20-1581

No. _____

In The
Supreme Court of the United States

MALIA ARCIERO
Petitioner,

v.

UNITED STATES OF AMERICAN
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MALIA ARCIERO
Pro se Petitioner
Fed Reg No. 16101-022
FCI Victorville Medium II
Federal Correctional Institution
Satellite Camp
P.O. Box 5300
Adelanto, GA 92301

QUESTION PRESENTED

Malia Arciero was charged with conspiring to distribute and to possess with intent to distribute 50 grams or more of meth. Two weeks prior to her trial, Arciero frantically told her then trial counsel that she was feared losing at trial and wanted to plead out. Counsel Dubin responded by demanded that she reject the offer and proceed to trial based on his fundamental misunderstanding of federal law. Unbeknown to Arciero, Dubin was a state real estate attorney with little or no experience in federal law, nevertheless, Arciero did as Dubin advised her and rejected the offer, Arciero was later convicted on all counts as charged. Arciero does not assert that any error occurred at the trial.

On habeas review, both the Ninth Circuit and district court despite former trial counsel's concession on the above undisputed facts, found that Arciero did not demonstrated a reasonable probability that she would have accepted the plea offer had she been adequately advised, and therefore her Sixth Amendment rights to effective assistance of counsel was not violated. Both lower Courts also found that Arciero did not show prejudice when the district court imposed a two level obstruction-of-justice enhancement based on sentencing counsel advising her to withdrawing her allegations against the case agent right before sentencing. The question presented is:

Whether this Court holding in Lafler v. Cooper, 566 U.S. 156 (2012), is still good law, and if so, whether Arciero is entitled to relief due to defense counsels deficient advice which led to a two-point enhancement in her impose sentence and led her to reject a favorable plea offer that resulted in her being later convicted and sentence to a harsher sentence after a fair trial?

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MALIA ARCIERO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I do hereby certify that the following persons may have an interest in the outcome of this appeal:

1.) Court of Appeals for the Ninth Circuit

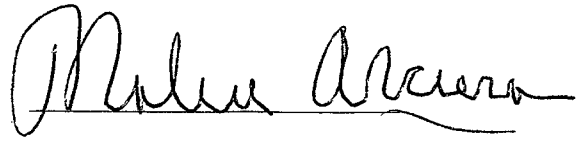
2.) Malia Arciero, the Defendant-Petitioner

3.) Marion Percell, Chief of Appeals, U.S. Attorney Office District of Hawaii

4.) Susan Oki Mollway, United States District Court Judge

5.) Thomas M. Otake, former trial counsel for the Petitioner

6.) United States of America



PARTIEES TO THE PROCEEDING

There are no parties to the proceedings other that those listed in the caption. The Petitioner is Malia Arciero, a pro se inmate. The Respondent is the United State of American.

OPINIONS BELOW

The Opinion of the Ninth Circuit is unpublished. Pet. App. 1a-5a. The order of the United States denying the petition is published. Pet. App. 7a- 42a. The decision of the Ninth Circuit affirming Arciero's conviction is unpublished. Pet. App. 44a- 46a. The District Court's order on attorney Otake's motion to withdrew as counsel of record. Pet. App 51a

JURISDICTION

The opinion of the Ninth Circuit filed November 06, 2020, affirmed the decision of the Hawaii District Court denying Arciero habeas relief. Pet. App. 1a-5a. Petitioner invokes the jurisdiction of this Court under 38 U.S.C. 1254(1).

CONSTITUTIONAL STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, 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."

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2255), provides in relevant part:

(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 State court proceedings.

PRELIMINARY STATEMENT

This is a case of national importance because the ruling of the court of appeals for ninth circuit has invalidated parts of a defendant's Sixth Amendment rights in that circuit. Allowing such a fundamental flaw ruling to stand will undoubtedly create a split among the lower courts. This Court should hear this case.

As a preliminary matter, Ms. Arciero avers the Court that she is not an attorney; has no legal or professional skills and training pertaining to the preparation and filing of legal motions, documents and or memorandums. Ms. Arciero gives notice of such limitations and prays this Court to construe her pleadings liberally in light of this Court holding in Haines v. Kernes, 404 U.S. 519 (1972).

INTRODUCTION

There were two critical Glover/Cooper errors by former defense counsels that was at the heart and soul of Ms. Arciero's ineffective assistance of counsel claims which are not in dispute. Frist, whether former disbarred counsel Dubin threats and bulling of Arciero into rejecting a favorable plea offer constituted ineffective assistance of counsel, and second, whether former sentencing counsel Otake's advice to withdraw her sexual assault rape allegation against the arresting agent Ryan Faulkner, constituted ineffective assistance, in light of the district court's two-level enhancement based on that withdrawal. Arciero argued that the two Glover/Cooper errors entitled her to relief, and the Ninth Circuit held that they do not. Thus, it is the correct application of governing law, not the facts of the case which are in dispute in this criminal appeal.

28 U.S.C. 2255(d) required the Ninth Circuit to limit its review to whether the district court adjudication contravened "clearly established" Supreme Court law. This Court has established that a criminal defendant in Arciero's situation is prejudiced in a way that is cognizable under the Sixth Amendment. Neither Strickland v. Washington, Glover v. United States nor Lafler v.

Cooper, two cases relevant to the issue, would support such a bad decision by the lower courts. With all due respect to the lower courts, the prejudice requirements of both those cases, authorizes relief to circumstances where counsel's deficient advice led to a defendant rejecting a favorable plea offer and/or the imposition of a harsher sentence.

In this case, the Ninth Circuit held that, as a matter of constitutional law, even if counsel deficiently advises his client to reject a plea deal, there is no violation of the Sixth Amendment if the defendant thereafter receives a fair trial. And while it is true that a criminal defendant in this situation may receive a harsher sentence than he or she would have but for their counsel's deficient performance, but because that injury does not stem from any unfairness in the trial that resulted in the harsher sentence, it is not actionable under the Sixth Amendment.

In a nutshell, the lower courts believe that the Constitution guarantees a criminal defendant a fair trial or fair plea, and Ms. Arciero had a fair trial. And while the Constitution also guarantees effective counsel, it does not require a federal court of appeals to overturn a conviction based on a fair trial because effective counsel would have procured a more favorable plea. This decision by the Ninth Circuit goes against everything this Court holding in Cooper constitutionally stand for. Accordingly, this Court should hear this case.

BAIL STATUS

Petitioner- Malia Arciero is serving her sentence at FCI Victorville Medium II, which is a Federal Satellite Prison Camp. Her projected release date is August 10, 2026.

STATEMENT OF THE CASE

A. The Facts of the Crime

Defendant-Petitioner Malia Arciero ("Arciero") and her sister, Keala ("KeKe") Arciero, were originally arrested by law enforcement officers on April 30, 2013, while they were in the process of making a delivery of a pound of methamphetamine, but they were released without charge. Subsequently, Arciero actively started to cooperate with law enforcement, along with working with Homeland Security Investigations (HIS), and Special Agent Faulkner and other agents in connection with an ongoing investigation of others.

B. Federal Court Proceeding

A federal criminal complaint against both Arciero and Keala Arciero was filed on October 24, 2013. Docket Sheet, ER 543; Criminal Complaint, SER 262. The Affiant was Special Agent Ryan Faulkner.

Arciero initially retained a seasoned criminal defense attorney, Michael Green, to represent her.

Attorney Green advised her to continue cooperating with the government. Attorney Green also negotiated a plea deal that would allowed her to avoid a ten-year mandatory minimum sentence if convicted, but Arciero rejected that deal and continue cooperating with the government in hope of obtaining a better offer down the road.

On November 21, 2013, a grand jury returned a two-count indictment against Arciero and her sister, charging them, in Count 1, with conspiring to distribute and to possess with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. 846, 841(a)(1), 841(b)(1)(A) and, in Count 2, with distributing a quantity of methamphetamine in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C).

On November 25, 2013, Gary Victor Dubin, Esq, entered an appearance for Arciero as counsel of record, replacing her former attorney, Michael Jay Green, Esq. Arciero retained Gary Gubin because without attorney Green knowledge, Dubin had pulled Arciero to the side and told her that he could get her charges dropped entirely based on his experience in the federal justice system.

The original indictment was superseded in June 2014, with a four-count indictment base off information accumulated during Arciero's Cooperation. In that First (and last) Superseding Indictment, the original Count 2 became Count 4, and a new Count 2 and 3 were added, which charged Malia Arciero alone with distribution of a quantity of methamphetamine on one date and distribution of 50 grams or more of methamphetamine on another date. See the First Superseding Indictment.

Recognizing and feeling that she had been play by the government with the adding of additional charges, Arciero told attorney Dubin that the case agent who was her cooperation handler, Agent Ryan Faulkner, had sexually abused her after she had gotten arrested and again while she was under his supervision during pre-trial.

Thereafter, in August 2014, Dubin filed a series of pretrial motions, including a motion to dismiss based upon outrageous government conduct and/or entrapment. In support of these motions, Dubin submitted declarations of Ms. Arciero. The district court conducted an evidentiary hearing on October 23 and 24, and November 24, 2014, at which a number of government witnesses testified. After conferring with defense counsel, Arciero decided not to testify, and the defense withdrew the motion to dismiss based upon outrageous government conduct and/or entrapment and withdrew the declaration signed by Arciero that had been submitted in support of the two other pending motions.

Thereafter, the district court denied the motion to suppress Arciero's typed confession and denied the motion to suppress other seized items. However, the district court did grant Ms. Arciero request to argue entrapment as a defense during trial based on the evidence presented during the hearings.

Also relevant to this review, during oral argument in the Ninth Circuit, the Panel asked the Government for an update into Arciero's 6-year old allegation against the agent, and counsel for the government stated that she knew of no final investigation into the 6-year old allegation.

As noted above, Arciero initially hired Dubin to go to trial. But two weeks prior to the start of trial, Arciero's codefendant (her sister) pleaded guilty. At that time, Arciero herself told former trial attorney Dubin that she also wanted to change her plea and no longer wanted to go to trial. Dubin then advised her not to change her plea, telling her that she would have to "accept a sentence of twenty year at the mercy of the court". This information was untrue, Dubin also added that she had to cooperate against other if she pled guilty (even though that was not accurate). Arciero reminded Dubin that she had already fully cooperated and provided extensive information to the government. Dubin responded by telling her that the government was not offering her anything anymore, but Arciero persisted in asserting that she wanted to change her plea anyway. Dubin then responded by berating her as having a "tantrum" and "crying" by telling her it was unlikely she would receive "anything but the maximum sentence," and by bragging that he had been in trial for two weeks in another drug case, which "everyone said was impossible to win", but two days of deliberations the jury was still unable to make a decision," an example of his skill that her bellyaching to shame."

The government, however, did offer Arciero another new plea offer. But on the foregoing advice from attorney Dubin, supplemental with his advice that she should not "run away ... like a spoiled brat" from her pending dismissal and suppression motions, Arciero rejected the new plea offer. And even after he withdrew the dismissal motion and Arciero's declaration about the sexual allegations, Dubin still advised Arciero to proceed to trial, which she agreed to do.

The charges against Arciero were tried in a six-day jury trial beginning on December 10, 2014 and ended on January 7, 2014. Arciero presented her case but did not testify. On the second day of deliberations, she was convicted of all four counts.

Arciero thereafter hired a different attorney, Thomas Otake, to represent her at sentencing. The first thing Attorney Otake did when he took over the case was to advise Arciero that she must formally retracted her sexual assault allegations against the case agent. Doing this Otake explained would give her credibility with the sentencing judge. Arciero explained that she did not wanted to do that because the allegations against the case agent were true and that doing so would make her look like a liar to everyone. Attorney Otake assisted that she had to trust him because he was the lawyer, and he knew what he was doing. Arciero very reluctantly did as Otake asked.

After Arciero formally retracted her sexual assault allegation, due to pressure placed on her from new and now her third trial counsel, the district judge went ballistic on her and called Ms. Arciero a manipulative compulsive liar, and thereafter sentenced Arciero to 172 months on each of the four drug counts to be served concurrently. Arciero final sentence contain a two-level obstructive of justice enhancement based on Arciero's declaration about the sexual assault

allegation. Arciero filed a timely notice of appeal to her conviction, and the Ninth Circuit affirmed it in an unpublished memorandum opinion. See C.A. No. 15-10479.

C. 2255 Proceedings

After an unsuccessful direct appeal, Arciero moved to vacate her conviction and sentence by raising several ineffective assistance of counsel claims in a timely 2255 motion. In that motion, Arciero argued that former trial counsel provided deficient performance, (1) in advising her to testify at the pretrial detention hearing without first advising her of the potential sentencing consequences should the court find her testimony untruthful, (2) in filing her declaration against the ICE agent and then later withdrawing that same declaration which made her look like a liar to the district court about the sexual assault allegations, and (3) in harassing and advising her to reject the plea offer based on counsel's misunderstanding of federal law. However, the habeas district court rejected all of Arciero's ineffective claims reasoning that her "faulting her attorney for having believed her lies ... is not a sound basis for an ineffective assistance claim." See Order at 1.

More specifically, the district court ruled that former counsel Dubin's performance was not deficient with regard to the pretrial detention hearing and the motions, because he [attorney Dubin] relied on what Arciero had told him. See Order at 25, 28. The district court further ruled that Dubin's performance was not deficient with regard to running an entrapment defense because the court allowed the defense to go to the jury. See Order at 28. Finally, the district court in totally disregarding everything presented and conceded during the evidentiary hearing ruled that former disbarred attorney Dubin's performance was not deficient in advising Arciero to go to trial "because she [Arciero] was committed to going to trial based on her allegations that the case agent had sexually assaulted her." See Order at 31. The district court never explain why this line of defense would somehow show or for that matter prove to the jury that Arciero wasn't guilty of possessing and distribute meth?

The district court did not issue a certificate of appealability, erroneously concluding that "[r]easonable jurists would not find this court's assessment of the merits of Arciero's constitutional claims debatable or wrong."

Following that denial, and with Ms. Arciero being totally fed up with attorney Otake's incompetence during sentencing and on her direct appeal, along with retained counsel's failure to call, text, write her or provide copies of pleading file on her behalf for over two year, Arciero through love ones and family members instructed attorney Otake to petition the Ninth Circuit for a COA on whether in light of this Court holdings in Strickland v. Washington, 466 U.S. 668 (1984), Glover v. United States, 531 U.S. 198 (2001), and Lafler v. Cooper, 566 U.S. 156 (2012), could reasonable jurists find the district court's assessment of Arciero's constitutional claims debatable or wrong.

Attorney Otake filed the request for a COA as instructed but failed to include Glover or Cooper as Supreme Court authority. The Ninth Circuit nevertheless did issue the COA on September 30, 2019 as to the issue of:

"whether trial counsel was ineffective in violation of appellant's Sixth Amendment right to counsel." See Pet. Appendix at 65a.

Several months later, and still with no form of communication between herself and counsel Otake, a family member informed Arciero of the court of appeals had recently issued a COA with respect to her ineffective assistance counsel claims. Arciero again instructed all of her family member to call and ask Otake not to forget to include Glover and Cooper in his opening brief. Oral argument was scheduled for October 21, 2020. Nevertheless, Arciero then filed a series of motions in the district court attacking the legitimacy of her detention in light of the COVID-19 ongoing pandemic. In respond to Arciero filings, Attorney Otake filed a motion to withdraw as counsel of record. The motion was granted by the district court. However, Attorney Otake did show up on time for oral argument in the Ninth Circuit.

At the Oral argument, one of the first question asked by the Panel was "in what ultimate universe could the Court grant Arciero the relief to which she was seeking," because the Panel stated that it did not know of any nor did it see any such authority in Otake's pleadings to the Court. Attorney Otake then responded that given the facts of the case, concessions during the evidentiary hearing in the district court, that this Court holding in Cooper controlled the disposition of Arciero's appeal of the district court's denial of her 2255 motion.

Without addressing Arciero's Cooper claim and/or claims, a Panel of the Ninth Circuit issued a memorandum opinion affirming the district court's denial of Arciero's 2255 motion. Arciero then moved pro se and filed a notice/motion for rehearing and en banc rehearing consideration on the grounds that the Panel's opinion and order was;

"Contrary to the decision of the Supreme Court in Lafler v. Cooper, 566 U.S. 156 (2020)" The pro se motion/notice was docketed in the court of appeals on November 11, 2020, at DKt, 30. Without citing any authority as to why the Panel got the case wrong, attorney Otake also filed a motion requesting rehearing and en banc rehearing consideration.

On December 09, 2020, the full Court of the Ninth Circuit issued an order denying Arciero's request for rehearing and en banc consideration. The order made no mention of Arciero's Cooper claims, or the Panel's failure to adhere to settled Supreme Court precedent nor Arciero;s pro se notice/motion. Therefore, this petition for writ of certiorari ensue.

REASONS FOR GRANTING THE PETITION

The opinion of the Ninth is contrary to this Court clearly established entitlement to relief for ineffective assistance of counsel during plea bargain negotiations when the defendant is later convicted and sentenced pursuant to a fair trial.

As stated above, during oral arguments, the Panel asked attorney Otake to explain to the court in what ultimate universe could the Court grant Arciero the relief to which she was seeking, because attorney Otake opening brief was devoid of any such authority. Attorney Otake responded that based on the facts of the case and in according with this Court holding in Lafler v. Cooper the court of appeals could and should grant Arciero habeas relief on her ineffective assistance of counsel claims with respect to trial counsel advice to reject the plea offer. See also Arciero's pro se motion DKt 30, filed in the court of appeals following the district court order granting attorney Otake's motion to withdraw as counsel. See Appendix ,at 49.

Keeping in mind that ***Lafler v. Cooper***, 566 U.S. 156 (2012), was a United States Supreme Court case in which the Court clarified the Sixth Amendment standard for reversing convictions due to ineffective assistance of counsel during plea bargaining. The Court ruled that when a lawyer's ineffective assistance leads to the rejection of a plea agreement, a defendant is entitled to relief if the outcome of the plea process would have been different with competent advice. In such cases, the Court ruled that the Sixth Amendment requires the trial judge to exercise discretion to determine an appropriate remedy.

Without any real consideration of Arciero's Glover/Cooper arguments, and that her ineffective assistance claim was control by this Court holding in Lafler v. Cooper, the panel and then full court of the Ninth Circuit concluded that Dubin's advice to Arcierio when she indicated she wanted to plead guilty (even without a plea agreement) was not prejudicial because, having received his advice to go to trial, she changed her mind, rejected a plea agreement, and agreed to "cooperate" (his word) with him by going to trial.

1. As to Dubin's advice when Arciero told him she wanted to plead guilty, the lower court held that:

"Arciero fails to show that Dubin's November 2014 emails regarding the merits of going to trial prejudiced her. After rejecting the first plea agreement and discharging her prior counsel, Arciero retained Dubin to go to trial. No plea agreement was available when the two corresponded in mid-November 2014, and Arciero subsequently rejected the plea agreement the government offered in late November 2014. Arciero was not prejudiced by Dubin's counsel because she desired to go to trial and decided to reject the then-available plea agreements."

Appendix, slip op. at 5.

The emails between Dubin and Arciero are at ER2 at 226–250 of the lower court's records. When her codefendant (and sister) decided to plead guilty to avoid 14 years' imprisonment, Arciero sensibly told Dubin that "it might be best to do the same before I get even more time than that." ER2 at 234. Dubin responded by telling Arciero that she would have to "accept a

sentence of twenty years at the mercy of the court" if she pled guilty. Id. Dubin's response was, of course, wrong; pleading guilty would have produced a lower guideline range, and the starting point for sentencing would have been that guideline range, not the statutory maximum of 20 years. Given the evidence against her and a codefendant's admissions of guilt, reasonable defense counsel would have agreed with Arciero that pleading guilty rather than going to trial was the thing to do to get a lower sentence than she would get if she went to trial.

Arciero's subsequent responses to Dubin reflected that she no longer believed she could "beat the charges" (because "there is so much evidence against me"), that she no longer wanted "to take a gamble at going to trial," that she correctly recognized that "the further we continue on the worse it will be for me," that she acknowledged her accusations against the case agent were not a ticket to dismissal or acquittal ("[m]aybe there was government misconduct that happened after the fact that I got busted with all those drugs in my car, but that does not erase the fact that they got me in the way they did"), and that she was willing to plead guilty without a plea agreement ("[y]ou don't need an offer to change your plea, though right?"). ER2 at 241. Reasonable defense counsel would have agreed with all of this and encouraged her to follow through on pleading guilty, even without a plea agreement.

Here's how Dubin, in a midnight email, responded to Arciero's remarks indicating she wanted to, request for advice on, pleading guilty:

> When you retained me we had a sure-fire game plan. Nothing has changed—NOTHING—except your emotional tantrums. .... Your Sister takes a plea, yet you told me that she does nothing without your doing. You tell me it is final and too late to change, yet that too is not true, there are moreover no deadlines to decide by this Friday, and nothing is in concrete until tomorrow Friday at 2:30 p.m. [(referring to the time set for her sister's change-of-plea hearing)]. You cry that the situation for you is hopeless, when in truth it is not unless you continue to make it so, but it might be if your Sister testifies against you depending on what she makes up to avoid prison. I am in a drug trafficking jury trial for the past two weeks in a case that everyone said was impossible to win, yet after two days of deliberations the jury is still unable to make a decision and I was able to block crucial prosecution evidence from being seen by the jury. Win or lose, that example puts your bellyaching to shame. Tell that to my client in that case and he would laugh in your face.[2] Tomorrow there is a 2:30 p.m. hearing wherein your Sister will be asked to change her please [(sic)] and to "cooperate." She will not have done so until the Court approves and she could change her mind at anytime by the 2:30 p.m. hearing. But again you are filled with erroneous assumptions, like a plane without a pilot, and you must know [where] that leads. You talk about wanting a plea deal. I have asked the prosecutor several times and each time the idea was brushed aside. Ask yourself this: Why would they give you anything but the maximum sentence now that they believe they have your Sister to testify against you and to name others? The irony in all of this is that you mistakenly think that your situation is hopeless just because what has happened in the past. There is a new player in town however: Me.

ER2 at 239–240 (typography emended). A few days later, Dubin again assured Arciero that he would win her case: "We go to trial! To win!" ER2 at 231. Only after receiving this (and more of the same) unreasonable "advice" did Arciero agree, as Dubin put it, to "cooperate" with him in

going to trial and give up her inclination to plead guilty without a plea agreement. ER2 at 231 (she agreed, "let's do it and win!").

Following the unreasonable advice to go to trial after correctly questioning whether a guilty plea would yield a better sentence cannot be why such advice is not prejudicial. That Arciero, after voicing her desire to plead guilty even without a plea agreement, was persuaded by and followed Dubin's unreasonable advice to go to trial is the reason why his advice was prejudicial. Especially in case, such as this one, in which there was overwhelming evidence against her that could not reasonably be contested, in which there was no persuasive trial defense to put before the jury, and in which there was every reason to do what could be done to minimize her eventual, unavoidable imprisonment sentence. As in many routine federal drug cases, from the moment of her arrest the question was never whether, but for how long, Arciero would go to prison.

2. The Hawaii Supreme Court has disbarred former defense counsel Dubin. See Dkt Entry 24.

He had little federal court experience when he counseled Arciero, which consisted merely of himself being successfully prosecuted for fraud, appearing as a witness in a revocation hearing, and representing a criminal defendant (the one he guided into a life sentence) contemporaneously with his representation of Arciero. DktEntry 8 at 33; DktEntry 20 at 19–20. His emails to Arciero evince no understanding of the guidelines, the federal sentencing scheme, or the caselaw governing federal sentencing, much less a proper understanding of them. ER2 at 226–250. He told Arciero she had nothing to lose by bringing her accusations against a government agent to the district court's attention. ER2 at 238. He told her she had everything to lose by pleading guilty. ER2 at 234, 240. Had he not decided to bring her sexual assault accusations to the district court's attention, her sentence would, at a minimum, have been 52 months less than it was. ER3 at 533–536. And had he correctly advised her to plead guilty when she indicated she wanted—even without a plea agreement—to plead guilty, she would not have gone to trial, her guideline range and sentence would have been, again, lower.

This was clearly a bad ruling by the lower court in light of this Court's well settled holding in Glover and Cooper. Accordingly, the Court should grant the requested Writ of Certiorari to the Ninth Circuit.

The panel also held that Arciero failed to establish prejudice. The panel concluded that Dubin's use of the sexual assault accusations was not prejudicial because the district court's remarks at sentencing focused on Arciero's accusations and her post-trial, pre-sentencing retraction of them, her "lies." At 534-539.

As to former trial counsel Dubin's unreasonable decision to bring Arciero's sexual assault accusation to the district court's attention, here is what the lower courts had to say:

Arciero argues that Dubin failed to advise her of the negative consequences of using the allegations, filed ineffective pretrial motions, and failed to question Arciero about the allegations. However, Arciero's argument merely faults Dubin for believing her. The record clearly illustrates that Arciero's false allegations and her last-minute retraction—not Dubin's conduct—guided the district court's sentence. Even if otherwise, Arciero cannot show prejudice because the district court imposed the obstruction-of-justice enhancement based on three separate instances of Arcierio's untruthfulness, not just her false allegations against the case agent. Moreover, Arciero conceded that she does not assert a failure-toinvestigate claim, and even if she did, she fails to explain why Dubin should have doubted her sexual assault allegations.

Appendix, slip op. at 4a–5a.

Dubin's professed belief that Arciero's unsubstantiated accusations against the agent were truthful was not the problem here. What was the problem, and what the panel's remarks entirely overlook, is that Arciero's accusations were made within the confines of the attorney-client privilege and that reasonable defense counsel would have ensured that they remain cloaked in that privilege, not weaponized them in irrelevant and meritless ways that, with all too obvious foreseeability, would not benefit Arciero. Reasonable defense counsel, that is, would have recognized that the question was not whether counsel believed her allegations (nor, for that matter, whether they were true), but whether the judge presiding over her criminal case was likely to find them (standing alone, as Dubin left them standing) credible. In a case such as this one—in which the agent in question was a repeat player in the local federal criminal justice system, in which the government's evidence against Arciero was overwhelming and largely uncontestable,1 and in which the sexual assault accusations had nothing to do with Arciero's guilt or innocence, nor anything to do with the government's investigation, arrest, and indictment of her—there was no reasonable possibility that the presiding judge would find her credible and the agent she accused not, much less do so and then also dismiss the case or suppress evidence on the basis of an agent's tangential post-crime assault of Arciero.

Balanced against the certain harm that would befall her at sentencing if the judge did not believe Arciero's accusations (not only under the guidelines but under 18 U.S.C. §3553(a)'s sentencing factors too), reasonable defense counsel would not have risked using such bare accusations at all in Arciero's criminal case.

Arciero's ineffective assistance claim here does not differs from the ineffective assistance claim in Glover. The issue presented in Glover was the following: assuming arguendo that the trial court erred in applying the Sentencing Guidelines and the legal error increased petitioner's prison sentence by at least 6 months, would the error constitute prejudice under Strickland if it resulted from counsel's deficient performance? Glover, 531 U.S. at 200. The Supreme Court found that it would. Holding that:

The Seventh Circuit was incorrect to ...deny relief to persons attacking their sentence who might show deficient performance in counsel's failure to object to an error of law affecting the calculation of a

sentence because the sentence increase does not meet some baseline standard of prejudice. Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance... We hold that the Seventh Circuit erred in engrafting onto the prejudice branch of the *Strickland* test

Consistent with this clear holding, the Supreme Court has since cited Glover as "precedent" that serves to "establish that there exists a right to [effective assistance of] counsel during sentencing in ... noncapital cases" See Lafler v. Cooper, 132 S. Ct. 1376, 1385-86 (March 21, 2012) (citing Glover v. U.S., 531 U.S. 198, 203-204 (2001)). The Lafler Court explained that "[e]ven though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because 'any amount of {additional] jail time has Sixth Amendment significance.'" Id. (citing Glover, supra, at 203).

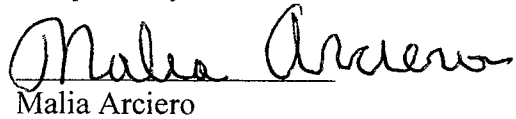
And here's the prejudice. At sentencing, the district court relied entirely and solely on the sexual assault allegations and Arceiro's retraction of them to increase her sentence from 120 months (if not something less) to 172 months, not just to support a 2-level upward enhancement to her guideline range for obstruction. (court remarks that, but for her sexual assault accusations, the court would have likely sentenced Arciero to something below 120 months); DktEntry 8 at 28–29; DktEntry 20 at 18–19. Had Dubin not irrelevantly questioned Arceiro about the allegations in a pretrial release revocation hearing and had he not attached them to three meritless motions, the district court never would have heard about them. Had the district court not heard about them, there would have been no what everyone deems to believe to be so called "lies" about the case agent. And none of the things that the district court relied upon to increase Arceiro's sentence from (at least) 120 to 172 months would have been in the record, nor before the court at sentencing. That is were the prejudice lies, even if one thinks (as the panel did) that there was at least one other instance of obstruction on which to base a guideline obstruction-of-justice enhancement. Fifty-two months' imprisonment, not just a 2-level guideline enhancement, is what's prejudicial. Fifty-two months that would not have been added to her sentence had Dubin not uncloaked her accusations against the agent and brought them, repeatedly, to the district court's attention in public filings and open court.

This Court should grant this petition to correct the mistaken view of the record and Arciero's claim that informed the panel's prejudice ruling on this aspect of her claim. Upon doing so, this Court should hold that Dubin's decisions to bring Arciero's accusations to the district court's attention—repeatedly and publicly—during her criminal case was prejudicial because, had he not done so, the district court would not have known about the accusations (nor would have others) and, consequently, the court would not have increased Arciero's sentence by (at least) 52 months because of the accusations. Accordingly, this Court should reverse the judgment of the Ninth Circuit and remand the matter back to the district court so that the government can reoffer the plea offer, thereby allowing Arciero the opportunity to accept the offer which was lost through ineffective assistance of counsel over six year ago.

CONCLUSION

The Petition for writ of certiorari should be granted, and the decision of the Ninth Circuit should be reversed.

Respectfully submitted.



Malia Arciero
Fed Reg No. 16101-022
FCI Victorville Medium II
Federal Correctional Institution
Satellite Camp
P.O. Box 5300
Adelanto, CA 92301