found it "unlikely that [petitioner's attorney's] erroneous advice regarding th[e] elements meaningfully affected [petitioner's] calculus of whether to accept the plea deal." Ibid.

The court of appeals thus declined to disturb the district court's finding that petitioner was not prejudiced. Pet. App. A31. The court reasoned that it was "not for [the court of appeals]

to substitute [its] judgment for the district court's when weighing conflicting factual evidence." Ibid. Accordingly, it explained that, even if its reading of the facts differed from the district court's, it "would affirm absent a finding of clear error." Ibid. But the court of appeals stressed that the district court's determinations here were "[f]ar from clearly erroneous," but instead "supported by the record." Ibid.

Judge Dennis dissented. Pet. App. A32-A35. In his view, petitioner's defenses -- that he lacked knowledge of the type and quantity of drugs and that he only transported the substance under duress -- were "synergistic," and interpreted the record as reflecting that both had "influenced his decision" to forgo the plea agreement. Id. at A34.

ARGUMENT

Petitioner contends (Pet. 18-24) that the lower courts erred in determining that he failed to show a reasonable probability that, but for his attorney's incorrect advice, petitioner would have accepted the plea agreement before the government filed the Section 851 information and thus received a lower sentence than the district court imposed after trial. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review of petitioner's factbound contentions is unwarranted.

1. Under Strickland v. Washington, 466 U.S. 668 (1984), an ineffective-assistance claim has two components. First, the defendant must show that his counsel's performance was deficient by demonstrating that it "fell below an objective standard of reasonableness." Id. at 688. Second, the defendant must "affirmatively prove prejudice" by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-694. To establish prejudice where, as here, a defendant claims that his counsel's deficient performance led him to reject a plea agreement and proceed to trial, the defendant must prove 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 v. Cooper, 566 U.S. 156, 164 (2012).

The lower courts in this case correctly determined that, on this record, petitioner failed to establish prejudice. In particular, petitioner failed to demonstrate a reasonable probability that but for counsel's incorrect statements of the offense elements, petitioner would have accepted the government's

plea offer and not decided to proceed to trial. To the contrary, evidence from the hearing before the district court indicated that petitioner "refused the plea agreement * * * in favor of mounting a duress defense," not because of misadvice about the offense elements. Pet. App. A30.

Several aspects of the plea colloquy confirm that the prospect of a successful duress defense, not a misunderstanding of the elements of the crime, caused petitioner to proceed to trial. First, notwithstanding petitioner's attorney's misstatement, the district court correctly informed petitioner that the government needed only to prove knowledge that he possessed an illegal drug, not knowledge of a specific quantity of marijuana. C.A. ROA 302. Second, when the district court judge asked petitioner, following the government's recitation of the relevant facts, why his tractor-trailer contained 3500 pounds of marijuana, petitioner did not deny knowledge that he was transporting marijuana, but instead claimed that "[s]omeone forced me to do that." C.A. ROA 317-318. Third, in the discussion that immediately followed, the district court again stated the offense elements without suggesting that petitioner had to know he possessed a specific quantity of marijuana, id. at 325, and then discussed at length the duress defense, reading petitioner the circuit pattern jury instruction associated with that defense, id. at 326-327. And the recess after which petitioner stated unequivocally that he "want[ed] to go to trial" directly followed that extended discussion of the duress

defense. Id. at 330. As the court of appeals recognized, that sequence of events strongly indicates that petitioner's attorney's erroneous advice about the elements did not "meaningfully affect[]" petitioner's calculus of whether to accept the plea deal. Pet. App. A31.

That determination is reinforced by the testimony of both petitioner and his attorney before the district court. At the evidentiary hearing, petitioner testified that his attorney incorrectly advised him that the government had to prove that he knew that he was transporting marijuana. C.A. ROA 862-863. But petitioner never actually testified that he would have accepted the plea agreement if his attorney had stated the offense elements correctly. See Pet. App. A31. By contrast, in testimony that the court found "largely credible," id. at B60, petitioner's attorney specifically testified that petitioner decided to go to trial because "he wanted the jury to hear the threats and the possibility of his duress defense." C.A. ROA 943. And that testimony was consistent with petitioner's acknowledgment that his attorney advised him they "could fight the case because of everything that was going on in Mexico." Id. at 895; see id. at 862 (petitioner testified that a trial defense "might be successful" if petitioner relied on "all the violence that was happening in Mexico").

Finally, contrary to the assertion of the dissent below, the lower courts' finding of no prejudice is not undermined by the fact that petitioner's eventual testimony at trial was not limited

to the duress issue, but also addressed his lack of type-and-quantity knowledge. See Pet. App. A34-A35 (Dennis, J., dissenting). The relevant question under Lafler v. Cooper, supra, is what motivated petitioner's decision to forgo the plea agreement and proceed the trial. See 566 U.S. at 164. Once a defendant makes such a decision, he may reasonably -- and likely will -- advance any number of perceived defenses, of varying potential strength, in an effort to obtain acquittal. But that does not establish that the opportunity to offer each defense was itself a but-for cause of the defendant's decision to proceed to the trial in the first place. Here, petitioner admitted during the plea colloquy that the government could prove all of its allegations, C.A. ROA 317-318, making it unlikely that the opportunity to advance an (erroneous) defense on the elements meaningfully affected his decision to take a chance at trial.

2. Petitioner does not argue that the court of appeals' decision implicates any conflict among the circuits that would warrant this Court's review. Instead, he contends (Pet. 19, 24) that review is warranted to resolve whether the panel majority or the dissent followed the "proper methodology" for "applying the 'reasonable probability' test under Strickland and Lafler when a defendant rejects a plea agreement, goes to trial, presents a nonexistent defense based on the incompetent advice, as well as a complementary defense." That contention lacks merit.

As an initial matter, even if the majority and dissent in the court of appeals did "present two different methodologies" (Pet. 25) for applying Strickland and Lafler in these narrow circumstances, that disagreement would not warrant this Court's review. Petitioner does not identify any other case in which that question has been presented -- let alone make a plausible claim that it occurs with such frequency as to warrant this Court's review in the absence of a conflict among the circuits.

In any event, the majority and dissent did not, in fact, adopt different methodologies. Petitioner contends (Pet. 24) that the panel majority "look[ed] at the strength of each defense individually," while the dissent "look[ed] at the strength of the two defenses collectively or holistically." But neither the panel majority nor dissent recognized any disagreement over "methodology" or described its approach in such terms. Rather, they each recognized that Lafler supplied the appropriate standard, and each asked only whether, but for his attorney's mistaken understanding of the elements, a "reasonable probability" existed that petitioner would have accepted the plea agreement. Compare Pet. App. A30, with id. at A32. After considering all of the evidence and both potential defenses, the panel majority found it "unlikely that [petitioner's attorney's] erroneous advice regarding th[e] elements meaningfully affected [petitioner's] calculus of whether to accept the plea deal," id. at A31, while the dissent "respectfully disagree[d]" with that finding, id. at

A33. This Court ordinarily does not grant certiorari to review such factbound disputes. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925). Petitioner offers no sound reason to depart from that practice here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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