CASE No. _____

In The Supreme Court of the United States

MICHAEL RAY DAVIS.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *United States v. Granados*, 168 F.3d 343 (8th Cir. 1999), Has Been Overruled by *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *Lafler v. Cooper*, 566 U.S. 156 (2012).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the United States Court of Appeals for the Eighth Circuit's order dismissing Petitioner's request for a certificate of appealability.

OPINIONS BELOW

The Eighth Circuit's order and judgment was entered October 4, 2022. ("App.")

JURISDICTION

The Eighth Circuit's order and judgment was entered October 4, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Davis filed a § 2255 motion and a declaration stating: At the time of his arrest, Davis was 70 years old. (R. Doc. 3) (Davis Decl. ¶ 2). Davis informed Attorney John Osgood that he would not plead guilty to any sentence over 120 months (10 years). *Id*. Davis informed Attorney

Osgood that any sentence over 120 months was a death sentence for a man 70 years old, and he would take his chances at trial if a plea agreement could not be reached. *Id*.

Attorney Osgood informed Davis he had reviewed the Government's open file. (ECF 3) (Davis Decl. ¶ 5). Attorney Osgood informed Davis that the conspiracy involved 400 to 700 grams of heroin, and there was no evidence to support an obstruction of justice enhancement. *Id*. Attorney Osgood never informed Davis that Cooperating Witness Two ("CW2") alleged Davis distributed more than 3,000 grams of heroin. *Id*. Moreover, Attorney Osgood never informed Davis that Cooperating Witness Three ("CW3") alleged Davis obstructed justice with regards to the $200 sent to Williams. *Id*.

Attorney Osgood informed Davis that, if he plead guilty and received acceptance of responsibility, the United States Sentencing Guidelines (U.S.S.G.) sentence would be calculated as follows:

USSG § 2D1.1 (400-700 Grams Heroin)	26
USSG § 3E1.1 (Acceptance of Responsibility)	-3
Total Offense Level	23
Criminal History Category	III

Sentencing Guideline Range 57 to 71 months

(R. Doc. 3) (Davis Decl. ¶ 6).

On May 4, 2018, Davis signed a written plea agreement and plead guilty. (R. Crim. Doc. 127). At the plea hearing, Attorney Osgood confirmed that he had reviewed the Government's open file:

THE COURT: And, Mr. Osgood, are you satisfied, based on you review of the discovery, that if this case went to trial that the Government could make a submissible case?

MR. OSGOOD: Yes. We've spent quite a bit of time talking about that. And the latest events in the case were they've developed yet another very substantial witness. We felt we had no choice other than to plead guilty.

* * * * * * * *

THE COURT: … Mr. Rhodes, I always ask this question as well. Did you turn over all of the discovery to the defense.

MR. RHODES: Yes, Your Honor.

(R. Crim. Doc. 131) (Plea Hearing at 16).

The Presentence Investigation Report (PSR) recommended that Davis receive a sentence based on the following U.S.S.G. calculations,

USSG § 2D1.1 (3,000 Plus Grams Heroin)	32
USSG § 3B1.1 (Leader/Organizer)	+4
USSG § 3C1.1 (Obstruction of Justice)	+2
USSG § 3E1.1 (Acceptance of Responsibility)	0
Total Offense Level	38
Criminal History Category	III
Sentencing Guideline Range	292 to 365 months

(R. Crim. Doc. 170) (PSR ¶¶ 42, 45, 46, 49 & 66).

After reading the PSR, Davis immediately wrote a letter to Attorney Osgood. (R. Doc. 3) (Davis Decl. ¶ 13). Davis instructed Attorney Osgood to file a motion to withdraw his guilty plea as involuntary. *Id*. Had Attorney Osgood informed Davis about CW2 and/or CW3's allegations, Davis would not have plead guilty and would have insisted on a jury trial. *Id*.

The district court sentenced Davis to 170 months based on the following U.S.S.G. calculations,

USSG§2D1.1(less than 3,000 grams heroin)	30
USSG § 3B1.1 (Leader/Organizer)	+4
USSG § 3C1.1 (Obstruction of Justice)	+2

USSG § 3E1.1 (Acceptance of Responsibility)	-3
Total Offense Level	33
Criminal History Category	III
Sentencing Guideline Range	168 to 210 months

(R. Crim. Doc. 204) (Sentencing Hearing at 15).

On June 6, 2019, Davis filed a *pro se* notice of appeal. (R. Crim. Doc. 202). Per the Eighth Circuit's instructions, on August 26, 2019, Davis filed a pro se supplemental brief,

… Attorney Osgood himself told me that he would take my case to trial if he felt that I would get 10 years or more because at my age that would be a life sentence…. [Attorney Osgood] came to me and said … he had a deal where I would plead guilty to a small amount of heroin and only be sentenced to 6 years….

After I signed the deal … [Davis learned] that a cooperating witness was saying [he] had sold … 3 kilos of heroin, that [an] obstruction of justice would be applied because [he] had sent Sidney Williams $100 while [Williams] was in CCA on a unrelated charge of bank robbery…. The PSR also stated [he] was being given an enhancement for a leader and organizer role over people who [he] didn't even know…. [He] tried

to contact [his] attorney repeatedly and was unable to contact [Attorney] Osgood.

United States v. Davis, Case No. 19-2190 (8th Cir. Aug. 27, 2019)).

Davis filed a § 2255 motion arguing that Attorney Osgood was ineffective, and his guilty plea was involuntary, where Attorney Osgood failed to inform him about CW2's drug quantity allegations and CW3's obstruction of justice allegations. (R. Doc. 3). The Government responded that Attorney Osgood does not specifically remember discussing CW2 with Davis … but the "300 to 700 grams was based on an email from AUSA Rhodes on August 2, 2017, in which he stated he believed Mr. Davis was responsible for 423 grams which was a level 26." (R. Doc. 7-4 at 23).

On May 5, 2022, the district court denied the § 2255. (R. Doc. 8). The district court never acknowledges that Attorney Osgood misadvised Davis regarding the drug quantity or obstruction of justice. *Id*. Instead, the district court stated the "law is this circuit is clear that a defendant who plead guilty has no right to be apprised of the sentencing options outside the statutory maximum and minimum sentences." *Id*. The

district court cited *United States v. Granados*, 168 F.3d 343, 345 (8th Cir. 1999). *Id.*

REASONS FOR GRANTING THE WRIT

I. Reasonable Jurists Can Debate Whether *United States v. Granados*, 168 F.3d 343 (8th Cir. 1999), Has Been Overruled by *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *Lafler v. Cooper*, 566 U.S. 156 (2012).

First, Attorney Osgood admitted that he misinformed Davis regarding the drug quantity. Attorney Osgood stated the "300 to 700 grams was based on an email from AUSA Rhodes on August 2, 2017, in which he stated he believed Mr. Davis was responsible for 423 grams which was a level 26. Davis submits this mis-advice is ineffective assistance. *United States v. Marcos-Quiroga*, 478 F.Supp.2d 1114 (N.D. Iowa Mar. 23, 2007).

Second, Davis informed Attorney Osgood that any sentence over 120 months was a death sentence for a man 70 years old, and he would take his chances at trial if a plea agreement could not be reached. The district court never addressed whether this uncontested statement established sufficient prejudice. *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017).

Third, *United States v. Granados*, 168 F.3d 343 (8th Cir. 1999), cites *Thomas v. United States*, 27 F.3d 321 (8th Cir. 1994). In a similar case, Francisco Marcos-Quiroga "argued that he was induced to plead guilty by specific representations of his counsel that he was not a career offender." *United States v. Marcos-Quiroga*, 478 F. Supp. 2d 1114, 1128 (N.D. Iowa 2007). The district court distinguished *Thomas v. United States*, 27 F.3d 321 (8th Cir. 1994). The court found in *Thomas,* counsel did not mis-advise his client. *Id*. The court held because counsel mis-advised *Marcos-Quiroga* his guilty plea was involuntary. *Id*. at 1143-44.

Fourth, the district court's statement "that a defendant who pleads guilty has no right to be apprised of the sentencing options outside the statutory maximum and minimum sentences" is incorrect as a matter of law. The Supreme Court has held that counsel's failure to inform the defendant of certain collateral consequences constitutes ineffective assistance. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (counsel must inform the defendant regarding immigration).

Fifth, in *Lafler v. Cooper*, 566 U.S. 156 (2012), the defendant was mis-advised "the prosecution would be unable to establish his intent to murder." *Id*. at 161. "[A]ll parties agree[d] the performance of

[defendant's] counsel was deficient." *Id*. at 163. This is consistent with the Eighth Circuit's decision in *Mayfield v. United States*, 955 F.3d 707, 711 (8th Cir. 2020) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance), and *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (the misadvice was of a solid nature, directly affecting Hill's decision to plead guilty).

Sixth, in *Lafler* the Court adopted *United States v. Day*, 969 F.2d 39 (3rd Cir. 1992). In *Day*, the attorney misadvised the defendant regarding the applicability of the career offender guideline. *Id*. The Court held this mis-advice was ineffective assistance. This is consistent with *United States v. Marcos-Quiroga*, 478 F. Supp. 2d 1114, 1128 (N.D. Iowa 2007).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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