No. 10-209

IN THE
SUPREME COURT OF THE UNITED STATES

Blaine Lafler,

Petitioner,

v.

Anthony Cooper,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case presents three questions, none of which are the subject of any disagreement in the federal courts of appeals.

1. Are the federal courts of appeals correct in uniformly holding that the determination of whether a state court decision contravenes clearly established federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA) turns on the actual reasoning used by the state court, not different reasoning advanced by the government on appeal in federal habeas proceedings?

2. Does a state court contravene clearly established federal law by holding that an attorney's grossly erroneous advice to his client to decline a favorable plea offer does not constitute ineffective assistance of counsel if the client makes his own decision to follow that advice?

3. Is an attorney's grossly erroneous advice to decline a plea offer, which directly results in the client receiving a significantly harsher sentence, immune from scrutiny under the Sixth Amendment right to counsel on the ground that the client later received a fair trial?

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Respondent Anthony Cooper respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The State offered respondent a favorable plea agreement that respondent would have accepted but for his lawyer's flatly incorrect advice that he could not, as a matter of law, be convicted of the principal charge against him. Respondent went to trial, where he was convicted and received a substantially longer sentence than the plea offer. The state courts rejected respondent's claim that he had received constitutionally inadequate assistance of counsel, reasoning that respondent had made his own choice to follow his lawyer's advice and reject the plea offer. The Sixth Circuit held that respondent was entitled to a writ of habeas corpus, holding that his attorney's advice to reject the plea based on objectively wrong legal analysis qualified as constitutionally ineffective assistance of counsel.

1. On the evening of March 25, 2003, Kali Mundy parked her car at an apartment complex in Detroit, Michigan. Pet. App. 25a. She exited the vehicle and began walking towards respondent, who pulled out a gun and began shooting. Pet. App. 2a. Ms. Mundy ran, but she was struck in the buttocks and thigh. *Id.* Officers promptly arrested respondent nearby. Pet. App. 2a-3a.

Ms. Mundy's injuries were serious, and her condition was at one point listed as life threatening. Pet. App. 2a. She required surgery and was not released from the hospital for nearly three weeks. *Id.*

2. The State of Michigan charged respondent with various crimes, including assault with intent to murder (AWIM). *See* Mich. Comp. Laws § 750.83.[1] The maximum sentence for AWIM is life in prison. *Id.* § 750.83.

At a pretrial conference on May 16, 2003, prosecutors offered respondent a plea agreement, but no specific sentence length was mentioned and the parties agreed to continue the discussions at a later date. Final Conf. Tr. 4, May 16, 2003. However, as respondent explained, all along he "was intending to enter into a plea . . . [b]ecause I was guilty." *Ginther* Hr'g Tr. 29.

When respondent met with his lawyer, Brian McClain, a few days before a July 17, 2003 pretrial hearing, McClain advised respondent that "they couldn't find [him] guilty of the charge because the woman was shot below the waist." *Ginther* Hr'g Tr. 31. On that basis, McClain advised respondent that prosecutors would reduce the charge to assault with intent to commit great bodily harm less than murder, *see id.* at 30, and would offer him a plea agreement of 18 to 84 months.[2] *Id.* McClain presented his mistaken view not as a prediction of what might happen at trial, but as a

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1 Respondent was also charged with possession of a firearm by a felon, Mich. Comp. Laws § 750.224f; possession of a firearm at the time of commission of a felony ("felony firearm"), *id.* § 750.227b; and possession of marijuana, *id.* § 333.7403(2)(d). The Brief in Opposition does not discuss those charges at length because they did not play a material role in the plea bargain process.

2 The plea terms discussed are the range for the minimum sentence.

certainty: McClain advised respondent that "the Prosecution does not have the evidence to try to [sic] this case." Pretrial Tr. 3, July 17, 2003.

It is undisputed that McClain's advice was objectively wrong: no injury at all is required for a conviction of AWIM. *See, e.g.*, *People v. Cochran*, 399 N.W.2d 44 (Mich. Ct. App. 1986) (affirming AWIM conviction where defendant fired one shot into the air). The elements of the offense are instead "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v. Brown*, 703 N.W.2d 230, 236 (Mich. Ct. App. 2005) (quoting *People v. Davis*, 549 N.W.2d 1, 4 (Mich. Ct. App. 1996)).

Relying on McClain's specific advice, respondent intended at his next court date to accept a plea agreement for 18 to 84 months. *Ginther* Hr'g Tr. 50-51. When the parties next met for the July 17 hearing, however, the State offered a plea agreement with a range of 51 to 85 months. *Id.* at 31. McClain stated several times at the hearing that AWIM could not be supported by the evidence, Pretrial Tr. 3, and said that the trial prosecutor, who had not yet been assigned, would "take a more serious look at this and give us a more reasonable offer." *Id.* Eventually, McClain explained that "[w]e're just rejecting the offer." *Id.* at 4, 5.

McClain remained convinced that respondent was innocent of AWIM as a matter of law. Accordingly, he believed that "the attorney who ha[d] [to] make the case for the Prosecution" would make a better plea offer before trial. Pretrial Tr. 3. McClain later conceded that – absent some change in

the evidence – he could not remember the State ever offering a more generous plea offer right before trial in any other case. *Ginther* Hr'g Tr. 18-19.

On the day of trial, July 23, 2003, the prosecutor offered a new plea agreement. It was worse: a range of 126 to 210 months. *Ginther* Hr'g Tr. 11. The record is silent regarding the rejection of this plea offer, but trial began. *Id.*

Prior to trial, McClain never discussed with respondent how to defend the case. As respondent explained, "[w]e never really got a chance to discuss a strategy," and indeed respondent "never knew [he] was going to trial until the trial started. So [they] didn't discuss that until the trial started." *Ginther* Hr'g Tr. 38.

At trial, the judge's instructions to the jury noted three elements required for an AWIM conviction: first, "that [respondent] tried to physically injure another person"; second, that when respondent committed the assault, he had or believed he had the ability to cause an injury; and third, that respondent intended to kill Mundy when he assaulted her. Jury Instructions Tr. 9. Respondent was found guilty of AWIM and the additional charges, Trial Tr. 253, and was sentenced to 185 to 360 months in prison. Sentencing Tr. 12.

3. Through new counsel, respondent moved in state court for a new trial on the ground that he had received ineffective assistance of counsel in

the plea process. At an evidentiary hearing before the trial court, McClain confirmed that he had told respondent "that the information in the medical report . . . did not support the charge of assault with intent to murder based on the nature of the injuries." *Ginther* Hr'g Tr. 6. McClain stated "[t]hat's the way I felt. That [it] could not be supported by the evidence." *Id.* at 15.

Although respondent urged the trial judge to focus on the erroneous advice McClain gave because "the defendant is suppose[d] to be educated about what's going on and be able to make an *informed* choice," *Ginther* Hr'g Tr. 58 (emphasis added), the trial judge instead rested his decision exclusively on the fact that respondent had chosen to go to trial. The judge recognized that "it's obvious that [respondent] and Mr. McClain didn't believe that the facts as presented . . . would support a finding of assault with the intent to murder. Both were convinced that that couldn't occur." *Id.* at 73. The judge further acknowledged that their beliefs "might have been based on the representations of Mr. McClain and on hindsight sometimes they would say, you know, that was an out there kind of claim." *Id.* at 74. But, he concluded, "I'm not going to find that there was ineffective assistance of counsel based on this record. [Respondent] made his own choices." *Id.* at 75.

4. On respondent's appeal, the Michigan Court of Appeals affirmed. It too rested its decision exclusively on the fact that respondent chose not to plead guilty, without regard to whether he made that choice based on his lawyer's erroneous advice. Pet. App. 45a. The court reasoned that "the

record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. The Michigan Supreme Court denied leave to appeal. Pet. App. 43a.

5. Respondent timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, arguing that the decision of the Michigan Court of Appeals "unreasonably applied clearly established federal precedent" in rejecting his claim of ineffective assistance of counsel by improperly focusing on "the legitimacy of [respondent]'s plea decision, [rather than] the validity of counsel's underlying advice." Petition for Writ of Habeas Corpus 18 (emphasis in original).

Before the district court, the State did not dispute that a lawyer's erroneous advice to his client to reject a plea agreement can amount to constitutionally ineffective assistance of counsel. Instead, it argued that on the facts of this particular case, the state courts correctly rejected respondent's claim on the basis that he alone made the "ultimate decision" to reject the plea offers. Resp. Answer in Opp'n to Pet. for Writ of Habeas Corpus 12. Alternatively, it argued that McClain's plea advice was not "objectively unreasonable," *id.* at 13, and that respondent had not proved "that he would have accepted a plea offer if advised differently by his counsel at the time," *id.* at 14.

The district court granted respondent relief, holding "the Michigan Court of Appeals decision unreasonably applied the standards set forth" by

this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), when it relied on respondent's decision to reject the plea, without taking into account that the decision was based on McClain's objectively unreasonable advice. Pet. App. 38a. The court found that McClain had provided constitutionally deficient advice by "rely[ing] on a misapprehension of the law and facts in advising [respondent] to reject the plea." Pet. App. 41a. Recognizing that the appropriate remedy was a matter of its discretion, the court conditionally granted the writ, requiring the State to offer respondent the initial agreement, with a sentencing range of 4-7 years, or release him. Pet. App. 42a.

6. The State appealed, raising for the first time the question presented by the petition for certiorari: whether respondent's Sixth Amendment rights had been violated in the plea negotiations, given that he assertedly later received a fair trial. Pet'r. C.A. Br. 5. The State argued in the alternative that the state courts' decisions were not contrary to clearly established Supreme Court precedent because a "specific performance" remedy for a plea offer was not clearly established. *Id.* at 12-13. Finally, the State characterized the state trial court as having implicitly held that McClain's advice was reasonable and that respondent had wanted to go to trial: "In stating that [respondent] knowingly and intelligently rejected two plea offers, the State appellate court was effectively saying that trial counsel was not

deficient in conveying the benefits of the plea and inferring" that respondent would not have accepted a plea agreement. *Id.* at 29.

The Sixth Circuit unanimously affirmed the district court's conditional grant of relief. Pet. App. 1a. It agreed that McClain "informed [respondent] of an incorrect legal rule . . . in advising [respondent] not to accept the state's plea offer," and that "such erroneous advice . . . is obviously deficient performance." Pet. App. 14a. It further agreed that McClain's erroneous advice prejudiced respondent, who "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 19a.

Accordingly, the Sixth Circuit found that the Michigan Court of Appeals had unreasonably applied this Court's precedent. It explained that the Michigan Court of Appeals had "failed to appreciate the nature of [respondent]'s claim. Rather than addressing [respondent]'s argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel." Pet. App. 10a. As a consequence, "[e]ven full deference under AEDPA cannot salvage the state court's decision." Pet. App. 11a.

Further, the court held that the remedy chosen by the district court was within its discretion because "[t]he absence of clearly established law by

the Supreme Court is not relevant when fashioning a habeas remedy," Pet. App. 20a, and because the State, "apparently content to leave the constitutional violation unremedied," offered no alternative, Pet. App. 22a.

REASONS FOR DENYING THE WRIT

This case does not warrant this Court's intervention. Not only did the Sixth Circuit correctly state the legal standards for granting habeas corpus relief, but there is also no conflict in the lower courts on any of the legal questions arguably presented by the petition. Further, on the facts of this case, the decision of the state courts was obviously contrary to this Court's precedents. The state courts rejected respondent's claim on the sole ground that he chose not to plead guilty. This Court's cases, by contrast, clearly establish that the relevant inquiry is whether the defendant acted on the basis of his attorney's erroneous advice.

Nor is there merit to petitioner's argument that even flatly incorrect advice from a lawyer that his client reject a favorable plea agreement can never amount to constitutionally ineffective assistance of counsel if the defendant is convicted at a fair trial. This Court's decisions establish that a criminal defendant has a right to accurate legal advice to make an informed plea decision. The plea process is a critical stage of the criminal proceedings; indeed, the overwhelming majority of criminal charges are resolved by plea. Accordingly, a defendant may be prejudiced in violation of his Sixth Amendment right to effective assistance of counsel if he rejects a plea deal on

the basis of his lawyer's erroneous advice and is later subjected to a harsher sentence.

Even if the questions presented by the petition otherwise warranted this Court's review, this case would be a poor vehicle for the resolution of those questions. The Court would more sensibly decide the scope of the Sixth Amendment right to counsel in a case not obscured by AEDPA's standard of review: either a state case on direct review or a federal criminal case. This case in particular is further complicated because the Michigan state court decisions are poorly articulated; because the state courts did not decide the case on the basis invoked by petitioner; because petitioner failures to acknowledge the actual basis on which the state courts ruled; and because petitioner only raised the argument on which it now relies for the first time in the court of appeals.

Accordingly, certiorari should be denied.

I. Certiorari Is Not Warranted To Review The Sixth Circuit's Application Of AEDPA.

The Sixth Circuit correctly applied the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132 (1996). That statute directs federal courts to evaluate the reasoning that the state court employed, which in this case petitioner conspicuously does not defend. There is no serious dispute that the state courts' decisions rejecting respondent's claim on the ground that respondent made the choice to plead guilty are contrary to this Court's clearly established precedents.

A. The Sixth Circuit Applied The Proper Standard Of Review Under AEDPA.

Petitioner does not contend that the Sixth Circuit identified or applied an incorrect legal standard under AEDPA, or that the lower courts are in conflict with respect to that question. AEDPA authorizes a federal court to grant a writ of habeas corpus if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). As the Sixth Circuit recognized, a state court decision is contrary to clearly established precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or if it "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." Pet. App. 9a-10a (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

In assessing whether a state court decision is contrary to clearly established federal law, a federal court considers the "grounds" the state court actually advances for its decision, *Williams*, 529 U.S. at 405, including specifically whether the state court "correctly identifies" the governing legal rule, *id.* at 407. The principles of federalism underlying AEDPA require that federal courts respect state courts' actual decisions and avoid imputing to them rationales that they did not employ. Thus, it is the state court's

decision, and not the arguments made by the state's lawyers in federal court, that are due deference under AEDPA.

The federal courts of appeals uniformly hold, consistent with the Sixth Circuit's judgment in this case, that no deference is due under AEDPA to alternative rationales that did not form the basis of the state court's decision. *See, e.g.*, *Revilla v. Gibson*, 283 F.3d 1203, 1220 n.14 (10th Cir.), *cert. denied*, 537 U.S. 1021 (2002); *Romine v. Head*, 253 F.3d 1349, 1365 (11th Cir. 2001); *Cooperwood v. Cambra*, 245 F.3d 1042, 1046 (9th Cir.), *cert. denied*, 534 U.S. 900 (2001); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. 2000), *cert. denied*, 534 U.S. 943 (2001).

In this case, the Sixth Circuit correctly reviewed and rejected the state court's rationale as contrary to this Court's clearly established precedents. *See infra* Section I(B). In rejecting the alternative rationale that the State's lawyers have advanced in federal court, but which the state court conspicuously did not adopt, the court of appeals was not required to employ AEDPA's deferential standard of review. *See infra* Section II. Because the Sixth Circuit correctly applied AEDPA's standard of review, there is no warrant for this Court's involvement.

B. The Sixth Circuit's Application Of AEDPA To The Michigan Court Of Appeals' Decision Was Correct And Unremarkable.

1. Petitioner errs in arguing that in this case the Sixth Circuit contravened AEDPA in granting respondent habeas relief because respondent was subsequently "convicted after a fair and reliable trial." Pet.

9. That assertion fails to account for the critical fact – which the State completely fails to acknowledge – that petitioner's proffered interpretation of the Sixth Amendment was not the basis of the Michigan Court of Appeals' decision and thus is due no deference under AEDPA. The state courts did not invoke the "fair trial" rationale now presented by the petition. The state trial court instead held that respondent's Sixth Amendment rights were not violated because he "made his own choices." Pet. App. 54a. The Michigan Court of Appeals in turn affirmed on the basis that respondent "knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. As the Sixth Circuit recognized, "[r]ather than addressing [respondent's] argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel."[3] Pet. App. 10a.

The actual holding of the Michigan Court of Appeals is contrary to this Court's clearly established precedents. The state court failed to apply the well-established standard for evaluating claims of ineffective assistance of counsel articulated by this Court in *Strickland v. Washington*, 466 U.S. 668

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[3] Petitioner incorrectly characterizes the decision of the Michigan Court of Appeals as a summary disposition, Pet. 8, attempting to impute to the state court's decision the "fair trial" rationale it now advances. Summary dispositions of the sort at issue in *Harrington v. Richter*, No. 09-587, are typically a single conclusory sentence: "Petition for writ of habeas corpus is DENIED." *See* Petition for Writ of Certiorari at 22a, *Harrington v. Richter*, No 09-587 (Nov. 9, 2009). In contrast, the decision of the Michigan Court of Appeals, although brief, provided an explicit statement of that court's rationale that respondent had made the decision to plead guilty. *See* Pet. App. 45a.

(1984), instead substituting a rule of its own making that as long as the defendant makes the ultimate choice, the quality of his lawyer's advice and its influence on that choice do not matter. In *Strickland*, this Court adopted a two-part test for determining whether the Sixth Amendment right to effective assistance of counsel has been violated: the defendant must demonstrate first that counsel's performance fell below an objective standard of reasonableness, and second that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 687. It was "past question" at the time of the state court trial in this case that the two-prong *Strickland* rule was clearly established federal law. *Williams*, 529 U.S. at 391; *see id.* at 413 ("*Strickland* undoubtedly qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States,' within the meaning of § 2254(d)(1)." (citation omitted)).

It was equally well-settled while this case was in the Michigan courts that "[t]he same two-part standard . . . [is] applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). This Court has "*long recognized* that the negotiation of a plea bargain . . . [implicates] the Sixth Amendment right to effective assistance of counsel," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added), including when the defendant makes the plea decision himself on the basis of counsel's advice, *Hill*, 474 U.S. at 59. An attorney's performance is

constitutionally deficient when he offers plea advice on the basis of an objectively incorrect understanding of straightforward law. *Padilla*, 130 S. Ct. at 1483-84; *see also id.* at 1492 (Alito, J., concurring) ("[A]ffirmative misadvice [during the plea bargaining process] may constitute ineffective assistance."). The defendant is prejudiced, and a Sixth Amendment violation established, when "counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Hill*, 474 U.S. at 59 (emphasis added).

This Court's decision in *Hill v. Lockhart* clearly establishes that an attorney's erroneous advice in the plea bargaining context may amount to constitutionally ineffective assistance of counsel, notwithstanding that the defendant makes his own choice on the basis of that advice about whether to go to trial. 474 U.S. at 57. The Court has long recognized that a plea decision "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Accordingly, the relevant question is not whether the defendant himself made a decision to accept or reject a plea, but instead "whether the plea represents a voluntary and intelligent choice among the alternative courses of action." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Where, as here, a defendant makes his plea decision on the basis of counsel's legally erroneous advice, and is subject to a higher sentence as a result, he is entitled to relief because "the voluntariness of the plea depends on whether counsel's

advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Indeed, this Court reaffirmed *Hill* as recently as last Term in *Padilla v. Kentucky*, holding that erroneous advice to accept a plea bargain – there, the advice that the agreement would not create adverse immigration consequences – can give rise to a Sixth Amendment violation. *Padilla*, 130 S. Ct. at 1483-84. Petitioner inexplicably fails to acknowledge the standard announced in *Hill* or to even cite this Court's decision in *Padilla*, on which the Sixth Circuit twice relied. *See* Pet. App. 12a, 14a.

2. There also is no merit to petitioner's passing contention that "[b]ecause this Court has not clearly established the appropriate *remedy*, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed." *See* Pet. 16 (emphasis added). Petitioner conflates the Sixth Amendment right with the remedy for its violation. Those are two separate issues.

The presence of clearly established law is pertinent only to a federal court's determination of *whether* to grant habeas relief, not to the *form* that relief takes. As the Sixth Circuit explained, "[t]he absence of clearly established law by the Supreme Court is not relevant when fashioning a habeas remedy." Pet. App. 20a. *Compare* 28 U.S.C. § 2254(d) (limiting federal courts' authority to grant a writ of habeas corpus to cases in which a

state court's decision runs against "clearly established Federal law"), *with* 28 U.S.C. § 2243 (providing that a federal court ordering a writ of habeas corpus "shall . . . dispose of the matter as law and justice require").[4] Petitioner's argument improperly conflates the clearly established law of *Strickland* with the remedy for that constitutional violation.

The wholly separate question of what *form* of remedy is appropriate when an attorney provides erroneous advice not to accept a plea bargain is not encompassed by the Question Presented. *See* Pet. i ("Is a state habeas petitioner *entitled to relief* where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?" (emphasis added)). Petitioner unsuccessfully raised the question of the remedy before the court of appeals, which noted that petitioner failed to "identify an alternative remedy that it would prefer, apparently content to leave the constitutional violation unremedied." Pet. App. 22a. The State then chose not to include the issue within the Question Presented.

The distinction between right and remedy also explains why there is no merit to petitioner's passing invocation, Pet. 10, of *Arave v. Hoffman*, 552

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[4] Nor is there any error in the Sixth Circuit's conclusion that the district court acted within its discretion in fashioning a remedy on these facts. Federal statutes and this Court's cases entrust lower courts with broad discretion in fashioning habeas remedies. 28 U.S.C. § 2243; *see Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (interpreting § 2243 "as vesting a federal court with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus" (quotation marks omitted)); *United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.").

U.S. 1008 (2007), *cert. dismissed*, 552 U.S. 117 (2008).[5] In *Arave*, the state's petition presented the question whether counsel's incorrect advice in plea negotiations must constitute "gross error" to establish constitutionally deficient performance. Petition for Writ of Certiorari at i, *Arave v. Hoffman*, No 07-110 (July 26, 2007). In other words, the State asked this Court to impose a higher standard for finding that counsel's performance was ineffective. This case does not present that issue. To be sure, in *Arave*, this Court also directed the parties to address the further question, "[w]hat, if any, *remedy* should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" 552 U.S. at 1008 (emphasis added). In this case, once again, that issue is not presented because petitioner no longer contests the remedy adopted by the district court. Because this case (unlike *Arave*) involves neither the question whether counsel's performance was deficient, which petitioner concedes, nor the question of the appropriate remedy when an attorney provides constitutionally inadequate advice to reject a plea agreement, certiorari should be denied.

II. An Attorney's Legally Erroneous Advice To Reject A Plea Offer Can Constitute Ineffective Assistance Of Counsel.

Petitioner misapprehends the scope of the Sixth Amendment in arguing that an attorney never provides constitutionally ineffective

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[5] After the Court granted certiorari, Hoffman filed a motion to vacate the Ninth Circuit's decision and dismiss the case because he had accepted a new plea offer that rendered his *Strickland* claim moot. This Court, in a per curiam opinion, granted Hoffman's motion and remanded the case to the Ninth Circuit. *Arave v. Hoffman*, 552 U.S. 117 (2008).

assistance of counsel by giving erroneous legal advice that leads his client to reject a favorable plea agreement, so long as the defendant is later convicted at a fair trial. The federal courts of appeals uniformly reject that view. There is accordingly no basis for this Court's intervention.

A. The Constitutional Violation That Arises From The Erroneous Advice Provided By Respondent's Lawyer Is Not Vitiated By The Subsequent Trial.

As discussed in Section I, *supra*, this Court has clearly established that a criminal defendant has a constitutional right to the effective assistance of counsel in determining whether to accept a plea bargain. According to petitioner, that right applies only when the attorney advises his client to accept a plea bargain, as in *Hill v. Lockhart*, 474 U.S. 52 (1985). By contrast, the lawyer's advice to turn down the plea, as in this case, would have no constitutional significance whatsoever.[6]

Petitioner's argument provides no basis for this asymmetry. *Hill* held, and later cases such as *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), confirm, that the right to counsel attaches at the plea bargain stage. *Hill* furthermore settles that the test for whether the defendant has been prejudiced is whether "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. There is no precedent for petitioner's position that the Constitution applies to the plea negotiation if

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6 Although petitioner leaves open the prospect that the defendant could state a claim when the conviction did not result from a "fair trial," the constitutional violation in such a case would be unrelated to the attorney's advice at the plea stage.

the attorney advises the client to accept a plea offer, but does not apply if the lawyer advises the client to reject the identical offer. If the Sixth Amendment were concerned only with the right to a fair trial, it is unclear why it would apply at all when a defendant *accepts* a plea based on legally erroneous advice.

Indeed, this Court's decisions have laid down a categorical rule that plea bargaining is a critical stage of the criminal process, *Santobello v. New York*, 404 U.S. 257, 260 (1971), to which the Sixth Amendment right to counsel attaches. *United States v. Wade*, 388 U.S. 218, 224 (1967). The pretrial decision about whether to plead guilty is perhaps the most consequential choice a defendant makes in a criminal prosecution. "[A]n 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." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion). Thus the Sixth Amendment right to effective assistance of counsel necessarily applies to the plea process, which is among "perhaps the most critical period[s] of the proceedings," regardless of whether counsel's ineffective performance leads the defendant to accept or instead reject a plea. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

Petitioner nevertheless argues that the prejudice requirements in this Court's Sixth Amendment jurisprudence "limit relief to circumstances where

counsel's deficient performance affected the fairness or existence of a trial." Pet. 3. That argument lacks merit. In *United States v. Gonzalez-Lopez*, this Court explained, "[i]t is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." 548 U.S. 140, 145 (2005). Because effective assistance of counsel cannot be meaningful unless it is extends beyond the narrow limits of the formal trial, *United States v. Ash*, 413 U.S. 300, 309-10 (1973), the right to effective assistance of counsel at pretrial proceedings cannot be discarded simply because a subsequent trial does not itself give rise to a further, independent violation of the defendant's constitutional rights.

Contrary to petitioner's submission, its position is not supported by this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *See* Pet. 12. In *Fretwell*, this Court determined that an attorney's failure to invoke a lower court ruling that was overturned soon thereafter did not give rise to a claim of ineffective assistance of counsel. *Id.* at 366. Reasoning that counsel's failure had only "deprived [Fretwell] of the chance to have the state court make an error in his favor," the Court found that counsel's performance had not prejudiced the defense. *Id.* at 371 (internal citation omitted).

Petitioner overreads this Court's observation in *Fretwell* that "mere outcome determination," 506 U.S. at 369, does not necessarily establish constitutional prejudice. In stark contrast to *Fretwell*, respondent does not

seek to take advantage of an error in the criminal justice system, and the State does not claim that its offer was a mistake or somehow illegal or illegitimate. Instead, respondent here would have been better off with no counsel at all during the plea bargaining process than he was with the dramatically ineffective counsel he received, because he would have pled guilty as he had always planned. Accordingly, he merely seeks to avoid the disadvantage his counsel caused him.

This Court rejected a similar attempt to extend the reasoning of *Fretwell* in *Williams v. Taylor*, 529 U.S. 362 (2000). The Court explained in *Williams* that although the facts of *Fretwell* "justif[ied] a departure from a straightforward application of *Strickland*" to prevent a windfall to the defendant, this departure was unwarranted in the ordinary instance in which the defendant had been deprived of a substantive or procedural right – here, a right to competent advice from his counsel during plea negotiations. 529 U.S. at 393. Accordingly, any "separate inquiry into fundamental fairness" would contravene clearly established Federal law, given that respondent "is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding," *id.* at 393. State law created a plea bargain process that functioned properly, with the sole exception that respondent's counsel provided grossly inadequate advice that caused him to turn down a favorable plea bargain.

B. The Circuits Uniformly Agree That Legally Erroneous Advice From Counsel To Reject A Favorable Plea Offer May Constitute A Violation Of The Sixth Amendment, Regardless Of Whether The Subsequent Trial Is "Fair."

Consistent with this Court's precedents, every circuit has recognized a Sixth Amendment claim when ineffective assistance of counsel leads a defendant to reject a plea offer, even if he is later convicted following a fair trial. *See, e.g.*, *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) (per curiam) (counsel's bad advice leading to rejection of plea offer "does not preclude an attack on Sixth Amendment grounds" even if defendant "still receives all the constitutional protections of trial"); *United States v. Gordon*, 156 F.3d 376, 380-81 (2d Cir. 1998) (per curiam) (counsel's grossly incorrect advice leading to rejection of a plea "satisfied the two prongs of *Strickland*"); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("subsequent fair trial does not remedy" earlier lack of effective counsel that led to rejection of favorable plea offer); *United States v. Brannon*, 48 Fed. Appx. 51, 53 (4th Cir. 2002) (per curiam) ("[e]rroneous advice during the plea negotiation process" constitutes Sixth Amendment violation); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981); *Turner v. Tennessee*, 940 F.2d 1000, 1001 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007); *Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001) (determining that it was "an objectively unreasonable application of *Strickland*'s prejudice prong" for the state court to "h[o]ld that [defendant] could not show that he had been prejudiced by any

inadequate advice at the plea bargaining stage because he ultimately received a fair trial"); *Hoffman v. Arave*, 455 F.3d 926, 942 (9th Cir. 2006), *cert. dismissed*, 552 U.S. 117 (2008) (finding prejudice where counsel's erroneous advice led to rejection of a plea and conviction after a fair trial); *Williams v. Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) (per curiam), *cert. denied*, 130 S.Ct. 3385 (2010) (same); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996); *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (per curiam) (Tatel, J.).[7]

Petitioner cites a single case as arguably suggesting that a defendant suffers no prejudice from the erroneous advice to reject a favorable plea bargain. *See* Pet. 17 (citing *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993)). In fact, the Seventh Circuit applies the same rule as every other court of appeals. In *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007), for instance, the defendant rejected a favorable plea offer on the basis of his counsel's legally erroneous advice regarding the maximum sentence allowable for his offense. Following a fair trial, the jury handed down a much

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[7] Many state courts have similarly found violations of criminal defendants' Sixth Amendment rights where counsel's deficient performance leads to the rejection of a favorable plea. *See, e.g.*, *In re McCready*, 996 P.2d 658 (Wash. Ct. App. 2000) (finding Sixth Amendment violation where counsel's misinformation caused defendant to reject a plea); *State v. Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997) (same); *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997) ("[I]t has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial."); *Williams v. State*, 605 A.2d 103 (Md. 1992) (same); *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) (en banc) ("[W]e conclude, in conformity with the decisions of the federal and state courts that have addressed the issue, that when a defendant" rejects a plea bargain due to ineffective assistance of counsel, "the defendant has been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment . . . even if defendant thereafter receives a fair trial.").

harsher sentence. Faced with convincing evidence that the defendant would have accepted the plea offer but for his attorney's unreasonably flawed advice and gross underestimation of the risk of going to trial, the Seventh Circuit found that Julian had satisfied both *Strickland* prongs and established a valid Sixth Amendment claim. *Id.* at 498. *See also Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991) (applying *Strickland* test where ineffective assistance of counsel led to rejection of plea offer), *cert. denied*, 505 U.S. 1223 (1992); *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998) (following *Toro*).

The Seventh Circuit's decision in *Springs*, by contrast, is inapposite. The court in that case merely held that a defendant cannot prove prejudice simply on the basis of having accepted a suboptimal plea deal following his attorney's failure to "loc[k] in" a better one, the terms of which the defendant refused to accept. 988 F.2d at 749. That narrow factual circumstance finds no parallel in the facts of this case. Respondent is not challenging his attorney's failure to force him to take a plea deal, but rather his attorney's legally erroneous advice to reject it.[8]

III. This Case Is A Poor Vehicle To Address The Issues Raised By Petitioner.

Even if certiorari were otherwise warranted to decide the questions presented, for a number of reasons this case would be a poor vehicle in which

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[8] Furthermore, the opinion in *Springs* relies on the same language from *Fretwell* invoked by petitioner and discussed above. 988 F.2d at 749. But subsequent to *Springs*, this Court rejected that expansive interpretation of *Fretwell*. *Williams v. Taylor*, 529 U.S. 362, 393 (2000).

to do so. First, this case is not well suited to exploring the degree of deference afforded to state court rulings under AEDPA. Petitioner does not defend – indeed, does not even *acknowledge* – the actual basis for the state courts' ruling. That decision was so obviously contrary to this Court's clearly established precedents that "[e]ven full deference under AEDPA cannot salvage the state court's decision." Pet. App. 11a. This Court should instead address the application of AEDPA to an attorney's erroneous advice to reject a plea bargain in a case in which the state court actually adopts the legal rule now proposed by the State's lawyers: that such a factual scenario cannot give rise to a claim under the Sixth Amendment so long as the defendant receives a fair trial.

Indeed, to reach the issue raised by petitioner, this Court could be forced to wade through murky interpretive questions regarding the state court decisions in applying AEDPA. The decision of the Michigan Court of Appeals was explicit, but extremely terse. For example, the Sixth Circuit explained that "it is highly unlikely that anything in either cursory ruling of the [state] trial court or the [state] appellate court could be construed as addressing the prejudice prong of petitioner's ineffective assistance claim." Pet. App. 19a n.4.

Second, this Court would be better served to address the Sixth Amendment question raised by the petition without the complication created by deciding the issue in a state case on federal habeas corpus. The fact that

the Sixth Circuit's application of AEDPA is also contested, *see* Section I, only further complicates review of the Sixth Amendment issue. Because of these complications, the proper vehicle to resolve the Sixth Amendment's application in this context would be a state case on direct review, as in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), last Term, or a federal criminal case.

Third, this Court recently resolved analogous Sixth Amendment issues in decisions that the lower courts have not yet had time to consider fully. Most important, this Court very recently held that an attorney's advice in plea negotiations is subject to the Sixth Amendment in *Padilla v. Kentucky*. The implications of this ruling should be permitted to percolate further before this Court intervenes to decide yet another case regarding the application of the Sixth Amendment to plea negotiations.

Fourth, the record in this case contains one material uncertainty. On the date of trial, the prosecution offered respondent a final plea bargain. That offer was declined. But the record does not explain the circumstances. This lack of clarity could complicate the Court's determination of whether respondent was prejudiced by counsel's unconstitutionally deficient advice.

Also, it would be unusual for this Court to address petitioner's "fair trial, so no prejudice" argument when the State did not make that argument in its answer to respondent's petition for habeas corpus. By failing to raise this argument in the first instance, the State waived it. The answer to the

habeas petition argued only that the performance of respondent's counsel was not deficient, and that respondent provided insufficient evidence that he would have pled guilty had his counsel properly advised him.

Finally, there remains some doubt as to whether respondent's trial was "fair and reliable" to begin with. Respondent argued during the state court proceedings that his trial counsel provided constitutionally ineffective representation during trial; this is unsurprising, given the established record of counsel's deficient performance leading up to the trial. Persisting in his mistaken belief that respondent could not be convicted on the AWIM charge, and that respondent would ultimately receive a better plea offer before the start of trial, counsel deemed it unnecessary to prepare a defense. *Ginther* Hr'g Tr. 38. This case thus presents an inappropriate vehicle for testing the proposition that a fair trial vitiates an earlier violation of the right to effective counsel: precisely because counsel's belief in the imminence of a better plea obviated the need to prepare for trial, the subsequent trial could not have been fair and could not have cured the Sixth Amendment violation during the earlier plea stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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