No. 19-7825

IN THE SUPREME COURT OF THE UNITED STATES

GUSTAVO GONZALEZ
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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REPLY BRIEF TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

CASES

RULES

REPLY TO THE BRIEF IN OPPOSITION

This Court should grant certiorari to decide an important question that has not been, but should be, settled by this Court concerning the application of the "reasonable probability" test of *Strickland v. Washington*, 466 U.S. 668 (1984), and *Lafler v. Cooper*, 566 U.S. 156 (2012).

In his petition for a writ of certiorari, Mr. Gonzalez asked the Court to grant certiorari to consider the important question regarding how courts should apply the reasonable-probability test under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012), to a defendant who rejects a plea agreement based on counsel's incompetent advice and presents a legally invalid defense based on that advice, as well as an alternative defense at trial. Pet. i, 19. Should a court look at each defense individually, as the Fifth Circuit majority did in this case, or look at the two defenses holistically, as the dissent did in this case, when considering whether there was a reasonable probability that the defendant would have accepted the plea agreement but for the incompetent advice? *Compare United States v. Gonzalez*, 943 F.3d 979, 983-84 (5th Cir. 2019), *cert. petition filed* (No. 19-7825) (Feb. 28, 2020), *with id.* at 985-88 (Dennis, J., dissenting); *see also* Pet. 19. Mr. Gonzalez's petition also explained that the choice of methodology in applying *Strickland*'s and *Lafler*'s reasonable-probability test makes a significant difference in the outcome of the case – as it did here and will in similar cases in the future. Pet. 19, 24.

In its Brief in Opposition ("BIO"), the government principally argues that this case is "factbound," that there is no conflict among the circuits or even between the majority and dissent and that there is no need for the Court to address the proper methodology for

applying *Strickland* and *Lafler* here. BIO 10. The government's arguments miss the mark for the following reasons.

First, this case merits plenary review and is not factbound. True, the question presented arises in a particular factual context in which a criminal defendant rejected a plea agreement based on false advice about the offense elements and presented a nonexistent defense based on that advice, as well as another defense. That there is a particular factual setting, however, is unextraordinary since federal courts, including this Court, cannot decide any *legal* question unless it is raised by an actual litigant who is seeking relief based on an actual harm in a particular factual setting. *See, e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (reiterating that "'[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision'" and that "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them'") (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990), among other cases).

To the extent that there is any appearance that the case is factbound, it arises from the government's inclination to reargue the facts by rehashing what occurred at the truncated guilty plea proceeding in this case. *See* BIO 12-14. Nevertheless, Mr. Gonzalez's petition did not dispute any of the facts, but instead relied on the facts within the opinion issued by the Fifth Circuit. *See* Pet. 19-24. Indeed, the legal question presented in his petition arises due to the alternative legal methodologies applied by the majority and dissent to the facts, as *those jurists* found them. *See* Pet. 19-24. In fact, the petition expressly noted that the Court need not address the fact-related issue of whether there was

prejudice once it decides the legal question, but may instead remand to the lower courts for resolution of that question. Pet. 24 n.1. In sum, Mr. Gonzalez's petition presents a legal question on the application of *Strickland* and *Lafler* to defendants who reject a plea agreement based on incompetent advice and mount more than one defense at trial.

The government also argues that the Court should not grant certiorari because there is no "conflict among the circuits" or even between the majority and dissent in this case, and that there is no need for the Court to address the proper methodology for applying *Strickland* and *Lafler* here. BIO. 13-16. The government's claim that the majority and the dissent did not disagree by "adopt[ing] different methodologies" and that "neither the panel majority nor dissent recognized any disagreement over 'methodology' or described its approach *in such terms*," BIO 15 (italics added), is in error.

The dissent clearly pointed out that its method of analysis and the majority's method of analysis were at odds:

> **The majority concludes that Gonzalez's desire to pursue a duress defense makes it unlikely that Cisneros's flawed advice as to scienter "meaningfully affected Gonzalez's calculus of whether to accept the plea deal."** Maj. at 984. I respectfully disagree. The two defense theories that Gonzalez pursued were not inconsistent. In fact, together they were synergistic. The chronology of events suggests Gonzalez was fully prepared to plead guilty until Cisneros's incorrect advice convinced him he possibly had two consistent grounds for acquittal that reinforced each other—duress and the government's inability to prove scienter as Cisneros had misstated it. **Gonzalez likely behaved rationally, evaluating the strength of *both* defenses relative to the government's case, and this balance was significantly different in reality than Cisneros's incorrect advice led Gonzalez to believe.** And that Gonzalez trusted and was influenced by Cisneros's misstatement is corroborated by the strategy he and his attorney in fact employed at trial. There is no evidence contradicting these conclusions, and I would accordingly hold that Gonzalez has demonstrated a reasonable probability that his attorney's deficient performance resulted in

his electing to go to trial and receiving a substantially longer sentence.

Gonzalez, 943 F.3d at 986 (Dennis, J., dissenting) (italics in original, but bold typeface added). It thus is clear that the dissent disagreed with the majority's methodology of focusing on the desire to pursue a particular defense rather than evaluating the strength of "*both* defenses relative to the government's case" and whether "this balance was significantly different in reality than [counsel]'s incorrect advice led [the defendant] to believe." *Id.* (italics in original).[1]

The government additionally claims that there is no conflict among the circuits and that there is no need for the Court to address the proper methodology for applying *Strickland* and *Lafler* here. BIO. 13-16. The former contention is not germane, while the latter contention ignores the importance of effective assistance of counsel in the plea bargaining process. Although the circuits are not divided on the question presented, Mr. Gonzalez's petition did not claim that they were, but instead raised the question presented

[1] There is a significant difference between the two modes of analysis. Imagine that Louise decides to engage in a gun battle rather than accept a settlement because she believes she has two fully loaded and functioning handguns at her disposal, one of which is her favorite. Suppose, to her surprise, it turns out that the handgun that is not her favorite is worthless and fails to fire and that she loses the gun battle. In analyzing whether her belief that she had two functioning handguns significantly influenced her decision to reject a settlement, one might look at just how much she liked her favorite handgun. Alternatively, one might look at how her decision to reject a settlement might have changed if she had known beforehand that she would have had her favorite handgun with her but that the other handgun was worthless. And, the more analogous question using the latter analysis here is whether her view of the strength of her position would have been significantly affected if she had been told the truth about the worthless handgun at the outset, rather than having been advised at the outset by an expert that the worthless handgun was an accurate, functioning weapon. There is a serious and important question about whether to apply the first analysis, which focuses primarily on the possession of a favorite handgun, rather than the second analysis, which looks at all of the facts concerning both handguns and assesses the effect on the strength of one's position in light of them. *See Gonzalez*, 943 F.3d at 986 (Dennis, J., dissenting).

as "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c); *see* Pet. 19. The prongs of Rule 10 are not written as a conjunction but rather are an "indicat[ion] of the character of the reasons the Court considers" in determining whether to grant certiorari. Sup. Ct. R. 10. For example, this Court has granted certiorari to address the application of *Strickland* in opinions that make no mention of any conflict among the circuits. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1881-87 (2020) (per curiam) (granting certiorari, concluding that petitioner demonstrated counsel's deficient performance with regard to investigation and presentation of mitigating evidence as well as investigation and rebuttal of aggravating evidence, and remanding for the state court to determine whether that deficient performance prejudiced the petitioner); *Florida v. Nixon*, 543 U.S. 175, 186-87 (2004) (granting certiorari "to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the Defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient, and whether counsel's effectiveness should be evaluated under *Cronic*[2] or *Strickland*").

The present case similarly raises "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). As this Court explained in *Lafler*:

> . . . [T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of

[2] *United States v. Cronic*, 466 U.S. 648 (1984).

> guilty pleas. *See Frye*, *ante*, at 1386, 132 S. Ct. 1399.[3] As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Ibid*. ("[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

Lafler, 566 U.S. at 169-70.

The government's position here, like the state's position in *Lafler*, ignores the "central role" played by the plea bargaining process, as well as counsel's advice about defenses, in a defendant's decision to accept or reject the plea agreement. Instead, the government's shortsighted focus on the presentation of a particular defense following an aborted guilty plea proceeding, *see* BIO 12-14, overlooks the importance of the question presented here. To account for the interplay of the plea bargaining process and counsel's crucial role within it, the proper method for applying the second prong of *Strickland* should, as Judge Dennis points out, look at all of the facts, including the effect constitutionally competent counsel would have had on Mr. Gonzalez's, or any defendant's view of the combined strength of *both* of his defenses during the plea bargaining process and thus the effect on his choice to proceed to trial. *See Gonzalez*, 943 F.3d at 986 (Dennis, J., dissenting); *see also supra* text, at 6 n.1.

In light of the central role of plea bargaining in criminal justice and the critical role played by counsel in the plea bargaining process, the question of the proper application of *Strickland* to a defendant who rejects a plea agreement based on counsel's incompetent advice in order to present invalid and valid defenses at trial is an important question that

[3] *See Missouri v. Frye*, 566 U.S. 134, 141-44 (2012).

has not been, but should be, addressed by this Court. This Court, therefore, should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: August 4, 2020

Respectfully submitted,

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