No. 22-5364

IN THE
SUPREME COURT OF THE UNITED STATES

QUARTAVIOUS DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Quartavious Davis is serving a 159.75-year custodial sentence. There is a strong likelihood that if Petitioner's trial attorney had pursued plea negotiations on his behalf, the district court could and would have imposed a drastically shorter sentence. Under these circumstances, Petitioner's attorney provided prejudicially ineffective assistance of counsel by not initiating plea negotiations. The Eleventh Circuit Court of Appeals held that Petitioner could not establish prejudice where the government had not offered a plea deal. The holding that a defendant can never show he was prejudiced by his attorney's failure to pursue plea negotiations where the government has not offered a plea deal not only is erroneous, but also is in conflict with holdings of the Fourth, Sixth, and Eighth Circuits.

The government does not dispute that the Sixth Amendment right to effective assistance of competent counsel extends to pretrial plea negotiations. *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 162 (2012). Nevertheless, the government appears to question whether a criminal defendant can establish prejudice arising from his attorney's failure to pursue plea negotiations if the government has not made a formal plea offer. The government notes that in *Lafler*, the prosecution offered the defendant a plea deal, and it distinguishes Petitioner's case on the basis that he did not receive the offer of a plea deal. Brief in Opposition at 7.

The Seventh Circuit Court of Appeals discussed the import of *Lafler* in *Byrd v. Skipper*, 940 F.3d 248, 255 (6th Cir. 2019). It concluded, "The Supreme Court has never cabined [the right to effective assistance of counsel in plea negotiations] to negotiations

that take place only after an offer has been made." *Id; see also United States v. Pender*, 514 F. App'x 359, 361 (4th Cir. 2013) (holding that a defendant can establish ineffective assistance by alleging counsel failed to initiate plea negotiations, where the government would have offered a beneficial plea agreement if requested by the defense). The government's failure to make a plea offer does not foreclose a claim of ineffective assistance of counsel in plea negotiations.

Petitioner demonstrated in the certiorari petition that the Eleventh Circuit's refusal to consider Petitioner's ineffective assistance of counsel claim on the basis that the government did not offer a plea deal conflicts with the case-by-case analysis applied in the Fourth, Sixth and Eighth circuits. Petition at 9-12 (citing *Byrd v. Skipper*, 940 F.3d 248 (6th Cir. 2019); *United States v. Pender*, 514 F. App'x 359 (4th Cir. 2013) (unpublished); *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981)). The government does not dispute that other circuits apply a case-by-case analysis in determining whether a defendant can show prejudicially deficient performance in the absence of the government's offer of a plea deal. It also does not dispute that the Eleventh Circuit's decision was based on the absence of the government's offer of a plea deal. Instead, the government attempts to distinguish the Fourth and Sixth Circuits' decisions in *Byrd* and *Pender* on factual grounds and suggests the Eight Circuit's *Hawkman* decision no longer binds that Court. The government's arguments fail.

As to the Sixth Circuit's decision in *Byrd,* the government notes that a prosecutor *testified* the State was willing to extend a plea agreement to the defendant.

Brief in Opposition at 9 (citing *Byrd*, 940 F.3d at 258). The government seeks to distinguish Petitioner's case on the basis that "[n]o comparable facts" were proved or alleged. *Id*. Petitioner did not have an opportunity to present any testimony in support of his 28 U.S.C. § 2255 motion, however, because the district court denied his motion without a hearing.[1] Nevertheless, the record contains powerful evidence of the government's willingness to enter into a favorable plea agreement. Two of petitioner's similarly-situated co-defendants negotiated plea agreements resulting in the dismissal of multiple § 924(c) charges. In *Byrd*, the Court looked to similar evidence to conclude that a favorable plea agreement would have been offered and accepted if a defendant's attorney had pursued negotiations. *Byrd*, 940 F.3d at 258.

The government asks the Court to disregard evidence of the plea agreements reached by Petitioner's co-defendants, arguing that Petitioner did not rely on this evidence in his Section 2255 motion to show prejudice. Brief in Opposition at 8. The district court considered the effect of the co-defendants' plea agreements in the context of showing prejudice, however. It stated that Petitioner argued "that in light of that fact that each of his co-defendants were offered plea deals of less than 40 years' imprisonment, it would strain credulity to premise the denial of an evidentiary hearing

[1]The government states Petitioner has not renewed his challenge to the district court's failure to conduct an evidentiary hearing. Brief in Opposition at 8-9 n.*. In the Eleventh Circuit, Petitioner fully developed his argument that the district court should have conducted an evidentiary hearing. The Eleventh Circuit's conclusion that Petitioner could not establish prejudice absent a showing that the government had offered a plea deal foreclosed its proper consideration of whether the information and evidence presented in the 28 U.S.C. § 2255 motion warranted an evidentiary hearing. That determination should be made on remand from this Court.

to the Movant on the possibility that a similar plea agreement would not have been offered to him as well in this case." *See* Pet. App. 45 (internal quotation marks omitted). The Eleventh Circuit also mentioned Petitioner's argument about the co-defendants' plea agreements. *See* Pet. App. 5 (noting Petitioner's argument that "two of Davis's similarly-situated codefendants negotiated a plea deal resulting in the dismissal of multiple 18 U.S.C. § 924(c) charges"). The lower courts therefore considered Petitioner's argument that evidence of the co-defendant's plea agreements established prejudice resulting from counsel's failure to pursue plea negotiations.

For these reasons, *Byrd* is not materially distinguishable from Petitioner's case, and it conflicts irreconcilably with the Eleventh Circuit's decision.

Next, the government seeks to distinguish the Fourth Circuit's *Pender* decision on the basis that the government alleged in that case that the defendant had rejected an offer of a beneficial plea agreement. Brief in Opposition at 10 (citing *Pender*, 514 F. App'x at 360). The Fourth Circuit did not accept the government's allegation as true. Instead, it construed the allegation as a concession that a beneficial plea agreement would have been offered if the defendant's attorney had pursued plea negotiations. *Pender*, 514 F. App'x at 361. In Petitioner's case, the government has never denied that it would have offered a beneficial plea agreement if defense counsel has pursued plea negotiations. The failure to deny this fact has the same effect as an express concession. The district court was required to accept as true Petitioner's undisputed allegations.

Griffith v. United States, 871 F.3d 1321, 1330 n.9 (11th Cir. 2017). Thus, *Pender* also conflicts irreconcilably with the Eleventh Circuit's decision.

The government makes no attempt to distinguish the Eighth Circuit's decision in *Hawkman*, 661 F.2d at 1171, where the Court found that "counsel's failure to initiate plea negotiations…constituted ineffective assistance of counsel which prejudiced Hawkman." Instead, the government argues the Eighth Circuit rejected an ineffective assistance of counsel claim in a subsequent decision under circumstances where the government had not made a formal plea offer. Brief in Opposition at 10 (citing *Ramirez v. United States*, 751 F.3d 604, 606-08 (8th Cir. 2014)).

The Court did not hold or suggest in *Ramirez* that a defendant could never establish an ineffective assistance claim based on counsel's failure to initiate plea negotiations, in the absence of a plea offer by the government. *Ramirez* presented an allegation that a defense attorney failed to advise the defendant that the prosecutor had inquired about the defendant's willingness to cooperate against others. *Id*. at 606. The possibility of a plea offer was expressly contingent on the prosecutor's assessment of the value of any information the defendant chose to provide. *Id*. at 607-08. The defendant neither expressed a willingness to cooperate nor indicated he possessed information that would benefit the government. *Id*. at 608. Under these circumstances, the Court understandably held the defendant had failed to show "that a reasonable probability existed that the government would have extended a plea offer." *Id*. The Eighth Circuit did not suggest there never could be circumstances where the defendant

would be able to make this showing. It also did not disavow (or even cite) *Hawkman*. *Ramirez* therefore was not inconsistent with *Hawkman*.

In any event, if the Eighth Circuit's *Hawkman* and *Ramirez* decisions were inconsistent, the earlier *Hawkman* decision would bind the Court. Eighth Circuit precedent "prohibits any three-judge panel of the Court from overruling a previous panel opinion." *United States v. Wilson*, 315 F.3d 972, 973-74 (8th Cir. 2003); *accord United States v. Riza*, 267 F.3d 757, 760 (8th Cir. 2001) ("Only the court en banc may overrule…prior panel opinions."); *see also Mack v. Stryker Corp.*, 748 F.3d 845, 854 n.6 (8th Cir. 2014) (noting that a Sixth Circuit decision that directly conflicts with an earlier published opinion is "likely not the law of the Sixth Circuit").

In sum, the Eleventh Circuit's holding that Petitioner could not establish prejudicial ineffective assistance of counsel in the context of plea negotiations absent an allegation that the government had offered a plea deal conflicts with holdings of the Fourth, Sixth, and Eighth Circuits.

In light of the overwhelming importance of plea agreements in the administration of criminal justice, and in light of the circuit split on the question of whether a defendant can show prejudice based on his attorney's failure to initiate plea negotiations regardless of whether the government offered a plea agreement, a grant of certiorari is warranted to resolve a question of great importance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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