

No. 17A813

IN THE SUPREME COURT
OF THE UNITED STATES

CYRUS ANDREW SULLIVAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Hill v. Lockhart* that the standard for determining prejudice from ineffective assistance of counsel in a case involving a guilty plea “focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” 474 U.S. 52, 59 (1985). This Court expanded on the potential effect of poor advice from counsel, beyond whether a trial would have resulted, in *Lafler v. Cooper*, in which defective advice regarding plea bargaining required courts to determine prejudice in terms of lost opportunities to obtain better results from plea negotiations, with formulation of an equitable remedy specific to the case. 556 U.S. 156, 174 (2012). In the present case, defense counsel failed to advise the petitioner that the information to which he was pleading guilty incorrectly stated an element of the offense, which would have permitted the filing of a motion in arrest of judgment. On appeal, the Ninth Circuit held that Mr. Sullivan failed to establish prejudice because he did not establish he would have insisted on going to trial. The question presented is:

Where defense counsel failed to advise the petitioner of a defect in the charging document that could form the basis of a dispositive motion to arrest judgment, did the petitioner establish that the ineffective performance affected the outcome of the plea process and therefor constituted prejudice within the meaning of *Hill* and *Lafler*?

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The petitioner, Cyrus Andrew Sullivan, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 9, 2017, affirming the denial of his motion for relief from the judgment against him pursuant to 28 U.S.C. § 2255.

1. Opinions Below

The District Court denied Mr. Sullivan's motion under § 2255 for relief on January 6, 2016 (Appendix at 1-27). The Ninth Circuit affirmed the denial of § 2255 relief in an unpublished memorandum opinion on November 9, 2017 (Appendix at 28-31).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

3. Constitutional And Statutory Provisions

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "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, . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. § 2255. At the time of the guilty plea in this case, Rule 34 stated:

Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if:

- (1) the indictment or information does not charge an offense; or
- (2) the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Fed. R. Crim. P. 34. In 2014, the Rule 34 was amended to delete subsection (a)(1), which provided for mandatory arrest of judgment where the charging document does not charge an offense. *Id.* , Advisory Committee Notes (Dec. 1, 2014).

4. Statement Of The Case

This case involves the standard for determining prejudice in the context of a guilty plea where a defendant receives advice that falls below the minimum standard for effective

assistance of counsel under the Sixth Amendment. The facts relevant to the narrow issue raised in this petition begin with the entry of a guilty plea to an Information charging Mr. Sullivan with transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. § 875(c):

On or about June 4, 2012, in the District of Oregon, defendant Cyrus Andrew Sullivan knowingly transmitted and caused to be transmitted in interstate or foreign commerce a communication containing a threat to injure the person of another, to wit, an email communication via the Internet containing a threat to kill another person, A.K., which a reasonable person would take as a serious expression of an intention to inflict bodily harm upon A.K. All in violation of Title 18, United States Code, Section 875(c).

Appendix at 9. Under the law of the Ninth Circuit at the time of the guilty plea, the mens rea element of the offense required “a subjective, specific intent to threaten,” *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988), as this Court later affirmed in *Elonis v. United States*, 135 S. Ct. 2001, 2011-12 (2015).

Mr. Sullivan filed a pro se § 2255 motion challenging the advice he received from his trial counsel in entering his guilty plea. The District Court recognized the Information was problematic: “Defendant is correct that the Superseding Information did not expressly recite the element that Defendant intended his June 4, 2012 email to A.K. to be a threat.” (Appendix at 16). The District Court first found that the inclusion of “knowingly” fairly informed Mr. Sullivan of the charge, then stated “even if the required specific intent cannot be discerned from the Information,” the record established his actual knowledge of the mens rea requirement (Appendix at 17-18). Although finding that Mr. Sullivan had

received correct advice from counsel regarding the mens rea standard, his trial counsel had not asserted he advised Mr. Sullivan that the Information to which he entered his guilty plea, as well as the written plea petition, did not expressly include the requisite mens rea to constitute a federal crime. The District Court granted a certificate of appealability on the claim that trial counsel “was ineffective in advising Defendant to plead guilty to the Superseding Information which did not expressly recite the element of the crime regarding the intent to convey a threat.” (Appendix at 27).

On February 1, 2016, Mr. Sullivan supplemented his § 2255 motion, making the following claim:

A reasonably competent lawyer would have realized that his client had just pled guilty to a fatally defective information, that the defect constituted a non-waivable jurisdictional defect, that non-waivable claims cannot be waived by plea agreements, and that by filing a Rule 34 motion to arrest judgment [trial counsel] could have gotten my case thrown out without violating my plea agreement. Had [trial counsel] informed me of the defective charging instrument I would have instructed him to file a motion to arrest judgment had he not also failed to inform me of Rule 34 and had he done so still would have forced him to file it or quit in which case I would have filed it myself.

The District Court denied the motion to supplement on February 16, 2016.

On appeal, Mr. Sullivan asserted that, under well-established law, the charging document must contain an allegation fulfilling every essential element of the crime. In this case, the Superseding Information did not include the subjective intent to communicate a threat, which was not cured by the general intent communicated by “knowingly.” Citing *Kimmelman v. Morrison*, Mr. Sullivan asserted that a single serious error by otherwise

competent counsel constituted ineffective assistance of counsel. 477 U.S. 365, 383 (1986). At the time of the guilty plea, under controlling Ninth Circuit law, Mr. Sullivan could have successfully moved to arrest the judgment under Rule 34, which would have resulted in dismissal of the information, regardless of the information having been filed pursuant to a plea agreement. *United States v. Shaw*, 655 F.2d 168, 171-72 (9th Cir. 1981). Under the pre-2014 version of Rule 34, “the court must arrest judgment” if the information failed to state an offense or the court lacked jurisdiction, and the defendant filed the motion within 14 days “after a plea of guilty.” Rule 34 (a) and (b). Based on the uncontroverted supplement, if Mr. Sullivan had been advised of the possibility of arresting the judgment under Rule 34, he would have sought such relief, which constituted prejudice within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984).

The Ninth Circuit affirmed. The court did not reach the issue of counsel’s performance based on its prejudice ruling (Appendix at 29) (citing *Strickland*, 466 U.S. at 697). First, the court found that the Rule 34 claim was not within the scope of the certificate of appealability (Appendix at 29-30). Second, because the record demonstrated Mr. Sullivan was repeatedly informed of the proper mens rea standard, he “has not shown that there is a reasonable probability that, but for his attorney’s error, he would not have pleaded guilty and would have insisted on going to trial.” (Appendix at 30) (citing *Hill*, 474 U.S. at 59).

5. Reasons For Granting The Writ

This Court should grant a writ of certiorari to clearly resolve the functional as opposed to the categorical determination of prejudice in the context of ineffective advice regarding the entry of a guilty plea. This Court's seminal case on ineffective assistance of counsel addressed failures during trial, articulating the requirement for prejudice as a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In *Hill*, the Court applied *Strickland* in the context of a guilty plea, making two statements regarding prejudice that are in some tension:

- "The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process."
- "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Hill, 474 U.S. at 59. As in the present case, the latter statement is frequently used in the lower courts as a categorical requirement that must be established in order for defendants to prevail in guilty plea cases. In contrast, this Court has been applying the functional focus of the former statement on the outcome of the plea process, finding prejudice from counsel's failure to advise regarding the risks of trial that would have resulted in a guilty

plea and lower sentence (*Lafler*, 566 U.S. at 174) and failure to advise regarding the existence of a plea offer that likely would have been accepted (*Missouri v. Frye*, 566 U.S. 134, 147-48 (2012)). More recently, the Court recognized that, where counsel's failure resulted in a guilty plea, the "outcome" was the exercise of trial rights, not necessarily the trial's result in acquittal. *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) ("We instead consider whether the defendant was prejudiced by the 'denial of the entire judicial proceeding ... to which he had a right.'") (quoting *Hill*, 474 U.S. at 483).

In the present case, the pro se petitioner asserted the deficiency of the information and, after denial of his motion, pointed out the prejudice that the uncontroverted facts established – he could and would have moved successfully for arrest of judgment. The Ninth Circuit did not consider the claim within the scope of a certificate of appealability that encompassed ineffectiveness for failing to advise regarding the Information's deficiency, then found no prejudice solely based on the section of *Hill* requiring the defendant to establish he "would have insisted on going to trial." (Appendix at 30). This Court should grant certiorari to clarify that the prejudice determination is functional: the effect on "outcome" includes a Rule 34 motion to arrest judgment, even if there were to be a lack of proof the defendant would have insisted on trial.

Clarification of the prejudice standard as functional, and not solely requiring proof of categorical conformance with the facts of cases like *Hill*, *Lafler*, *Fry*, and *Lee*, would provide important guidance in a reoccurring area of federal law. In both federal and state

courts, the percentage of cases resolved with guilty pleas is high and growing. *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (“Pleas account for nearly 95% of all criminal convictions.”); 2017 Bureau of Justice Statistics. Ineffectiveness of counsel is the most frequent area of post-conviction litigation through habeas corpus proceedings in which this Court’s standards from *Strickland* and its progeny provide the applicable law. *See Massaro v. United States*, 538 U.S. 500, 505-06 (2003) (ineffective assistance of counsel is generally raised in collateral attacks on convictions). The appellate court in the present case, despite the pro se petitioner having (belatedly) pointed out the prejudice that appears from the facts he timely asserted, applied an apparently categorical prejudice test requiring the defendant to prove insistence on trial. This Court has stated, “*Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.” *Frye*, 566 U.S. at 148. The Court should expand on its precedent to clarify that prejudice is not limited to insistence on trial or foregoing plea negotiations. This Court should grant the writ and hold that prejudice affecting the “outcome” includes post-judgment dispositive motions, such as for arrest of judgment, and, in doing so, clarify that the test is functional rather than categorical.

6. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 7th day of February, 2018.



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