

No. 23-5519

Supreme Court, U.S.
FILED

MAY 31 2023

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTAVIO CORTIZ FERRIOS PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For THE Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

OCTAVIO CORTIZ FERRIOS
(Your Name)

PO Box 759
(Address)

Millersville PA 17954-0759
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

11) Was it an abuse of discretion, to dismiss the petitioners 2255, with-out an evidentiary hearing. Because the record was undeveloped regarding the defendants plea.

2) Was, the petitioner denied effective assistance of counsel, when his attorney had him pled to an "open plea" with-out informing the petitioner of the grave consequences, he faced,

3) Was the plea of guilty knowingly, and voluntarily. entered into, when counsel told defendant, he only faced, 10 years, when the factual truth, is, he faced, up to 500 months,

4).

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

United States District Court For The
Northern District of Iowa - 20-CV-2103-CAR
18-CR-2002 CAR.

United States Court of Appeals
For the Eighth Circuit
MO. 23-1015

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See.

order →

TABLE OF AUTHORITIES CITED

CASES

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- McREYNOLDS v. KEMMIA 208 F.3d 721, 722 (8th Cir. 2000) citing STRICKLAND v. WASHINGTON 466 U.S. 668, 687 (1984)
- LAFLER v. COOPER, 132 S.Ct. 1376 (2012)
- MISSOURI v. FRYE 132 S.Ct. 1399 (2012)
- ADRIAN v. KENTUCKY 559 U.S. 354 (2010) HILL v. LOCKHART 474 U.S. 54 (1985)
- UNITED STATES v. DEMO 2010 358 F.Supp. 3d 815 (2019) quoting UNITED STATES v. DAY 969 F.2d 39
- VON MOLTKE v. GILLIES 332 U.S. 708 (1948)
- UNITED STATES v. HERRA 412 F.3d 577 5th 2005)
- UNITED STATES v. MCCOY 215 F.3d 102 (DC 2000)

STATUTES AND RULES

- UNITED STATES v. GALLOWAY 976 F.2d 414 (8th 1992)
- UNITED STATES v. THURMAN 278 F.3d 1012 (8th Cir. 2002 -
- HARRIS v. UNITED STATES 701 F.Supp. 2d 1084 (S.D. FAWA 2010)

- 28 U.S.C. 1254(1)
- 28 U.S.C. 2255
- 21 U.S.C. 846 851
- 21 U.S.C. 841 (A)(1)
- 21 U.S.C. 841 (B)(1)(A)

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 _____ 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 _____ 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 JANUARY 31 2023.

☐ 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: April 1 2020, 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

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence U.S. Const. Amend. VI

STATEMENT OF THE CASE

ON September 4, 2018, APPELLANT entered a plea of guilty to a single count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846. Thereafter, he was sentenced to a term of 420 months imprisonment see United States v. Fierros 807, Fed. Appx 572 (8th Cir 2020)

APPELLANT filed a timely 2255 motion on December 9th 2020. Therein, APPELLANT argued among other things that his attorney (Chad R Freese) representation violated the Sixth Amendment during the plea negotiation stage of the proceedings. Specifically, APPELLANT argued that he had no knowledge that he was entering into an open plea and that entering said plea that his attorney failed to adequately explain the nature of the process, viz, that his sentence would be determined based on the application of the United States Sentencing Guidelines. According to APPELLANT, counsel merely informed him that the open plea exposed him to a mandatory minimum of 10 years imprisonment [without] explaining that other factors such as drug quantity or aggravating role in the offense, would potentially impact where within the statutory range he would be sentenced. Subsequently, the defendant was sentenced to [420 months] rather than the 10 years he was told,

REASONS FOR GRANTING THE PETITION

The sixth amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defence" U.S. Const. Amend. VI. To prevail on an ineffective assistance of counsel claim, movant must show that his counsel's performance was deficient and that he was prejudiced by the deficient performance. See *McReynolds v. Kemna*, 208 F.3d 721, 722 (8th Cir. 2000) citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Counsel's performance was deficient if it fell outside the wide range of professionally competent assistance." *McReynolds*, 208 F.3d at 730. Prejudice is shown if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 684. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court may address the two prongs of the *Strickland* test in any order, and if the movant fails to make a sufficient showing of one prong, the court need not address the other prong." *Id.* 466 U.S. at 697. *Fields v. United States*, 201 F.3d 1025, 1027 (8th Cir. 2000).

A movant's sixth amendment right to counsel extends to the plea-bargaining process. See *Laffer v. Cooper*, 132 S.Ct. 1376 (2012) see, *Hick Missouri v. Foye*, 132 S.Ct. 1399 (2012), also *Padilla v. Kentucky*, 559 U.S. 350 (2010), and *Hill v. Lockhart*, 474 U.S. 58 (1985). During plea negotiations defendant has "entitled to the effective assistance of competent counsel." *Laffer*, 132 S.Ct. at 1384 citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

The Strickland Standard Applies to guilty plea challenges premised upon allegations of ineffective assistance of counsel.

Generally, in the plea-bargain context counsel is required to give a defendant enough information to make a reasonably informed decision whether to accept a plea offer. See *United States v. Penoncello*, 358 F. Supp. 3d 815, 822 (D. Minn. 2019) (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992); see also *Hill*, 471 U.S. @ 56-57. (voluntariness of guilty plea depends on adequacy of counsel advice). Also see *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved, and then to offer his informed opinion as to what plea should be entered). Knowing the potential sentencing exposure under a plea agreement versus standing trial is an important factor in the decision making process. And is often "crucial to the decision whether to plead guilty." See *United States v. Day*, 969 F.2d @ 43. Thus, it is necessarily follows that in order to provide objectively reasonable advice counsel must have a familiarity with structure and basic content of the guidelines. Id. See also *Penoncello*, 358 F. Supp. 3d @ 822. (citing *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005)) "Defense counsel has an obligation to 'advise' a defendant about his sentencing exposure under the sentencing guidelines) see *United States v. Washington*, 619 F.3d 1252 (10th Cir. 2010) holding that failure to understand basic structure and mechanics of sentencing

Guidelines could amount to objectively deficient performance under Strickland); see *Smith v. United States* 318 F.3d 545, 553 (6th Cir. 2003) ("A criminal defendant has a right to expect at least that his attorney will explain the sentencing exposure the defendant will face as a [consequence] of exercising each of the options available") *United States v. McCoy*, 215 F.3d 102, 108 (DC 2000) (while "not every error made in applying guideline amounts to deficient performance. Under the standard of Strickland, counsel must at least be familiar with 'the structure and basic content of the guidelines'.

As pertinent in this instance, the sentencing guidelines embody the concept of "relevant" conduct. The cornerstone of the Sentencing Guidelines see *United States v. Galloway* 976 F.2d 414, 415 (8th Cir. 1992) This concept known, as "relevant conduct" includes all acts and omissions committed, aided, abetted, consented, commanded, induced, procured or willfully caused by the defendant, and includes all acts and omissions that were part of the same scheme. See USSC 1863 (a)(2), 7613, also see *United States v. Noriega*, 760 F.3d 908, 911 (8th Cir. 2014).

Here then is considerable doubt, as to whether the nature a quantity of the advice appellant received prior to entering the open plea.

To be clear, counsel's advice to appellant, was specific. That he would face a [10 year sentence nothing more.] missing what the sixth amendment necessitates, [has] although appellant

Appellant was subject to a 10 year mandatory minimum, because of the facts of the case (which counsel presumably knew) because of the facts of the case, [The defendant's sentence ultimately would be predicated on his relevant conduct. See United States v. Thurmon, 278 F.3d 1002, 1014 (8th Cir 2002) holding that a defendant's role in the offense is measured by relevant conduct. under USSC 1B1.3. In this case, relevant conduct constituted [Drug quantity] involved in the conspiracy to which appellant pled.

For example, Counsel was cognizant during the plea negotiations that Adilene Garcia, assisted Appellant in the disbursement of the drug for one-to-two pound quantities and had collected \$, to 10 thousand per transactions that would warrant an upward adjustment under USSC 2B1.1(c) [What a competent attorney would do, is inform his client, it faced more than 10 years.

Prejudice is assessed on a "case by case basis upon the totality of evidence see Williams v. Taylor, 529 U.S. 362, 391 (2000) Also see Strickland, 466 U.S. 668 "where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the government offers one." Lee 137, S.Ct 1966, but that is not invariably the case where, for example the plea that is offered is "similarly dire" to the consequences of a

loss AFTER trial, a defendant might rationally reject a plea offer "IN FAVOR OF throwing a Hail Mary" At trial Id @ 1967 Also see United States v. Doe 915 F.3d 905 914 (2d Cir 2019) "EVEN if Doe were likely to lose, it would be far from irrational for Doe to litigate the entire charge or the loss amount, given his strong interest in remaining in the country.

In the instant case Appellant received no benefit from entering an [open plea] to court and therefore proceeding to trial would not have been laden with peril as it may have been in the case of the mill case where a defendant actually receives some tangible benefit for entering a plea of guilty. Rather, had he opted to proceed to trial, the testimonies of the government's cooperating witnesses would have differed from their testimony at sentencing and therefore his ultimate sentencing range had he been convicted would have mirrored the range in the open plea since the issue of drug quantity and aggravated role in the offense both factors which were responsible for the upward adjustments of his base offense level. In this case any competent attorney would have informed his client of possible outcomes, before entering a plea agreement.

IN REJECTING ANY OUTCOME DETERMINATIVE TEST SUCH AS EMPLOYED IN
FEDERAL RULE OF CRIMINAL PROCEDURE 33, THE RESULT OF A PROCEEDING MAY
BE RENDERED UNRELIABLE, AND HENCE THE PROCEEDING ITSELF UNFAIR, EVEN
IF THE ERRORS OF COUNSEL CANNOT BE SHOWN BY A PREPONDERANCE OF
THE EVIDENCE TO HAVE DETERMINED THE OUTCOME. STRICKLAND v.
WASHINGTON 466 U.S. AT 694 80 L.Ed.2d AT 697. WILLIAMS v. TAYLOR 120 S.Ct
1445 1519 2000 U.S. LEXIS 2837, 146 L.Ed.2d 389 4-18-2000). THE COURT
FURTHER AND SPECIFICALLY REJECTED THE APPLICATION OF THE
"ACTUAL PREJUDICE" STANDARD OF UNITED STATES v. FRADY, 456 U.S.
152 71 L.Ed.2d 816 102 S.Ct. 1558 (1982) TO CLAIMS OF THE EFFECTIVE
ASSISTANCE OF COUNSEL WITH THE FOLLOWING ADMONISHMENT -

THE PRINCIPLES GOVERNING INEFFECTIVENESS CLAIMS
SHOULD APPLY IN FEDERAL COLLATERAL PROCEEDINGS AS
THEY DO ON DIRECT APPEAL OR THE MOTIONS FOR A
NEW TRIAL, AS INDICATED BY THE "CHANCE AND PREJUDICE"
TEST FOR OVERCOMING PROCEDURAL WAIVERS OF CLAIMS.
OF ERROR, THE PRESUMPTION THAT A CRIMINAL JUDGMENT
IS FINAL IS AT ITS STRONGEST IN COLLATERAL ATTACKS
ON THAT JUDGMENT SEE UNITED STATES v. FRADY, 456
U.S. 152 162-169, 71 L.Ed.2d 816, 102 S.Ct. 1558 (1982)
AN INEFFECTIVENESS CLAIM HOWEVER, AS OUR ARTICULATION
OF THE STANDARDS THAT GOVERN DECISION OF SUCH CLAIMS
MAKES CLEAR, IS AN ATTACK ON THE FUNDAMENTAL

Fairness is the central concern of the writ of habeas corpus, No special standards ought to apply to ineffectiveness claims made in habeas proceedings Strickland, 466 U.S. at 697-98 80 LEd 2d at 700.

The court hearing an ineffectiveness claim should consider the totality of the factors which guided the decisionmaker in the challenged proceedings. then try to determine which factors were or were NOT "affected" by counsel's errors.

Strickland v. Washington 466 U.S. at 696 80 LEd. 2d 694 Where through "hindsight" the court can determine that But for the errors of counsel there is a "reasonable probability of a different outcome, a probability sufficient to undermine confidence in the challenged proceedings, the defendant has affirmatively proven prejudice. Strickland 466 U.S. at 694-95, Also see United States v. Glover. 531 U.S. 198 121 S.Ct 694 148 LEd 2d 604. 2001 U.S. Lexis 639 (2001) Williams v. Taylor 120 S.Ct 1495, 1512 - 14. 2000. U.S. Lexis 2837. 53 - 64 146 LEd 2d 389 April 18. 2000

This rule IS App. cable to Find "Prejudice" where hindsight demonstrates that counsel's constitutionally deficient performance deprived a Federal criminal defendant of consideration for a favorable adjustment or downward departure under the United States Sentencing Guidelines see United States v. Glover, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 601, 2001 U.S. LEXIS 639 (2001) Rejection of Court of Appeals rule that only a "substantial" change in application of sentencing guidelines constituted "prejudice" within the meaning of "Strickland"

In Williams v. Taylor, 120 S.Ct. 1495, 1512-16, 2000 U.S. LEXIS 2837, 53-64 the Supreme Court explicitly rejected the theory that Lockhart v. Fretwell, 506 U.S. 364, 373, 122 L.Ed.2d 180, 189, 113 S.Ct. 838 (1993) somehow modified Strickland, to require a separate inquiry into fundamental fairness even when [petitioner] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceedings. Williams v. Taylor, 120 S.Ct. 1495. The Supreme Court's holding in Lockhart v. Fretwell, was limited to circumstances where

there was a different outcome. would be contrary
the law. AS Justice O'Connor pointed out FRI
Lockhart v Fretwell.

Today's decision will, in the vast majority
OF cases. have no effect on the pre-judicial inquiry under
Strickland. The determinative question. Whether there is
Reasonable probability that, but for counsel's unprofessional error
the result of the proceedings would have been different
Remains unchanged. "Id 506 US at 373 (O'Connor concurring)

See also *Mattis v. Johnson*, 2000 US App Lexis 8858 (10th Cir 2000)
Citing *Williams v. Taylor*, 120 S.Ct. 1495. Also *Jackson v. Coker*,
2000 US App Lexis 9049, 9th Cir 5-8-2000 (same) United
States v. Hovey 333 F.3d 1185 2003 US App Lexis 12732 (10th Cir
03) Ineffective assistance of counsel, defendants prejudiced

sentenced vacated even though defendant did not receive
financially greater sentence as a result of counsel's
errors, also
United States v. Williams 374 F3d 433 2004 US App.
1368p (5th Cir 2004) Prejudiced the
claim of ineffective assistance.

With out AN evidentiary Hearing, The petitioner
IS CURRENTLY IN prison. For 420 months. Well over
three decades. Because his attorney. Failed TO
Advise him OF the consequences OF his plea.

His attorney took full advantage. OF the FACT
That. OCTAVIO CORTES FERRER, IS A NON-AMERICAN
CITIZEN, WHO did NOT understand LAW. let alone
ALL its complex. procedures. IS A complete
mis carriage OF Justice. TO let this conviction
AND sentence stand, would be A SLAP. IN THE
FACE. OF our DECLARATION OF INDEPENDENCE, BILL OF RIGHT.
AND the U.S CONSTITUTION,

Respectfully
Submitted

H. Alvarez