QUESTIONS PRESENTED

Whether the Sixth Amendment requires that a district court hold an evidentiary hearing before denying a motion to withdraw a guilty plea before imposing a life sentence, where the defendant has alleged his guilty plea was involuntary because of ineffective assistance of counsel, and where the government subsequently withdrew the promised benefits it had agreed to provide to the defendant pursuant to a written plea agreement.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2020

No.

BYRON BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

The Petitioner, Byron Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which was entered in the above-entitled case on August 28, 2020.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entitled United States v. Byron Brown,, et al., No. 17-1650, *slip opinion*, (Seventh Circuit August 28, 2020), included in the appendix attached hereto at page A1.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). On August 28, 2020, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision to deny defendant Brown's motion to withdraw his guilty plea, by rejecting his allegation of ineffective assistance of counsel, without a hearing, in a capital case. No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

Title 28, United States Code, Section 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, ch. 646, 62 Stat. 963.)

STATEMENT OF THE CASE

Sometime in 2012, while in custody in the Cook County Jail awaiting sentencing on a state murder charge, Byron Brown was approached by federal law enforcement agents and asked to provide information concerning an on-going federal criminal investigation concerning the Hobos street gang in Chicago. Brown agreed, and began to provide information to federal authorities about his extensive criminal activity and involvement as a member of the Hobos street gang. At the time, Brown was represented by his retained counsel.[1] Brown was told by the interviewing federal agents while awaiting sentencing in the state case that if he agreed to provide information about the suspected criminal conduct of the members of Hobos street gang to assist the federal investigation, federal authorities would negotiate a possible reduced sentence on the first degree murder conviction that had been returned in Cook County, in addition to providing Brown a global plea agreement for all admitted personal criminal conduct in the on-going federal investigation, including any additional crimes for which the federal death penalty could be imposed. With the assistance of his legal counsel, Brown agreed to continue to provide requested information about the Hobo street gang to federal agents as requested, in exchange for a favorable global plea agreement relating to the anticipated federal charges.

In September 2013, a federal criminal indictment charging Byron Brown, along with Gregory Chester, Arnold Council, Gabriel Bush, and Stanley Vaughan, all members of the Hobo street gang, with operating a racketeering enterprise, a violation

[1] Retained Counsel was Attorney Robert Loeb, who was subsequently appointed by the district court pursuant to the Criminal Justice Act on 10/21/2013, to represent Brown in the federal case - 13 CR 774.

of Title 18, United States Code, Section 1962(d). The racketeering charge also alleged that the defendant committed three sperate murders in aid of the racketeering enterprise.

As the federal prosecutors prepared the federally indicted case for trial, Brown was required to repeatedly meet with the assigned Assistant U.S. Attorney and federal case agents to review and discuss what was revealed by Brown as part of his government cooperation. Throughout, Brown continued to be represented by his CJA appointed attorney. As required by his agreement to cooperate and provide information to the government, Brown was also directed to provide sworn testimony before a grand jury. After testifying as directed before the grand jury, Brown entered into a written plea agreement. Pursuant to the terms of the plea agreement, the government agreed to recommend that Brown receive a sentence of 30-40 years imprisonment. After signing the plea agreement, the district court held a change of plea hearing and accepted Brown's plea of guilty. As provided by the terms of the plea agreement, Brown pled guilty to Count One on the Indictment– racketeering in violation of 18 U.S.C. § 1962(d) ***and*** Count Four- murder in aid of racketeering, in violation of 18 U.S.C. §1959(a). The district court accepted Brown's guilty plea after conducting the required Rule 11 colloquy.

Prior to being sentenced, Brown filed, *pro se,* a "Motion to Strike Finding of Guilty Based on Plea," alleging misconduct by his appointed defense attorney. The appointed attorney thereafter filed, on behalf of Brown, a motion to Withdraw Guilty Plea and a Motion to withdraw as attorney for Byron Brown. The district court granted

the attorney's request to withdraw as appointed counsel and subsequently appointed new counsel for Brown pursuant to the Criminal Justice Act.

With the assistance of new counsel, Brown filed an amended Motion to Withdraw his plea of guilty. In support of this motion, Brown submitted an Affidavit detailing private conversations and representations made to him by his former attorney, and the rationale underlying his motion to withdraw his guilty plea. In this Affidavit, Brown specifically alleged the following:

> In about 2009, while I was in held in custody at the Cook County Jail on the charge of first degree murder, I was visited by two law enforcement investigators who I believe were federal agents. The agents knew that I had been charged with first degree murder, that I was a member of the Hobos street gang, and that I would be facing a long prison term if convicted in Cook County. The agents explained that they were hoping to get some information about the Hobos and particularly Gregory Chester (BOWLEGS), Arnold Council (ARNOLD) and Gabriel Bush (GABE). The agents explained that if I had information about crimes committed by the Hobos, and in particular Gregory Chester, Arnold Council and Gabriel Bush, this information could help me with the first-degree murder charge. The agents knew that Gregory Chester, Arnold Council and Gabriel Bush were considered the leaders of the "Hobos". The agents further explained that if I could provide information especially about the

murders committed by Gregory Chester, Arnold Council or Gabriel Bush, then I could possibly get a good plea deal on all other crimes committed and this first degree murder charge. Because I only recently been charged and held in custody, I told the agents that I did not have any information and did not know anything about murders committed by Gregory Chester, Arnold Council or Gabriel Bush. When the agents left, they told me to really think about it and stated that all I have to do is "come up" with information to put on Gregory Chester, Arnold Council and Gabriel Bush. They also stated that I should not be the only one going away for murders committed for the Hobos, and for Gregory Chester, Arnold Council and Gabriel Bush. I told the agents again that I did not have any information Gregory Chester, Arnold Council and/or Gabriel Bush.

On or about August 29, 2012, the agents came to Cook County Jail again. During this meeting I told the agents what they wanted to hear. I described my criminal activity as a member of the Hobos and I provided information about Gregory Chester, Arnold Council and Gabriel Bush. I provided a lot of details that I knew not only because I was present during most of what I told the agents, but also because other Hobos had talked about each incident with enough detail that I could describe the incident as if I was also there, when in fact, I was not there and only learned about what happened from others. I

knew, however, that if the information I was providing to the agents about what I knew about Gregory Chester, Arnold Council and Gabriel Bush, I had to describe each incident as if I was there and to admit my involvement with each murder. I also knew that I had to tell the agents that Gregory Chester was involved in a murder that Arnold Council committed a murder and that Gabriel Bush was also involved in the murders I knew about or that I committed with others. When I spoke to the agents I was alone, and no attorney was present. The agents made it clear to me that I had have really good information about each murder and I have to provide a good description of how Gregory Chester, Arnold Council and Gabriel Bush were each involved if I hoped to get any type of deal from the government. Although I had an attorney representing me in the first-degree murder case still pending in Cook County, my attorney was not present when I was interviewed by the federal agents in the Cook County Jail.

After this second meeting with the agents, my attorney, Robert Loeb, explained to me that the government was interested in using me as a witness against Gregory Chester, Arnold Council and Gabriel Bush, as well as other members of the Hobos. I was told that my cooperation with the federal case would help me in the first degree murder case in Cook County, but that I would also need to

plead guilty to federal charges. The new federal charges would be very serious, but my sentence at the end would be the same because the deal he would try to work out would result in an agreement where the prison sentence I would receive in the first-degree murder state charge, would run concurrent with the recommended federal sentence following my guilty plea to federal charges. My attorney further advised that I could possibly get a deal for term of prison of 35-40 years if I agreed to cooperate with federal authorities. In reliance on my attorney's advice, I agreed to cooperate and provide another statement to the federal prosecutor, telling him the same things I have told to the federal agents that had come to question me in August 2012.

As I have promised to do, I meet with the federal prosecutor several times. During each meeting, I was asked to provide more and more details to about each murder I admitted in the earlier meeting and the prosecutor continued to ask me questions about the involvement and participation of BOWLEGS, GABE, and ARNOLD in each murder that I had admitted to. As the federal prosecutor began to change what I had first described about Gregory Chester, Arnold Council and Gabriel Bush, I had numerous discussions with my attorney about the prosecutor was putting words in my mouth and changing what I had said about Gregory Chester, Arnold

Council and Gabriel Bush. When I told my attorney that this was wrong and not true, my attorney told me that I hard to go along with whatever the prosecutor wanted, or I would not get the deal that we had discussed – 35-40 years to run concurrent with the state sentence. Because of this threat, I continued to agree with whatever the prosecutor stated whenever we met to go over again what I had first told the federal agents in August 2012.

During January 2014, a typed written statement was presented to me and my attorney. I was told by my attorney that this was now my statement and that I be required to testify before the Grand Jury to swear that all the information and statements contained in the written statement prepared were true and accurate.

Before testifying in the Grand Jury, I told my attorney, Robert Loeb that I had made up most of the information about Gregory Chester, Arnold Council and Gabriel Bush. I also told my attorney that I did not want to testify before the Grand Jury because the statement that had been prepared was not accurate or true. My attorney then threatened me by saying, "if you change your testimony now, you will not get any deal and will be facing a life sentence or the death penalty." My attorney further stated that I had to go along with whatever the prosecutor wanted, or I would lose the deal. Because I believed that I, in fact, had a deal with the federal

government on August 14, 2014, for a sentence 35-40 years only if I agreed to testify before the Grand Jury and swear that the statement prepared for me was true and accurate, I did so, even though my attorney and I knew all along that it was not true.

When I received the written plea agreement eight-months later, in August 2014, I learned for the first time that all that I had been promised was a chance to get a sentence or not more less than 35 years, but not more than 40 years, but only if the prosecutor continued to believe that I was continuing to cooperate and be truthful. My attorney assured me that everything was fine and that I would get the 35-40 year sentence recommendation if I just testified consistent with the grand jury statement. I told my attorney that I had already testified consistent with the grand jury statement that he had prepared. I was then told by my attorney that Gregory Chester, Arnold Council and Gabriel Bush were going to trial and that I would now need to sign a written plea agreement and enter a guilty plea to the federal charges in order to continue to cooperate. My attorney assured me that once I pled guilty to the charges as described in the plea agreement, the deal would be done as long as I continued to cooperate and do what the prosecutor wanted.

After I signed the written plea agreement and entered my guilty plea, I was required to meet with the federal prosecutor on several

more occasions. At each meeting, the prosecutor again went over the previous grand jury statement and began to instruct me on how to answer certain questions when questioned at trial about the things I had said. Over time, I began to feel that what the prosecutor wanted me to say at trial was different from what I first told the federal agents and the prosecutor, and was even more false than the lies I had told about Gregory Chester, Arnold Council and Gabriel Bush. I began to believe that my words were now being twisted and that I was being forced to say things about Gregory Chester, Arnold Council and Gabriel Bush that both my attorney and I knew were not true. When I asked my attorney to try to address and correct this problem with the prosecutor, my attorney threatened me and told me that I would lose the deal and would be sentenced to life. I believe my attorney stopped working for me and was now only interested in helping the prosecutor.

I believe

. . . . I believe I received ineffective assistance of counsel before I entered my guilty plea because my attorney: (1) improperly and unreasonably instructed me to provide testimony on August 14, 2014, before the grand jury, testimony that he knew was false and inaccurate; (2) failed to inform the federal prosecutor before I entered my guilty plea of my desire and willingness correct prior false and

inaccurate statements about Gregory Chester, Arnold Council and Gabriel Bush; (3) improperly prevented me from providing essential different but truthful information about my knowledge of Gregory Chester, Arnold Council and Gabriel Bush to the federal prosecutor before the guilty plea; (4) improperly advised me to waive my right to file an appeal and/or post-conviction petition in accordance 28 U.S.C § 2255, to challenge any sentence imposed – including a life sentence; and (5) in complete disregard to the likely consequences, arranged a meeting between me and the federal prosecutor in 2015, long after these issues came to light, for the sole purpose allowing the prosecutor an opportunity obtain factual support and a legal basis to justify withholding its recommendation for a reduced sentence, knowing that result of this meeting would leave me with no recourse and with no opportunity to receive the reduction in the statutory sentence which was promised following my extensive cooperation and testimony in the grand jury.

/s/ Byron Brown

The district court, without holding an evidentiary hearing, denied Brown's Motion to Withdraw his Guilty Plea, summarily dismissing Brown's allegations of ineffective assistance of counsel. The district court further held that the government's decision not to recommend that Brown receive a cooperation assistance sentencing departure, as provided in the written plea agreement, was within the government's

discretion. Because the government had concluded that Brown lied and presented false information to the grand jury, the government did not recommend that Brown receive a 30-40 month sentence. The district court thereafter ordered Brown to be sentenced for a total term of life imprisonment as to each of Counts 1 and 4, to run concurrently to each other and any other custodial sentence that has been imposed. On August 28, 2020, the Court of Appeals for the Seventh Circuit denied Brown's appeal. *United States v. Byron Brown, et al*, 17-1650 (Slip Opinion) August 28, 2020.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to review the question presented because the Court of Appeals for the Seventh Circuit improperly held that a district court may summarily deny a motion to withdraw a guilty plea, without a hearing, unless the defendant first "offers substantial evidence supporting his claim," thereby preventing a defendant from establishing a record to evaluate and assess his ineffective assistance of counsel claims.

In denying Brown appeal, the Seventh Circuit, first ruled that "moving to withdraw a guilty plea does not automatically entitle a defendant to an evidentiary hearing," citing *United States v. Collins*, 796 F.3d 829, 834 (7th Cir. 2015). U.S. v. Brown, Slip Op. 17-1650, p. 77. In further reliance on *Collins*, the Seventh Circuit further held, that not only must "a defendant must offer substantial evidence in supporting his claim" but that "if the allegations advanced in support of the motion are conclusory or unreliable, the motion may be summarily dismissed." *Id*. (citing, *United States v.*

Peterson, 4141 F.3d 825, 827 (7thCir. 2005); *United States v. Jones*, 381 F.3d 615, 618 (7th Cir. 2004)). The district court's determination of whether or not a defendant has advanced sufficient allegations in support of the motion that are not merely "conclusory or unreliable" is not defined and the Seventh Circuit offers no guidance to assessment whether a district court has abused its discretion by a summary dismissal.

Unlike the Seventh Circuit, the Sixth Circuit applies a "totality of the circumstances" analysis when determining whether a district court abused its discretion when the court decides against granting a defendant an evidentiary hearing when considering a Motion to Withdraw a guilty plea. In *United States v. Wynn,* 663 F.3d at 849-50 (6th Cir. 1994), the Sixth Circuit explained that district courts must consider seven factors in assessing whether a defendant established a "fair and just" reason under the totality of the circumstances:

(1) the amount of time that elapsed between the plea and the motion to withdraw it;

(2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings;

(3) whether the defendant has asserted or maintained his innocence;

(4) the circumstances underlying the entry of the guilty plea;

(5) the defendant's nature and background;

(6) the degree to which the defendant has had prior experience with the criminal justice system; and

(7) potential prejudice to the government if the motion to withdraw is granted.

Similarly, while the D.C. Court of Appeals also reviews a district court's denial of such a motion for abuse of discretion, the D.C. Court of Appeals in *United States v. Robinson,* 587 F.3d 1122, 1127, (D.C. Cir. 2009), held that the district court is required to focus on three factors: "(1) `whether the defendant has asserted a viable claim of innocence'; (2) `whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case;' and (3) 'whether the guilty plea was somehow tainted.'" (citing, *United States v. Taylor*, 139 F.3d 924, 929 (D.C.Cir.1998) (*quoting United States v. Ford*, 993 F.2d 249, 251 (D.C.Cir.1993)). The D.C. Court further noted that the third factor is the "most important."

Moreover, in affirming the district court's summary dismissal of Brown's seeking to withdraw his guilty plea, the Seventh Circuit further reasoned that "even assuming Brown received ineffective assistance of counsel, he cannot show prejudice, which the court stated, required Brown to "show that there was a reasonable probability that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial." U.S. v. Brown, Slip Op. 17-1650, p. 78. Defining the scope of prejudice in this limited and very restrictive fashion when assessing a defendant's ineffective assistance of counsel claim is completely inconsistent with the well-reasoned approaches applied in other circuits, and improperly undermines the protections of the Sixth Amendment guarantee of competent legal representation.

Under *Strickland's* familiar two-prong test, an appellate court is required to evaluate the issue of deficiency, i.e., whether "counsel's representation fell below an objective standard of reasonableness," and then consider the issue of prejudice, i.e.,

whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Carter v. Duncan*, 819 F.3d at 941 (*quoting Strickland v. Washington, 466 U.S.* 688, 694, 104 S.Ct. 2052). Accordingly, *Strickland's* prejudice standard does not require a defendant to show that the result of the trial (outcome) would have been different but for counsel's error; "he only needed to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Jones v. Calloway*, 842 F.3d 454, 465 (7th Cir., 2016)(*quoting Strickland,* 466 U.S., at 694, 104 S.Ct. 2052)).

In this case, had the district court conducted an evidentiary hearing, the court would have been in a position to evaluate whether Brown's appointed counsel could have taken reasonable steps to save Brown's cooperation deal with the government. The record is undisputed that defendant Brown relied extensively on his attorney to negotiate a complex federal global plea agreement involving his cooperation and it was this attorney's responsibility to ensure Brown did not unknowingly commit any act that would prevent him from receiving the benefits of the bargained for plea agreement. Brown continued his cooperation over a three-year period of time and the extent of his cooperation throughout was complex and expansive. Brown was well aware that he needed to continue to cooperate pursuant to agreement in order earn a recommended sentence of 30-40 years, as opposed to a sentence to life imprisonment. Brown's attorney also knew that if Brown's cooperation was subsequently determined to be unacceptable in any way as determined at the sole discretion of the Government, Brown would lose the benefits of the plea agreement. Brown suffered prejudice because he lost the benefits

of his plea agreement despite his extensive cooperation, over a 3-year period. Brown only moved to withdraw his guilty pleas when he learned that the government would not make a recommendation to the court that Brown receive a sentence of 30-40 years because, according to the Government, Brown admitted that he had lied when testifying before the grand jury. Significantly, in his motion to withdraw his guilty plea, Brown alleged that his attorney advised him in November 2015, after he had plead guilty, to tell the Government he had lied in the grand jury, without also advising Brown that this would result is losing the benefits of his carefully negotiated plea agreement.

Petitioner submits that had the Seventh Circuit applied either the "seven factor" totality of the circumstance analysis applied in the Sixth Circuit, or the "three factor analysis as applied by the D.C. Circuit Court of Appeals, Petitioner's Sixth Amendment right to effective and competent legal representation would have been properly and sufficiently protected because the totality of the circumstances warranted that the district court hold an evidentiary hearing to assess Petitioner's ineffective assistance of counsel claims.

CONCLUSION

For the reasons noted herein, Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion on the United States Court of Appeals for the Seventh Circuit entered in *United States v. Byron Brown,* Slip Op. 17-1650, on August 28, 2020.

Respectfully submitted,

/s/ Gregory T. Mitchell
Gregory T. Mitchell
Counsel of Record

APPENDIX