No. 12-968

In the Supreme Court of the United States

DOMINGO URIBE, JR., WARDEN, *Petitioner,*

v.

KENNARD GERALD JOHNSON, *Respondent.*

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The district court found Johnson received ineffective assistance of counsel because trial counsel failed to adequately investigate and advise him during plea negotiations regarding sentence enhancements for serving prior prison terms. The court specifically found that Johnson was prejudiced by entering into a plea agreement wherein he received three years more than the lawful maximum sentence. The district court concluded that the appropriate remedy was to order the state court to resentence Johnson to no more than the lawful maximum sentence.

The Ninth Circuit reversed, stating it was "mere speculation" for the district court to conclude that Johnson would have entered the plea agreement if he had been properly advised. The Ninth Circuit concluded that the only remedy that would vindicate the constitutional violation "with certainty" was to allow Johnson to withdraw his plea and return to the point in the proceedings prior to the ineffective assistance.

The question presented for certiorari is whether *Lafler* v. *Cooper*, __ U.S. __, 132 S. Ct. 1376 (2012) and habeas corpus principles require certainty about the effect of a violation of the right to effective counsel during plea negotiations before granting relief less drastic than vacating the guilty plea.

Johnson argues this Court should deny certiorari because the issues presented in the petition were not raised below; the Ninth Circuit did not announce a certainty requirement for fashioning habeas relief; there is no need for further guidance from this Court on the fashioning of habeas remedies; the Ninth Circuit's remedy was materially different from that in *Burt* v. *Titlow*, 680 F.3d 577 (6th Cir.

2012), *cert. granted*, 133 S. Ct. 1457 (Feb. 25, 2013); and the Ninth Circuit's remedy does not implicate the competing state interests identified in *Lafler*.

A fair reading of the record shows that the issues of certainty and speculation in fashioning habeas remedies were argued below and formed the basis of the Ninth Circuit's decision. Johnson's case would serve as an excellent companion case to *Titlow* insofar as the remedy question. Johnson's case also implicates competing state interests, which the Ninth Circuit failed to consider as required under *Lafler*. Accordingly, Johnson's arguments should fail and certiorari should be granted.

While not "certain," it was surely reasonable for the district court to find that Johnson, having readily entered into a plea with a maximum sentence of 14 years and four months, would have accepted an offer exposing him to a lesser maximum sentence of 11 years and four months had the three invalid enhancements been discovered during the plea negotiations. Johnson's case presents a good opportunity for this Court to address the fairness of a remedy less than vacating the plea, as well as a good opportunity to refine the proper scope of discretion in fashioning post-*Lafler* habeas remedies for ineffective assistance of counsel at the plea negotiation stage.

ARGUMENT

A. The Issues Presented in the Petition Were Raised Below and Form the Basis of the Ninth Circuit's Decision

Johnson argues that certiorari should be denied because the issues of certainty and speculation were not raised by the state below. (Opp. at 17-20.) As discussed herein, the record refutes this contention.

These issues were first explored during the oral argument in the Ninth Circuit. When Judge Smith asked Johnson's counsel whether the ineffective assistance in this case was "in effect, a structural problem that requires us to send this back for a whole new trial or new plea negotiation," Johnson's counsel responded affirmatively. (Resp. App. at 9-10.) Judge Marbley later asked the state's counsel whether "it's more convenient just to resentence [Johnson] and not get into the area of speculation as to whether he would have done anything differently had he had facts and a competent lawyer[.]" (Resp. App. at 18.) The response was in part that, "it's our position an evidentiary hearing with factual findings is not speculation." (Resp. App. at 18.)

After the panel's ruling, in its petition for panel rehearing and rehearing en banc, the state argued as follows: "In rejecting the District Court's remedy as inadequate, this Court characterizes the District Court's credibility and factual findings – that Appellant would have still entered the *Vargas* waiver [1] with effective assistance of counsel – as "'mere speculation . . . .'" (Resp. App. at 33 (quoting

[1] *People* v. *Vargas*, 223 Cal. App. 3d 1107, 273 Cal. Rptr. 48 (Cal. Ct. App. 1990).

Ninth Circuit opinion).) As in oral argument, the state argued that "the District Court was not engaging in unfounded speculation," but rather "made informed findings of fact and credibility determinations based on the evidentiary hearing." (Resp. App. at 34.)

The state argued the issue explicitly in its petition for rehearing:

> Of great concern, this Court's published decision can be fairly read as dismissing any remedy short of plea withdrawal as "mere speculation" and inadequate for the violation of any defendant's right to effective assistance of counsel during the plea negotiation stage of the proceedings. [Citation.] However, in *Lafler*, the Supreme Court specifically approved of remedies such as that fashioned here by the District Court, "leav[ing] open to the trial court how best to exercise that discretion in all the circumstances of the case."

(Resp. App. at 39 (quoting *Lafler*, 132 S. Ct. at 1391).) Because the issues presented in the petition for writ of certiorari were raised below, they were not waived and constitute a proper subject for a grant of certiorari.[2] *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56, n.4 (2002); *Riggins* v. *Nevada*, 504 U.S. 127, 133 (1992).

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[2] In its motion for a stay of issuance of the mandate, the state indicated that the issue of "whether *Lafler* v. *Cooper* as well as *Missouri* v. *Fry* have altered the standards for overturning district court factual determinations and discretionary habeas remedies for Sixth Amendment violations" would be considered for a petition for writ of certiorari, again presenting the Court of Appeal with an issue subsumed within the question presented here. (Resp. App. at 20.)

Furthermore, the Ninth Circuit addressed the issues raised within the question presented in the petition. Reversing the district court's remedy, the Ninth Circuit reasoned that "the only remedy that places Johnson, with certainty, 'back in the position he would have been in if the Sixth Amendment violation never occurred,' [citation] – is to return Johnson to the pre-plea stage of the proceedings." (Pet. App. A at 33 (quoting *Chioino* v. *Kernan*, 581 F.3d 1182, 1184 (9th Cir. 2009)).) The court further stated, "Where, as here, it is mere speculation to assume that the plea negotiations would have progressed in a similar fashion with competent counsel, we cannot allow the defendant to be prejudiced by that uncertainty." (Pet. App. A at 34.)

This is significant because certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992). This rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.*; *see also Granfinanciera* v. *Nordberg*, 492 U.S. 33, 39 (1989) (Court will only consider grounds "'different from those on which the Court of Appeals rested its decision'... "in exceptional cases.'").

Johnson correctly notes that the state argued in the Ninth Circuit in reply to Judge Kleinfeld's comment about the district court not having the benefit of *Lafler,* that *Lafler* did not change anything in respect to the fashioning of habeas relief after an evidentiary hearing. (See Opp. at 18 (citing Resp. App. at 18).) However, the Ninth Circuit implicitly rejected this argument when it cited *Lafler* in support of its reversal of the district court's remedy. (See Pet. App. at 28-35.) The Ninth Circuit's application of *Lafler* in this case thus invokes the

question of whether principles guiding habeas relief *have* changed since the *Lafler* decision.

B. The Published Decision by the Ninth Circuit Can Be Fairly Read to Require Certainty When Fashioning Equitable Habeas Relief

Johnson argues that the Ninth Circuit's decision does not impose a certainty requirement in fashioning relief for ineffective assistance of counsel at the plea negotiation stage. (Opp. at 21-23.) But the Ninth Circuit specifically cited "certainty" in arriving at "[t]he appropriate remedy" in this case, and explained that it was rejecting the district court's remedy as "mere speculation" which prejudiced Johnson with "uncertainty." (Pet. App. at 33, 34.) Thus, the notion of certainty was essential to the Ninth Circuit's holding.

Because this new certainty principle was announced in a published decision, it now stands as binding authority in the Ninth Circuit. *See Levi Strauss & Company* v. *Abercrombie & Fitch Trading Company*, 633 F.3d 1158, 1167 (9th Cir. 2011); *Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam); *Hart* v. *Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001). Furthermore, this new standard is at odds with those of other circuits. *See, e.g., Pickens* v. *Howes*, 549 F.3d 377, 381-82 (6th Cir. 2008) ("when a sentence is modified to make it consistent with state law and to give the defendant the benefit of his original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea"); *United States* v. *Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) ("Withdrawal of the plea may be unnecessary when the agreed-on sentence exceeds the sentence authorized by law and

the government accepts a sentence reduced to the legal term, when the sentence can be reconciled with the plea agreement or otherwise corrected to give the defendant the benefit of the bargain, or when the defendant is willing to accept a legal sentence in place of the promised one").

C. The Ninth Circuit's Extrapolation of a Certainty Standard from *Lafler* Demonstrates the Need for Further Guidance from the Court on the Proper Scope of Discretion in Fashioning Habeas Relief

While acknowledging that *Lafler* left open the question of how discretion should be exercised for ineffective assistance of counsel at the plea negotiation stage, Johnson argues his case provides no opportunity to clarify the issue. (Opp. at 23.) The state disagrees.

By requiring "certainty" as an element of habeas relief for ineffective assistance of counsel at the plea negotiation stage, the Ninth Circuit effectively treats this situation as structural error. It is difficult to conceive how a cognizable claim of ineffective assistance of counsel during plea negotiations could *not* fall within the Ninth Circuit's certainty standard, since virtually all ineffective assistance at the plea negotiation stage of criminal proceedings consists of inadequate investigation or advice affecting the legitimacy of a plea decision. Thus, the Ninth Circuit's published decision is not limited to the particular facts of Johnson's case. (See Opp. at 24.)

Johnson also misinterprets the petition for writ of certiorari when he asserts that the state is requesting "a single 'one size fits all' solution to all habeas violations irrespective of the particular facts."

(See Opp. at 24.) To the contrary, the state is requesting a uniform *standard*, not a uniform solution, so as to prevent gross inequities in remedies for similarly situated habeas petitioners among the circuits. This Court's decision in *Lafler* implicitly recognized that, at some point, a need might arise to define the boundaries of discretion in fashioning habeas relief in these situations. The Ninth Circuit's extrapolation of an unworkable "certainty" standard from *Lafler* is compelling evidence that the time, and the need, have arrived.

D. Johnson's Case Is an Excellent Companion to *Burt* v. *Titlow* (No. 12-414)

Johnson argues that his case should not be considered in conjunction with *Burt* v. *Titlow* because the remedy imposed by the Ninth Circuit was "materially different" from that imposed by the Sixth Circuit in *Titlow*. (Opp. at 26-30 (italics and bold type omitted).)

But that is precisely why Johnson's case *would* make an excellent companion to *Titlow*. By addressing two instances of ineffective assistance of counsel at the plea negotiation stage – one where the defendant was prejudiced by accepting a plea offer and one where the defendant was prejudiced by rejecting a plea offer – this Court could provide broad guidance to the lower courts, which are charged with fashioning appropriate relief for every kind of variation on these claims. That *Titlow* presents additional issues does not detract from the remedy question common to both cases.

E. The Ninth Circuit Failed To Perform Its Duty of Balancing Competing State Interests Against Withdrawal of the Plea as Required Under *Lafler*

In *Lafler*, this Court held that Sixth Amendment remedies should be tailored to the particular injury suffered without unnecessarily infringing on competing state interests. *Lafler*, 132 S. Ct. at 1388. Here, vacating the plea unnecessarily infringes on competing state interests and grants him a windfall. Foremost, the state will now face the burdens of trying eight-year-old offenses if it does not offer a plea that Johnson will accept.[3] Given the difficulties of trying such an old case, Johnson will be elevated to a much stronger negotiating position than he previously enjoyed, rather than merely being returned to the time the ineffective assistance of counsel occurred.

Johnson received the benefit of his bargain and took advantage of the state's compassion to gain an immediate release and remain free from custody for more than a year, while the Ninth Circuit's remedy leaves the state with no benefits and a significant handicap in future negotiations. The Ninth Circuit has granted Johnson a windfall.

Notably, none of the arguments that Johnson posits in his opposition were addressed by the Ninth Circuit in its opinion. The court simply failed to perform its duty of balancing the competing state interests in arriving at a just and equitable remedy.

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[3] The petition erroneously states that the offenses are 13 years old. (Pet. at 12.) However, Johnson's crimes occurred approximately eight years ago in 2005. (Pet. App. E at 56.)

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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