No. 22-5364

IN THE SUPREME COURT OF THE UNITED STATES

QUARTAVIOUS DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in affirming the denial of petitioner's 28 U.S.C. 2255 motion based on the motion's failure to allege facts sufficient to establish that petitioner was prejudiced by his counsel's allegedly ineffective assistance at the plea-bargaining stage.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Davis v. United States, No. 19-cv-21457 (Jan. 23, 2020)

United States v. Davis, No. 10-cr-20896 (May 17,2012, amended July 11, 2012)

United States Court of Appeals (11th Cir.):

United States v. Davis, No. 20-11149 (Feb. 10, 2022)

United States v. Davis, No. 12-12928 (May 5, 2015)

United States v. Davis, No. 12-12928 (Sept. 4, 2014)

United States v. Davis, No. 12-12928 (June 11, 2014)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is available at 2022 WL 402915. The order of the district court (Pet App. 7-50) and the report and recommendation of the magistrate judge (Pet. App. 55-90) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2022. A petition for rehearing was denied on May 9, 2022 (Pet. App. 7). The petition for a writ of certiorari was filed on August

8, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on three counts of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); six counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and seven counts of using, carrying, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). First Am. Judgment 1-2. The district court sentenced petitioner to a total of 1941 months of imprisonment, to be followed by 5 years of supervised release. Id. at 3-4, 6. On direct appeal, the court affirmed petitioner's convictions, but vacated his sentence. 754 F.3d 1205 (11th Cir. 2015). The en banc court of appeals reached the same result, 785 F.3d 498, 500 n.2 (11th Cir. 2015), and this Court denied a petition for a writ of certiorari, 577 U.S. 975 (2015). On remand, the district court largely reinstated petitioner's sentence, but reduced his term of imprisonment to 1917 years. Second Am. Judgment 3-4, 7. The court of appeals affirmed, 711 Fed. Appx. 605 (11th Cir. 2017) (per curiam), and this Court again denied certiorari, 138 S. Ct. 1548 (2018).

Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district

court denied. Pet. App. 8-50. The court of appeals affirmed. Id. at 1-6.

1. Over a two-month period in 2010, petitioner and various co-conspirators committed seven armed robberies at stores and restaurants in South Florida. Pet. App. 11-12. In each of the armed robberies, petitioner and one or two of his co-conspirators entered a store or restaurant while employees -- and sometimes customers -- were present, and then used weapons and threats to obtain money or other valuables. Ibid. Petitioner was himself armed in at least six of the seven robberies. Ibid.

During one robbery, of a beauty salon, petitioner temporarily split off from his two co-conspirators in order to rob a martial arts studio next door that was "filled with children." Pet. App. 12. In the studio, petitioner "pointed his gun at a man and forced him to the floor," stole a camera and multiple cell phones, and knocked over a 77-year old woman while another adult hid the children in a back room. Ibid. Petitioner then rejoined his two co-conspirators in the beauty salon, where they held one of the employees at gunpoint, stole money from the cash register and purses, and "fled while the children from the Tae Kwan Do studio screamed." Ibid.

2. After a jury trial, petitioner was convicted on three counts of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); six counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and seven counts of using, carrying, and

possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). First Am. Judgment 1-2.

Petitioner was initially sentenced to 1941 months imprisonment, to be followed by five years of supervised release. First Am. Judgment 3-4, 6. But after the en banc court of appeals found an error in a sentencing enhancement and remanded for resentencing, 785 F.3d 498 (11th Cir.), cert. denied, 577 U.S. 975 (2015), the district court reduced the term of imprisonment to 1917 months, Second Am. Judgment 3, and the court of appeals affirmed, 711 Fed. Appx. 605 (11th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 1548 (2018).

3. With the assistance of counsel, petitioner subsequently filed a motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255, alleging six different grounds for relief. 19-cv-21457 D. Ct. Doc. 1 (Apr. 16, 2019). One of the grounds alleged was that "[t]rial counsel rendered ineffective assistance and misadvised the defendant concerning the entry of a guilty plea." Id. at 9. Specifically, petitioner alleged that:

> Trial counsel failed to fully advise [petitioner] of the relative benefits and detriments of going to trial as opposed to entering a guilty plea, nor did counsel pursue or negotiate a plea on behalf of the defendant. Trial counsel did not discuss with the defendant the fact that his codefendants' entry of guilty pleas and cooperation with the government combined with jurisdiction stipulations meant that any of them could testify against him at trial (and ultimately did so), in order to gain favor with the government in their own cases, furnishing the government with significant proof that would likely sway the jury to find him culpable of the charged offenses; and that the overwhelmingly powerful corroboration

> of cell phone location data meant that the codefendants' testimony would be credited. Trial counsel did not discuss with the defendant the certainty of conviction under counsel's understanding of the charges, and that he would receive a life sentence based on the required stacking of § 924(c) penalties. Trial counsel was ineffective in failing to seek and negotiate a plea on the defendant's behalf, and in failing to adequately advise Davis to plead guilty, despite the near-certain conviction and dire sentencing consequences.

Id. at 9-10. Petitioner also requested an evidentiary hearing. Id. at 1.

The district court referred the motion to a magistrate judge, who recommended that it be denied. Pet. App. 51-90. The court then adopted and supplemented the magistrate's report and recommendation. Id. at 8-50. The court explained that petitioner was not entitled to relief or an evidentiary hearing on his claim that he had received ineffective assistance at the plea-bargaining stage because petitioner had not alleged facts sufficient to establish that "the Government offered a plea deal," nor had he alleged that he had "told his attorney that he was interested in pursuing a plea deal," nor, "significantly, that he would have accepted a plea offer had one been presented." Id. at 49; see id. at 43-50.

4. The court of appeals affirmed. It observed that, under Strickland v. Washington, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel must show that his attorney was deficient and that he was prejudiced by counsel's error. Pet. App. 4. It explained that, in the plea-bargaining context, prejudice requires a showing that a plea agreement would have been

presented to the court. Id. at 4-5 (citing Lafler v. Cooper, 566 U.S. 156 (2012)). And it determined that petitioner could not establish prejudice because his Section 2255 motion had not alleged that "that the government even offered a plea deal, nor * * * that he would have accepted one." Id. at 5-6. The court also determined that the district court did not abuse its discretion in declining to hold an evidentiary hearing, because a hearing is not required where "the allegations viewed against the record ... fail to state a claim for relief" Id. at 6 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals erred in affirming the district court's determination that the allegations in his Section 2255 motion were insufficient to establish a claim of ineffective assistance of counsel at the plea-bargaining stage. The court of appeals' unpublished decision is correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel must establish both that his counsel's performance was deficient and that he was prejudiced by it. Id. at 693-694. To prove prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

In Lafler v. Cooper, 566 U.S. 156, 164 (2012), this Court addressed "how to apply Strickland's prejudice test where ineffective assistance results in a rejection of [a] plea offer and the defendant is convicted at the ensuing trial." Id. at 163. The Court held that in such a circumstance, where "[h]aving to stand trial * * * is the prejudice alleged," the "defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 164.

In this case, the court of appeals correctly determined that petitioner's Section 2255 motion had not alleged sufficient facts to establish prejudice. Pet. App. 5-6. This case is one step removed from Lafler: while the prosecution there had actually offered a plea deal, petitioner has not even alleged that the government did so here. This Court has not held that a claim of ineffective assistance is cognizable in that context, and it would make little sense to require an even lesser showing of prejudice. Indeed, while petitioner alleged that his counsel should have better advised him of the risks of going to trial and that counsel should have sought to enter plea negotiations with the government,

he did not allege that the government offered a plea agreement, nor did he allege the terms of any such agreement, nor that he would have accepted such terms had they been offered. Pet. App. 49; see pp. 4-5, supra (quoting allegations). Petitioner thus failed to allege facts sufficient to establish that "but for the ineffective advice of counsel there is a reasonable probability that [a] plea offer would have been presented to the court." Lafler, 566 U.S. at 164.

Petitioner nonetheless contends (Pet. 9-10) that he alleged sufficient facts to show prejudice because he alleged that his co-defendants received plea agreements and "[t]here was no reason the government would not have been willing to extend to [p]etitioner the same benefits conferred on his co-defendants." But petitioner's Section 2255 motion referenced his co-defendant's plea agreements only in describing his counsel's allegedly deficient performance, asserting that defense counsel failed to "discuss with the defendant the fact that his codefendants' entry of guilty pleas * * * meant that any of them could testify against him at trial." 19-cv-21457 D. Ct. Doc. 1, at 10. That allegation was plainly insufficient to make up for petitioner's failure even to allege all of the steps necessary to show that a plea agreement "would have been presented to the court." Lafler, 566 U.S. at 164.*

* Before the court of appeals, petitioner also challenged the denial of an evidentiary hearing. See Pet. App. 5-6. Petitioner does not renew that challenge in this Court, see Pet.

2. Petitioner also errs in contending (Pet. 9-11) that the court of appeals' unpublished and nonprecedential decision conflicts with the decisions of the other circuits. Petitioner asserts (Pet. 9) that the court determined that a defendant can "never" establish prejudice without showing that the government actually offered a plea deal, while other circuits "appl[y] a case-by-case approach" that allows a defendant to show ineffective assistance of counsel even in the absence of a plea offer. But none of the cases that petitioner cites suggests that another circuit would have found ineffective assistance of counsel in a case like this one.

In Byrd v. Singer, 940 F.3d 248 (2019), cert. denied, 140 S. Ct. 2803 (2020), for example, the Sixth Circuit concluded that a defendant was denied effective assistance of counsel where his attorney did not seek to enter plea bargain negotiations with the prosecutor even though the "prosecutor testified unequivocally about the state's willingness to extend a plea offer to [the defendant]." Id. at 258. The court therefore found that the defendant had established that "a plea offer was available to him," and he "would have accepted the offer," id. at 259. No comparable facts were alleged, let alone proved, here. See Pet. App. 5-6.

6-12, and the court of appeals' fact-bound determination that the district court did not abuse its discretion in declining to hold an evidentiary hearing in the absence of factual allegations sufficient to show prejudice is correct and does not warrant this Court's review.

In United States v. Pender, 514 Fed. Appx. 359 (2013), itself an unpublished and non-precedential decision, the Fourth Circuit concluded that the defendant was entitled to an evidentiary hearing on his ineffective-assistance claim where the defendant alleged that his attorney failed to seek a plea bargain, and the government responded "that [he] was in fact offered a beneficial plea agreement but he turned it down." Id. at 360. Again, petitioner did not allege that the same or similar circumstances are present here. Pet. App. 5.

Finally, while petitioner contends that Hawkman v. Parratt, 661 F.2d 1161 (1981), demonstrates the Eighth Circuit's willingness to find ineffective assistance of counsel in the absence of a plea offer from the government, Hawkman was decided decades before Lafler. And in a post-Lafler case, the Eighth Circuit rejected a defendant's attempt to show ineffective assistance of counsel in circumstances where the government had not made "a formal plea offer." Ramirez v. United States, 751 F.3d 604, 606-608 (2014). Any internal disagreement between Hawkman and Ramirez should be resolved by the Eighth Circuit in the first instance. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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