

22-5662

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

SEP 13 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SERGIO LOUIS Trevino — PETITIONER

(Your Name)

vs.

BOBBY LUMPKIN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SERGIO LOUIS Trevino TDCJ #: 02062898

(Your Name)

FRENCH M. ROBERTSON UNIT, 12071 F.M. 3522

(Address)

ABILENE, TEXAS 79601

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Q. In an ineffective assistance of counsel claim alleging probation misadvice, to what degree (if any) should the possibility of a conviction have on the prejudice inquiry as to whether there is a reasonable probability that counsel's deficient performance caused defendant to waive the right to trial or reject an alternate plea offer?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 27th June 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- NOT APPLICABLE -

STATEMENT OF THE CASE

On 18th December 2015, Petitioner Trevino pled guilty pursuant to a plea agreement to three counts of aggravated sexual assault of a child (counts 1-3) and two counts of indecency with a child by contact (counts 4-5). Following a sentencing hearing on 21st March 2016, Petitioner was sentenced to seventy (70) years of imprisonment on counts 1-3, and fifteen (15) years on counts 4-5 with all sentences to run concurrently as per the plea agreement.

On 28th September 2018, Petitioner filed a State Habeas Corpus application challenging his underlying convictions and sentence. Petitioner alleged that

- 1) his trial counsel was ineffective for the misadvice that the plea agreement granted a legitimate opportunity to be placed on deferred adjudication probation; and,
- 2) his guilty plea was not made knowingly and intelligently because of an unenforceable plea agreement.

These claims were denied without written order by the Texas Court of Criminal Appeals on 20th January 2019.

Petitioner filed a timely Petition for Habeas Corpus with the U.S. District Court, Western District of Texas, San Antonio Division, on 1st April 2019. On 29 May 2020, the petition was dismissed with prejudice and a Certificate of Appealability denied *sua sponte*. Petitioner filed a Notice of Appeal.

Petitioner sought a Certificate of Appealability from the Fifth Circuit Court of Appeals which was GRANTED on 21st June 2021. After briefing, the Fifth Circuit affirmed Petitioners appeal on 27th June 2022 on the premise that Petitioner could not make the showing that he would not have plead guilty but for the erroneous advice because he allegedly acknowledged that the evidence of guilt was "overwhelming" and admitted that he did not wish to put the complainant through the ordeal of a jury trial. Thus, the Fifth Circuit reasoned, Petitioner would have accepted

STATEMENT OF THE CASE (Cont.)

the plea deal regardless of counsel's misadvice.

Petitioner now seeks a writ of Certiorari to address the question of what degree (if any) should the possibility of a conviction have on the prejudice inquiry as to whether there is a reasonable probability that counsel's deficient performance caused defendant to waive the right to trial or reject an alternate plea offer.

REASONS FOR GRANTING THE PETITION

Q. In an ineffective assistance of counsel claim alleging probation misadvice, to what degree (if any) should the possibility of a conviction have on the prejudice inquiry as to whether there is a reasonable probability that counsel's deficient performance caused defendant to waive the right to trial or reject an alternate plea offer?

The United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. [Rule 10(c)].

This case presents an ineffective assistance claim stemming from the ever-fruitful topic of bad advice about probation eligibility. The issue turns on the measure of prejudice in terms of a defendant's decision making when it comes to accepting a plea agreement.

When Trevino entered into a plea agreement, his primary objective and motivating factor was the opportunity to be placed on deferred adjudication probation. However, because of two conflicting stipulations in the plea agreement, probation of any type was logically impossible. Trevino avers that had he known that probation was not an option under the plea agreement, he would not have entered into it and instead would have insisted on either proceeding to trial or accepted the alternate 30 year plea offer.

The Court of Appeals concluded that Trevino could not make the showing that he would not have plead guilty but for the erroneous advice because he allegedly acknowledged that the evidence of guilt was "overwhelming" and admitted that he did not wish to put the complainant through the ordeal of a jury trial. Thus, the lower court reasoned, Trevino would have accepted the plea deal regardless of counsel's misadvice.

Trevino presents the argument that this standard in determining the effect of counsel's error on his decision making is so speculative as to be unworkable, would literally render the prejudice

REASONS FOR GRANTING THE PETITION (Cont.)

analysis null and void for every convicted defendant, and is both unsupported by any authority and inconsistent with binding precedent from this Court.

Prejudice may be measured in one of two ways:

- 1) a reasonable probability of a different outcome, or
- 2) a reasonable probability of a different decision by the defendant.

Choosing between the two depends on the possible result of the deficient performance. For example, if the deficient performance pertained to a guilty verdict, then prejudice would depend on "a reasonable probability that, absent the error, the factfinders would have had a reasonable doubt respecting guilt". Strickland v. Washington, 466 U.S. 668 (1984)

BUT, if the deficient performance might have caused the defendant to waive a proceeding he was otherwise entitled to, then a reasonable probability that the deficient performance caused the waiver fulfills the prejudice requirement. Lee v. U.S., 137 S.Ct. 1958, 1965 (2017). In that situation the focus is on the defendant's decision making.

Before accepting the plea agreement, Trevino considered three options that were available to him:

- 1) a jury trial on the indictment as alleged;
- 2) a sentence of thirty (30) years on a plea of guilty to continuous sexual abuse; or,
- 3) an open plea to the lesser included offenses of aggravated sexual assault and indecency with a child by contact that would allow the judge to decide punishment.

Counsel stated in her affidavit that Trevino was "adamant" and "insisted that he wanted to have at least the chance to request community supervision from the Court" (Affidavit of Trial Counsel, pgs. 3, 4). Therefore, Trevino elected the third option because

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REASONS FOR GRANTING THE PETITION (Cont.)

he was erroneously advised by counsel that he had a legitimate opportunity to be placed on deferred adjudication probation.

The lower court overlooked the fact that, had the opportunity of probation not been a part of the third option, the motivating factor on his decision making was removed and there is a reasonable probability he would have selected one of the remaining two options available to him. The lower court only considered whether Trevino would have proceeded to trial.

Regardless of how "overwhelming" the alleged evidence may have been, entering a plea without an agreed upon sentence was not the most logical nor prudent course of action. With a trial there was the possibility of a favorable verdict - while a plea of guilty created an absolute certainty of a conviction. An open plea essentially waives the guilt and innocence phases, and places the defendant in the exact same situation as if found guilty after a trial on the merits. There is no strategic value in such and requires the waiver of numerous constitutional rights. Trevino avers that the presumption should always favor a defendant exercising or preserving his rights.

Furthermore, the decision whether to plead guilty or not may be influenced by factors that have nothing to do with defendant's guilt. It should not be presumed that each and every defendant is pleading guilty simply because he knows in his heart that he is guilty and wants to throw himself on the Courts mercy, divinely oblivious to any punishment that he may receive. The most important reason that a defendant pleads guilty is because he has an advantageous plea bargain.

Logic dictates that if, as in this case, that advantageous plea bargain was premised upon a misrepresentation that renders the advantageous element void, it can't be fairly presumed that the defendant would still enter into that same decision if they knew

REASONS FOR GRANTING THE PETITION (Cont.)

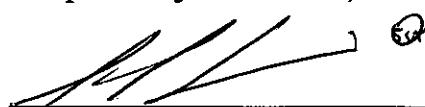
such. In this case the adventageous element was the opportunity for probation.

Therefore, this is an important question of federal law that has not been, but should be settled by this Court. Petitioner Trevino avers that this issue is ripe for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Sergio Louis Trevino TDCJ #: 02062898

Date: 13th September, 2022

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