Blogs
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The U.S. Supreme Court has recognized "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."

This is as true for defendants facing charges of robbery and extortion as for those charged with tax evasion, embezzlement, or securities fraud. Indeed, research has previously shown that nearly 97% of all federal convictions are secured through plea agreements—not jury verdicts.

Against this context, it is noteworthy that the Court recently declined to resolve a lingering circuit split involving the right of defendants to have their counsel seek such plea agreements. Specifically, the Court was asked to consider whether a defense attorney's failure to pursue a plea agreement on behalf of a client could constitute

ineffective assistance of counsel. The Sixth Amendment affords criminal defendants the right "to have the assistance of counsel" for their defense, which the Supreme Court has interpreted to mean *effective* counsel.

In *Davis v. United States*, Justices Ketanji Brown Jackson and Sonya Sotomayor took the rare step of issuing a written dissent of the Court's denial of certiorari. Both justices are former criminal law attorneys—Justice Jackson was once an assistant public defender in Washington, D.C., and Justice Sotomayor was an assistant district attorney in Manhattan. As a result of the Court's denial of certiorari, the ongoing circuit split means that an attorney's failure to pursue a plea agreement may constitute ineffective assistance of counsel in violation of the defendant's Constitutional rights, but only in certain states.

The defendant in *Davis* was convicted at trial for participating in a series of armed robberies in South Florida. While Davis's five codefendants all negotiated plea agreements and received sentences of less than 40 years in prison, Davis went to trial and was sentenced to nearly 160 years in prison. On appeal, Davis argued that his attorney's failure to pursue and negotiate a plea agreement with the government violated his Sixth Amendment rights to effective counsel.

Under the governing two-prong test set forth in *Strickland v. Washington*, defendants alleging ineffective assistance of counsel must show both that their counsel's performance was deficient (i.e., below an objective standard of reasonableness) *and* that they were prejudiced as a result. Davis argued he met this burden by establishing that counsel for all of his co-defendants negotiated favorable plea agreements, and that there was no reason the government would have acted any differently had his counsel had tried to reach an agreement, too. But the Eleventh Circuit Court of Appeals concluded that Davis failed to satisfy the prejudice prong because he did not sufficiently show that the outcome would have been different *but for* his counsel's deficient performance. In other words, Davis's claim failed because he did not show that the "government even offered a plea deal, nor … that he would have accepted one." That reasoning puts the Eleventh Circuit (and the like-minded Eighth Circuit) at odds with the Fourth and Sixth Circuits, which have not imposed the same "threshold requirement" that the government put a plea offer "on the table" before a defendant can show his counsel's failure to pursue it prejudiced him.

In a written dissent from the Court's declination to hear Davis's appeal, Justice Jackson acknowledged the "divergence of circuit opinions" and noted that it was "exceedingly likely that Davis would have prevailed" on his claim in other circuits. She observed that Davis established the "strong possibility" his counsel could have obtained a "favorable plea agreement" based on those his co-defendants obtained; and such an agreement could have lowered the resulting sentence from 160 to less than 40 years in prison. She and Justice Sotomayor would have granted the petition to resolve the split and address whether "having an actual plea offer is an indispensable prerequisite" to showing prejudice under the *Strickland* standard. The circuit split means that Davis and similarly-situated defendants could have a viable ineffective assistance claim in places like South Carolina in the Fourth Circuit and Tennessee in the Sixth Circuit, but not in Florida, which is located in the Eleventh Circuit. As a result, no uniform rule exists nationwide on whether defendants may still claim ineffective assistance of counsel based on their attorneys' failure to pursue plea agreements absent prosecutors initiating such discussions. While the circuit split continues, the breadth of defendants' Constitutional right to the effective assistance of counsel hangs in the balance.

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