No: 21-6812

ORIGINAL

In the
Supreme Court of the United States

MANUEL GERARDO VELASQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Fifth Circuit court of appeals err when it refused to grant a certificate of appealability, when the record clearly showed that Velasquez had received ineffective assistance of counsel resulting in a life incarceration sentence.

Did the district court err in not granting a hearing in direct violation of this court's decision in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District Court of Texas.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Manuel Gerardo Velasquez ("Velasquez"), the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished *United States v. Velasquez,* No. 20-50199 (5th Cir. July 6, 2021) is reprinted in the separate Appendix A to this Petition.

The opinion of the District Court, Western District of Texas, whose judgment was appealed to be reviewed, is published in *Velasquez v. United States*, 18cv365 reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on July 6, 2021.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).[1]

[1] Based upon restrictions caused by COVID-19, the United States Supreme Court extended its 90-day filing deadline of all Writ of Certiorari to 150 days. See, Order, No. 589, 2020 U.S. LEXIS 1643 at * 1 (Mar. 19, 2020) (IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

Id.

The Sixth Amendment to the Constitution of the United States 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id.

STATEMENT OF THE CASE

The government alleged that Velasquez was the leader of a drug trafficking operation that transported marijuana. Several government witnesses testified over Velasquez drug trafficking endeavors and how he controlled a marijuana distribution ring. As a result, the investigation which included court-authorized wiretaps on two telephones used by a cooperating witness and GPS tracking device on co-defendant vehicles the government was able to seize multiple loads of marijuana.

On August 7, 2013, a grand jury in the Western District of Texas returned a thirteen-count indictment charging nineteen subjects with various drug-trafficking and money-laundering offenses. (Doc. 60). The indictment charged Velasquez with engaging in a continuing criminal enterprise (Count One); conspiring to possess with the intent to distribute 1,000 kilograms or more of marijuana (Count Two); conspiring to launder monetary instruments (Count Three); possessing with the intent to distribute 1,000 kilograms or more of marijuana and aiding and abetting (Counts Four and Five); conspiring to possess with the intent to distribute 100 kilograms or more of marijuana and aiding and abetting (Counts Six, Seven, Ten, and Eleven); maintaining a manufacturing site to distribute marijuana (Counts Eight and Nine); conspiring to possess with the intent to possess a quantity of marijuana and aiding and abetting (Counts Twelve and Thirteen). *Id.* Velasquez

was kidnapped in Mexico and returned to the United States. This was supported by November 17, 2013, news article in "Proceso" suggesting that Velasquez was kidnapped and tortured by the Mexican authorities. *Id.* at (Doc. 847, Sealed Govt. Sentencing Memo). On June 17, 2014, the Government delivered a draft plea agreement to Antcliff. (Doc. 540 (sealed) Plea Agreement). The Government proposed if Velasquez pleaded guilty to Counts One, Four, Eight, Nine, and Eleven of the indictment, it would move to dismiss the remaining counts. *Id.* at 1-2. It explained in the plea agreement that the range of imprisonment for Count One was not less than twenty years or more than life, Count Four was not less than ten years or more than life, Counts Eight and Nine were not more than twenty years; and Count Eleven was not less than five or more than forty years. *Id.* at 2. But it offered Velasquez a binding sentencing recommendation under Federal Rule of Criminal Procedure 11(c)(1)(C) for a total offense level of 39. Id. at 5.

Consequently—based upon a total offense level of 39 and a criminal history category of I—Velasquez's guideline imprisonment range under the agreement was 262 to 327 months in prison. Velasquez signed the plea agreement. *Id.* at 10. Velasquez then moved to substitute counsel and Gary Hill ("Hill") became his attorney of record. A change of plea hearing was held and at the end of the colloquy, Velasquez pled guilty to Counts One, Four, Eight, Nine, and Eleven of the indictment. *Id.* Doc. 790 at 40-44. On March 26, 2015 - the day of

Velasquez's scheduled sentencing hearing - Velasquez asked to withdraw his guilty plea. (Doc. 879). Hill filed a formal motion to withdraw the plea on March 30, 2015. (Doc 883). On April 15, 2015, the Court granted Velasquez's request to withdraw his guilty pleas without a hearing. Velasquez's trial commenced on September 21, 2015. The advice provided to Velasquez that caused the withdraw of the change of plea was based on counsel's erroneous advice that a kidnapping from Mexico was a defense for trial. (Doc. 1217 at 21). The Supreme Court has held otherwise on that theory of defense. *United States v. Crews*, 445 U.S. 463, 474 (1980). Velasquez was convicted by the jury after trial. Ultimately, Velasquez received life in prison. (Doc. 1201).

After his direct appeal was unsuccessful, Velasquez filed his 2255 alleging that his decision to withdraw his accepted guilty plea was based on counsel misadvise that the Mexico kidnapping was a defense for trial. The District Court denied the 2255 and the Fifth Circuit Court of Appeals denied the request for a Certificate of Appealability, although in error.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

I. DID THE FIFTH CIRCUIT COURT OF APPEALS ERR WHEN IT REFUSED TO GRANT A CERTIFICATE OF APPEALABILITY, WHEN THE RECORD CLEARLY SHOWED THAT VELASQUEZ HAD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL RESULTING IN A LIFE INCARCERATION SENTENCE.

Velasquez received a life in prison sentence based on faulty advice he received from counsel when he was told to withdraw his guilty plea. There is no contesting that error. However, the Appeals Court's failure to address the claim warrants this court's intervention. Hill advised him to withdraw his guilty plea and pursue a meritless and faulty defense at trial. The lower courts decided that "Hill and Velasquez made conscious and informed decisions on trial tactics and strategy." (Doc. 1227 at 18). However, nothing on the record supports that conclusion.

Attorney Hill unfortunately passed away on March 26, 2016. (Doc. 1220, Gov't's Resp. 2). Without Hill, the court could not conclude that Hill was effective without a hearing especially when the record establishes otherwise. It is undisputed that the Government delivered a proposed plea agreement to Velasquez's first attorney, Christopher Antcliff. (Doc. 540, sealed). Under the terms of the plea agreement, Velasquez would face a sentencing range of 262 to 327 months in prison. Velasquez and his counsel, Antcliff, signed the first plea agreement. *Id.* at 10. Velasquez then obtained new counsel, Hill who incorrectly told him that kidnapping was a defense, so Velasquez withdrew the plea. (Doc.

893). In the motion to withdraw the plea, counsel told the Court he "mistakenly communicated a legal opinion to the defendant in exchange for his change of plea to guilty, [that] the defendant would not receive a sentence of more than twenty years of incarceration." (Doc. 883, p. 1-2). Velasquez alleged in his 2255 that counsel did not tell him to withdraw the plea because of erroneous sentencing advice, but on the defense of the kidnapping which he could prevail at trial.

1. The District Court erred in relying on "partial" recorded phone calls between Velasquez and his family without inquiring from the parties as to the calls substance.

While on pre-trial detention, Velasquez's telephone calls were monitored as he discussed his defenses with this family so they would not worry. The government used "bit and pieces" of Velasquez's conversations with his family to mischaracterize that Velasquez was aware of what he was doing at the time. The recording and their contents were not explained by the parties. When reviewing the conversations in their entirety, the calls support the position that Velasquez was advised by counsel that the arrest was a "kidnapping" and not lawful. For example, on a call on December 17, 2014, from the jail, Velasquez told his family "... [y]esterday my attorneys came by here." "[T]hey have been talking to the judge. And ... and they know the process that they did on [me] was wrong." (Doc. 1220, Exh. 1 at 2). This "process," as explained elsewhere in the papers, is the *kidnapping* defense counsel explained to Velasquez. Not all the calls were

reviewed by the District Court, only the synopsis the government presented. In *United States v. Rucker*, 2017 U.S. App. LEXIS 21330 (6th Cir. 2017) the Court criticized the Government for doing exactly what they did here, using ellipsis dots to twist the meaning of a statement. ("The government simply elides -- literally by means of the ellipsis" the real meaning of the text at issue). The Court pointed out that, taken without the ellipsis dots, the meaning of the text was not what the Government said it was. The same thing is being done in this case. Once Velasquez alleged that counsel advised him to withdraw his plea, on the same theory presented at trial that was rejected by the Supreme Court in Crews, a hearing was required. The court acknowledges that counsel raised that defense during the trial. (Doc. 1077, Trial Tr., Vol. 6, p. 110) (Hill employed the kidnapping not as a defense, but in combination with other trial tactics to establish the police engaged in misconduct and to discredit the Government's case.) At a minimum, a hearing was required warranting the granting of a COA as the preliminary inquiry into the matter. It was an error not to allow the matter to proceed further.

The Supreme Court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) (noting that the "threshold [COA] inquiry does not require full consideration of the

factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such as "full consideration" during the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."). *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003). Velasquez was entitled to have the case proceed further, not that he will be victorious on the merits of his claim. Even if the District Court denied all the claims without an evidentiary, (an error in this case) the appellate Court had the authority to grant relief and expand upon it. It erred in not doing so. *Valerio v Dir. of the Dep't of Prisons*, 306 F.3d 742 (9th Cir. 2002), *cert den.* (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has the power to grant COA where the district court has denied it as to all issues but also to expand COA

to include additional issues when a district court has granted COA as to some but not all issues.) The failure to review the matter further was an error.

II. DID THE DISTRICT COURT ERR IN NOT GRANTING A HEARING IN DIRECT VIOLATION OF THIS COURT'S DECISION IN *LAFLER V. COOPER*, 132 S.CT. 1376 (2012).

The Supreme Court has held that defendants have the right under the Sixth Amendment to the effective assistance of counsel during the plea-bargaining process, which this Court said is a "critical" stage of a criminal proceeding. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384-85 (2012). This effective assistance of counsel during plea bargaining requires *the guiding hand and advice of competent counsel* for a defendant to decide whether to accept a plea offer or to reject the offer and go to trial. *Id.*, at 1385. Velasquez's case is simply a repeat of *Lafler.* Hill convinced Velasquez that he had a solid defense since the U.S. federal agents "kidnapped" him in Mexico. (Doc. 1217 at 21). According to Hill that was considered "illegal" conduct by the federal agents amounting to an illegal arrest, which would hand him a victory at trial. *Id.* at 21. Counsel was so sure this defense theory would work that he encouraged Velasquez withdraw his guilty plea. That error would be devastating to Velasquez who would be convicted and sentenced to life in prison, instead of the government's offer of 21 years. Counsel's advice was the "sole" reason Velasquez withdrew his plea and proceeded to trial. *Id.* Knowing that there might be a chance the motion may not be granted or for some other unknown

reason, counsel lied and wrote in his motion to withdraw that Velasquez' was "mistakenly communicated" that he would face no more than 20 years in prison. (Doc. 883, at 1-2) Counsel's reasoning makes no sense for at least two reasons.

First, six months before the motion to withdraw was filed Velasquez was told by the Court that he faced more than 20 years in prison if he pleaded guilty. (Doc. 788, at 17-18). Second, 21 years under the plea agreement was infinitely better than the life-in-prison Velasquez received after losing at trial based on counsel's frivolous defense theory. All these points encouraged the granting of a COA. There could be no closer case to *Lafler* than this. The sequence of events, the plea offer that was accepted and withdrawn due on a trial defense that was not only incorrect, but also rejected by the Supreme Court in *Crews* years earlier, all warrant encouragement to proceed further. See, *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (The likelihood of a different result must be substantial, not just conceivable.) Here there could be no doubt on the effects of counsel's misadvise and the encouragement to proceed further should have been granted. The granting of a writ of certiorari is warranted in this case.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Fifth Circuit.

Done this 1, day of December 2021

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