

Nos. 10-209 and 10-444

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**In the  
Supreme Court of the United States**

BLAINE LAFLER,  
*Petitioner,*

v.

ANTHONY COOPER,  
*Respondent.*

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STATE OF MISSOURI,  
*Petitioner,*

v.

GALIN EDWARD FRYE,  
*Respondent.*

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*On Writs of Certiorari to the United States Court of  
Appeals for the Sixth Circuit and to the Court of  
Appeals of Missouri (Western District)*

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**BRIEF OF THE AMERICAN BAR ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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## **QUESTIONS PRESENTED**

1. Where defense counsel's deficient performance causes the defendant to lose the benefit of a favorable plea agreement that the defendant would have accepted had he been competently advised, has the defendant been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment?
2. What remedy, if any, should be provided for ineffective assistance of counsel during plea negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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**INTEREST OF THE ABA AS *AMICUS CURIAE***<sup>1</sup>

Pursuant to Supreme Court Rule 37.3, the American Bar Association (“ABA”), as *amicus curiae*, respectfully submits this brief in support of Respondents. The ABA requests that the Court consider the consensus views embodied in the ABA ethical rules and criminal justice standards in deciding whether a criminal defendant is entitled to a remedy where his lawyer’s constitutionally deficient performance causes him to lose the benefit of a favorable plea proposal.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.<sup>2</sup>

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

<sup>2</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by “[p]romot[ing] competence, ethical conduct and professionalism.”<sup>3</sup> One of these efforts is the development and adoption of professional standards to serve as models for the regulation of lawyers by the individual states. Its first standards, the CANONS OF PROFESSIONAL ETHICS, were adopted in 1908, and have been continuously amended and updated over the years. They are now published as the ABA MODEL RULES OF PROFESSIONAL CONDUCT.<sup>4</sup>

Another of these efforts has been the development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and refined over the last forty years, the Standards represent a considered collection of “best practices” based on the consensus views of a broad array of professionals involved in the

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<sup>3</sup> ABA Mission and Association Goals, *available at* <http://www.abanet.org/about/goals.html>.

<sup>4</sup> The ABA MODEL RULES OF PROFESSIONAL CONDUCT are developed through the efforts of ABA members and national, state and local bar organizations, and are subjected to review by academicians, practicing lawyers and the judiciary. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates (HOD), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at [http://www.americanbar.org/groups/leadership/house\\_of\\_delegates.html](http://www.americanbar.org/groups/leadership/house_of_delegates.html).

criminal justice system.<sup>5</sup> The Standards do not purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as “valuable measures of the prevailing professional norms of effective representation.” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable.”). As relevant to the cases before the Court, the Standards require criminal defense counsel to promptly communicate any plea offer to the client, and to provide the full and accurate advice necessary to permit the client to make an informed decision regarding any plea offer. The Standards also provide that, on finding that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective assistance of counsel, the court should have broad discretion in fashioning a remedy that will place the defendant insofar as possible in the position he or

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<sup>5</sup> The ABA CRIMINAL JUSTICE STANDARDS are developed through the work of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. They, too, must be approved by vote of the ABA HOD before they become official ABA policy. A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at [http://www.americanbar.org/groups/criminal\\_justice/policy/standards.html](http://www.americanbar.org/groups/criminal_justice/policy/standards.html); *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated).

she would have been in had the constitutional violation not occurred.

### **SUMMARY OF ARGUMENT**

This Court has recognized that American Bar Association standards are valuable measures of prevailing professional norms of effective representation for purposes of the Sixth Amendment. A lawyer's duties under the ABA ethical standards include providing competent representation to a client and communicating with the client concerning matters of significance to the client. These duties are particularly important when a criminal defendant is considering entering into an agreement to plead guilty. As elaborated in the ABA criminal justice standards, the lawyer's duties at the plea stage include promptly informing the client of all significant plea proposals made by the prosecutor, and fully explaining the choices available to the client after conducting an investigation and analysis of all pertinent issues of fact and law. When defense counsel fails to convey a plea offer to the client, or gives the client considering a guilty plea materially inaccurate advice about the charges and the burden of proof, defense counsel's performance falls below the established standard of reasonableness.

Where the accused has been denied the effective assistance of counsel because of deficient representation in the plea process, a subsequent fair trial does not remedy the initial constitutional error. In those rare cases where a defendant loses the benefit of an advantageous plea because of constitutionally ineffective counsel, the court should have discretion to fashion a remedy that will place the defendant insofar

as possible in the position he or she would have been in had the right to effective assistance not been violated. The fact that nearly 95% of criminal convictions now result from guilty pleas makes it all the more important that defendants considering a guilty plea should have competent counsel. In some cases, the circumstances will dictate that the appropriate remedy for a constitutional violation is to vacate the conviction and allow the government to re-prosecute the case. In this event, the government may choose to reopen plea negotiations. In other cases, including where re-prosecution is not feasible, the appropriate remedy may be to afford the defendant the benefit of the offer lost through constitutionally deficient counsel.

## **ARGUMENT**

### **I. PLEA NEGOTIATIONS ARE A CRITICAL STAGE OF THE CRIMINAL PROCESS IN WHICH A DEFENDANT MUST HAVE COMPETENT COUNSEL.**

#### **A. ABA Standards Emphasize the Importance of Competent Counsel at the Plea Stage.**

A lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations, is recognized in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("Model Rules" or "R.") and elaborated in the ABA STANDARDS FOR CRIMINAL JUSTICE. Under the Model Rules – and as this Court has long recognized, *see, e.g., Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) – the decision to plead guilty is considered so vital that it is specifically identified as one of the very few that cannot be made by the lawyer

alone. *See* R. 1.2(a) (a lawyer “must abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify”); *see also* R. 1.4(a)(1) (a lawyer must “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these rules”);<sup>6</sup> R 1.4(b) (a lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions”); *accord* Standard 4-5.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993) (hereinafter “Defense Function Standards”)<sup>7</sup> (the decision whether to plead and what plea agreement to accept are “ultimately for the accused . . . after full consultation with counsel.”)<sup>8</sup> Model Rule 1.2(a) and Defense Function Standard 4-5.2(a) give effect to an accused individual’s right to make decisions regarding matters that are “fundamental” or “substantive” because they are highly personal and derive from constitutional guarantees. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (decisions about fundamental

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<sup>6</sup> The first example in the commentary to Rule 1.4 of this duty to inform the client is that “a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance.” R. 1.4, cmt. 2.

<sup>7</sup> Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, only the Defense Function Standards are discussed in this brief.

<sup>8</sup> The commentary to Defense Function Standard 4-5.2 explains that “because of the fundamental nature of decisions such as these, so crucial to the accused’s fate, the accused must make the decisions himself or herself.”

matters, including decision to plead guilty, are reserved for the defendant).

Defense counsel's failure to communicate a plea offer, and to fully and accurately explain the choices facing the client at this critical stage of the case, effectively deprives the client of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. *See* Standard 14-3.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d. ed. 1999) (hereinafter "Pleas of Guilty Standards") (defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney"); *see also* Defense Function Standard 4-6.2(b) (counsel should "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor").<sup>9</sup> The ABA Criminal Justice Standards have contained

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<sup>9</sup> The commentary to Defense Function Standard 4-6.2 explains that:

Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide on prosecution proposals, even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.

Defense Function Standard 4-6.2(b) cmt.

these requirements for more than thirty years,<sup>10</sup> and they have been cited by numerous courts both before and after *Strickland* as establishing the norm of effective representation in the guilty plea context.<sup>11</sup>

ABA standards also require that a lawyer must fully explain and advise about the choices available to the client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent

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<sup>10</sup> See Standard 4-6.2(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION (2d ed. 1979); see also Standards 14-3.2(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (2d ed. 1979). The ethical duty to convey and advise about a plea offer was also contained in the 1969 MODEL CODE OF PROFESSIONAL RESPONSIBILITY that antedated the Model Rules. See, e.g., Ethical Consideration 7-7 (“A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken”); see also *State v. James*, 739 P.2d 1161, 1166-67 (Wash. Ct. App. 1987); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984).

<sup>11</sup> See, e.g., *Davie v. State*, 675 S.E.2d 416, 420 (S.C. 2009); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006); *People v. Perry*, 68 P.3d 472, 477 (Colo. Ct. App. 2002); *State v. Donald*, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); *Cottle v. State*, 733 So. 2d 963, 964-65 (Fla. 1999); *Becton v. Hun*, 516 S.E.2d 762, 766 (W. Va. 1999); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. Sup. Ct. 1987); *Lloyd v. State*, 373 S.E.2d 1, 2-3 (Ga. 1988); *James*, 739 P.2d at 1166-67; *Johnson v. Duckworth*, 793 F.2d 898, 901-902 (7th Cir. 1986); *Hanzelka*, 682 S.W.2d at 387; *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); *People v. Ferguson*, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); *Lyles v. State*, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978).

issues of fact and law. Pleas of Guilty Standard 14-3.2(b) provides that “to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision.” The commentary to this Standard explains that “[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant’s guilty plea is truly knowing and voluntary and is entered in his or her best interests.” *See also* commentary to Defense Function Standard 4-6.1(b) (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial.”). The commentary to Pleas of Guilty Standard 14-3.2 contrasts defense counsel’s advisory role with that of the court:

Although the court must inquire into the defendant’s understanding of the possible consequences at the time the plea is received . . . , this inquiry is not, of course, any substitute for advice by counsel. The court’s warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for

example, the probability of conviction in the event of trial.

Pleas of Guilty Standard 14-3.2 cmt. The Pleas of Guilty Standards also caution the court not to accept a plea “where it appears the defendant has not had the effective assistance of counsel.” See Pleas of Guilty Standard 14-1.4(d).<sup>12</sup> All of the Standards discussed above were in effect and reflected well-established norms many years before the defense attorneys’ actions in these cases. Compare *Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009) (per curiam).<sup>13</sup>

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<sup>12</sup> The commentary to Pleas of Guilty Standard 14-1.4 notes that a similar provision was contained in the UNIFORM RULES OF CRIMINAL PROCEDURE, promulgated in 1987. See UNIF. R. CRIM. P. 444(b)(2) (1987) (a court “may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.”).

<sup>13</sup> In *Bobby*, in considering whether counsel’s performance fell “below an objective standard of reasonableness” in light of “prevailing professional norms,” the Court distinguished the detailed 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (“2003 ABA Guidelines”), promulgated in 2003 long after the defendant’s trial, from the more general ABA standard in effect in 1985. See 130 S. Ct. at 17 (quoting from the ABA STANDARDS FOR THE DEFENSE FUNCTION (2d ed. 1979)). The Court criticized the court of appeals for interpreting the 2003 ABA Guidelines as “inexorable commands,” as opposed to “‘only guides’ to what reasonableness means,” *id.*, and reserved the possibility that it might “accept the legitimacy” of a less detailed set of guidelines that did not “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Id.* at 17 n.1. As argued *infra*, the specific ways in which counsel’s performance in these

**B. This Court’s Recent Sixth Amendment Jurisprudence Recognizes the Importance of Competent Counsel at the Plea Stage.**

This Court has “long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” *Padilla*, 130 S. Ct. at 1482, *citing Hill v. Lockhart*, 474 U.S. 52, 57 (1985), and *McMann v. Richardson*, 397 U.S. 759, 770–771 (1970). Until recently, however, a criminal defendant was protected in the plea negotiation process only against threats, misrepresentations, and bribes;<sup>14</sup> broken promises;<sup>15</sup> and a failure to disclose the “direct” or court-imposed consequences of conviction.<sup>16</sup> Counsel was expected to do no more than provide competent advice about the rights a defendant was forgoing by entering a guilty plea.<sup>17</sup> In *Padilla*, this Court

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two cases is claimed to have fallen short of an objective standard of reasonableness can in no way be described as “tactical decisions.” *See infra*, Part II.A.

<sup>14</sup> *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing with approval *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d on confession of error on other grounds*, 356 U.S. 26 (1958)).

<sup>15</sup> *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

<sup>16</sup> *Brady*, 397 U.S. at 755.

<sup>17</sup> *McMann*, 397 U.S. at 769-71; *see also Libretti v. United States*, 516 U.S. 29, 50-51 (1995) (“Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea

recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle. In holding that a lawyer should have affirmatively advised his client about the deportation consequences of pleading guilty, the *Padilla* Court noted that plea negotiation has become the predominant way of resolving criminal cases. 130 S. Ct. at 1485 n.13 (noting that nearly 95% of criminal convictions result from pleas).<sup>18</sup> The overwhelming reliance on disposition by plea in today's justice system has made it essential that defendants considering a guilty plea should not be "left to the 'mercies of incompetent

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would forgo."); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 29 CAL. L. REV. \_\_ (forthcoming), University of Pennsylvania Public Law and Legal Theory Research Paper Series 40, available at <http://ssrn.com/abstract=1694111> ("Plea bargaining, [the Court] assumed, was sufficiently protected by the option of going to trial and by plea colloquies that explained the trial procedures defendants were waiving.").

<sup>18</sup> More recent studies confirm the 2003 data cited by the Court in *Padilla*. See Bureau of Justice Statistics Bulletin, May 2010, NCJ 228944 (reporting that in 2006, in state courts in the nation's 75 largest counties, 68% of felony defendants were eventually convicted, and 95% of those convictions were by a guilty plea); see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) ("only a small fraction of . . . cases actually proceed to trial," noting the 5% figure provided in the Brief for Law Professors as *Amici Curiae* 7-8); Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 30 ST. LOUIS PUB. L. REV. \_\_ (2011) (forthcoming, available from the ABA) (plea bargaining is "no longer a negligible exception to the norm of trials; it is the norm").

counsel.” *Id.* at 1486, *quoting McMann*, 397 U.S. at 771.<sup>19</sup>

At the same time, this Court has been understandably reluctant to second-guess strategic decisions made by counsel in the plea bargaining process. In *Premo v. Moore*, 131 S. Ct. 733, 741 (2011), the Court observed that plea agreements are “the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.” Thus, the Court concluded that the substantive standard for reviewing counsel’s strategic choices must be whether there was “manifest deficiency in light of information then available to counsel.” *Id.*

In the cases presently before the Court, however, the claimed deficiency in counsel’s performance did not involve a strategic choice that turned out badly for the client. Rather, as discussed in the following section, the failure to convey a plea offer and the provision of plainly erroneous advice about the charges and standard of proof, like *Padilla*’s failure to warn about deportation consequences, fell below “an objective

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<sup>19</sup> Professor Ronald Wright has concluded, based on a study of plea and conviction statistics across the second half of the twentieth century, that federal defendants who would otherwise have been acquitted at trial have increasingly pleaded guilty instead. He attributes this in substantial part to increased prosecutorial power, and prosecutors’ ability to threaten large penalties for going to trial and to promise large rewards for pleading guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005).

standard of reasonableness” under “prevailing professional norms.” *Strickland*, 466 U.S. at 688.

**II. WHERE DEFENSE COUNSEL’S FAILURE TO CONVEY A PLEA OFFER OR ERRONEOUS ADVICE ABOUT LEGAL STANDARDS CAUSES THE CLIENT TO LOSE THE BENEFIT OF A FAVORABLE PLEA, COUNSEL’S PERFORMANCE SHOULD BE DEEMED CONSTITUTIONALLY DEFICIENT.**

**A. A Lawyer is Required Under Applicable Professional Norms to Communicate With the Client About a Plea Proposal, and to Advise the Client Competently Respecting the Proposal.**

A lawyer’s professional obligation to represent a client competently and diligently, and to communicate with the client about significant developments in the case, has been part of the American Bar Association’s ethical canons for over a century.<sup>20</sup> These ethical

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<sup>20</sup> See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), EC 7-4 through 7-7; ABA CANONS OF PROFESSIONAL ETHICS, Canon 8 (1908). As relevant here, Canon 8 provided:

A lawyer should endeavor to obtain full knowledge of his client’s cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever

duties, which form the basis for rules governing the professional conduct of lawyers in almost every state, have a particular relevance in the context of plea discussions. As discussed in Part I, these rules, together with the ABA CRIMINAL JUSTICE STANDARDS, require that a lawyer communicate with the client about plea offers and advise the client candidly and competently in order to enable the client to make an informed decision respecting the plea. *See also* Defense Function Standard 4-4.1(a) (defense counsel is obligated to investigate “facts relevant to the merits of the case and the penalty in the event of conviction”); Defense Function Standard 4-5.1(a) (“After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.”).

In the instant cases, the findings of the lower courts respecting defense counsel’s performance amply demonstrate deficient performance when measured against the standards of professional competence discussed above. In No. 10-444, counsel was found to have failed completely to communicate to his client an evidently advantageous plea offer, contrary to ABA Model Rules 1.2(a) and 1.4(b), and Defense Function Standards 4-5.2(a) and 4-6.2(b). In No. 10-209, defense counsel was found to have failed to provide his client considering a guilty plea offer with accurate advice about the elements of the charges and the burden of proof, in violation of ABA Model Rules 1.1 and 1.4(b), Defense Function Standards 4-4.1(a), 4-5.1(a) and 4-

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the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

6.1(b), and Pleas of Guilty Standard 14-3.2(b). These deficiencies were not related to strategic choices by counsel, but were failures to comply with clearly stated and generally accepted objective standards of professional competence. *Cf. Premo*, 131 S. Ct. at 741. That is, these are not cases in which the deficiencies in counsel's action can be defended as a tactical decision or where deference should otherwise have been accorded to counsel's judgment. *See Strickland*, 466 U.S. at 689.

**B. Where Deficient Performance Causes a Defendant to Lose the Benefit of a Favorable Plea Proposal, the Defendant Has Been Prejudiced, and Thus Deprived of the Effective Assistance of Counsel to Which the Sixth Amendment Entitles Him.**

**1. The prejudice analysis in *Hill v. Lockhart* is inapposite where a defendant does not take a plea offer because of deficient counsel.**

Prejudice is established for purposes of the Sixth Amendment where there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 691; *accord Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Petitioners and the United States as *amicus curiae* in support of Petitioners have argued that the formulation of the prejudice standard in *Hill* altered the *Strickland* test whenever ineffective assistance is alleged during the plea process, so that a defendant must show that but for his counsel’s deficient performance he “would have pleaded not guilty and insisted on going to trial.” *See Hill*, 474

U.S. at 59. By this reasoning, a defendant who rejects a plea offer and goes to trial can never meet the constitutional test of ineffective assistance regarding anything that occurred during the negotiation stage. Nor, presumably, can a defendant who subsequently accepts a less favorable plea offer, since he too will be unable to show that, but for his counsel's default, he "would have pleaded not guilty." *See id.*

Rather than *Hill* changing *Strickland*'s prejudice standard, however, the language on which Petitioners rely ("would have . . . insisted on going to trial") simply spells out what the defendant in *that* case needed to show to establish prejudice in the plea process, since he had in fact accepted a plea offer and therefore had given up his right to go to trial. The prejudice test in *Hill*, a case involving counsel's failure to warn about parole eligibility, "focuse[d] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*; *see also Padilla*, 130 S. Ct at 1485 ("to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L. J. 693, 712-719 (2011) (arguing that *Padilla* marks a rejection of a trial-outcome test of prejudice for ineffective assistance in the plea process).

These cases are distinguishable from *Premo v. Moore, supra*, where this Court noted the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt "if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and

advice leading to the plea took place.” 131 S. Ct. at 741. In *Premo*, the Court concluded that counsel’s failure to seek suppression of the defendant’s confession before discussing a plea could reasonably be considered a “strategic” choice that courts should be reluctant to second-guess. *Id.* at 743. By contrast, a complete failure to convey an advantageous plea offer (No. 10-444) and plainly erroneous advice about the standard for proving guilt (No. 10-209) do not involve any “facts and circumstances not apparent to a competent attorney,” and could not conceivably be considered part of a reasonable defense strategy.

**2. The fact that respondents were ultimately convicted and sentenced pursuant to constitutionally adequate procedures does not nullify the prejudice that infected the earlier plea stage.**

If Sixth Amendment prejudice can be established only where a defendant does not go to trial, then a defendant who goes to trial (or who accepts a less favorable plea offer) would be foreclosed from claiming ineffective assistance at an earlier stage of the case. But a constitutional violation in the pre-trial stages of a criminal case is not shielded from review simply because the trial portion of the case proceeds without additional error. For example, this Court held in *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1977), that ineffective assistance of counsel in relation to pre-trial investigation and in failing to file a motion to suppress evidence can itself require relief, even if the resulting trial is otherwise basically fair and counsel’s performance is otherwise unobjectionable. This Court has recently reaffirmed the principle that even though

the purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial, “it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.” *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011). If the defendant’s Sixth Amendment rights are violated, “[n]o additional showing of prejudice is required to make the violation ‘complete.’” *Id.*

In the present cases, the courts below found that if respondents had been properly advised of the existence and import of the plea offers, they would have accepted them, so that the further “constitutionally adequate” proceedings would not have occurred. While a finding of prejudice in this context does not settle the question of appropriate remedy,<sup>21</sup> deficient representation at the plea stage is not vitiated simply because later proceedings in the case were free from additional taint.

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<sup>21</sup> The Solicitor General argues in support of Petitioners that “the absence of any coherent remedy for a forgone plea confirms that respondent suffered no Sixth Amendment prejudice.” See Brief for the United States as *Amicus Curiae* at 24, 32. But this odd inversion of the equitable principle “*ubi jus ibi remedium*” takes no account of the many courts that have over the years found a way to fashion remedies for constitutional violations at the pretrial stages of a case. See, e.g., David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011), and cases cited *infra* at p. 24. The fact that this exercise is sometimes difficult and the result usually imperfect, as the Missouri court in 10-444 acknowledged, *Frye v. State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), should not be a reason for abandoning the effort altogether, much less for concluding, as the Solicitor General recommends, that there has been no violation at all. The Missouri court specifically rejected a similar argument, noting that “[w]e do not believe the determination of prejudice can be bootstrapped in this fashion.” *Id.*

**III. A POST-CONVICTION COURT SHOULD HAVE BROAD DISCRETION TO FASHION A REMEDY WHERE A DEFENDANT LOSES THE BENEFIT OF AN ADVANTAGEOUS PLEA BECAUSE OF CONSTITUTIONALLY INEFFECTIVE COUNSEL.**

Longstanding ABA policy provides that where a court determines in post-conviction proceedings that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective counsel, the court should have broad discretion to fashion a remedy. *See* Standard 22-2.1 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES (2d ed. 1978) (hereinafter “Post-Conviction Remedies Standards”) (“[a] post-conviction proceeding should be sufficiently broad to provide relief [for meritorious claims] that the conviction was obtained or sentence imposed in violation of the Constitution”). Post-Conviction Remedies Standard 22-4.7(a)(ii) identifies the kinds of relief a post-conviction court should be able to order when it finds error “in the trial or pretrial stages of the process leading to conviction,” noting that “the kind of affirmative relief ordered will vary with the nature of the meritorious contention.” Post-Conviction Remedies Standard 22-4.7(a)(ii) specifies that if further prosecution is foreclosed, “the order of the court should provide for immediate discharge from custody.” *Id.* If there is no bar to further prosecution,

the order of the court should provide for discharge from custody within a stated period of time unless, within that time, the state takes the necessary steps to commit the applicant to

custody pending reindictment, arraignment, retrial, or resentencing, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required.

*Id.* Under these Standards, a defendant who has been harmed by constitutionally deficient counsel in pre-trial proceedings should be placed insofar as possible in the position he or she would have been in had the constitutional violation not occurred. *See also* Pleas of Guilty Standard 14-2.1(b)(i)(A) (a defendant denied effective assistance of counsel at the plea stage should be permitted to withdraw a plea even after a criminal sentence has been imposed).

Consistent with this Court's general instruction that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 449 U.S. 361, 364 (1981), the courts have fashioned a variety of remedies where a defendant has been prejudiced by counsel's deficient performance by counsel at the plea negotiation stage. In some cases where a constitutional violation caused the defendant to forego a favorable plea offer, the court has vacated the conviction and given the government an opportunity to re-prosecute the case. *See Perez, supra*, 120 YALE L.J. at 1554-60. In other cases, particularly where re-prosecution is impracticable or inappropriate, the court has declined to vacate the conviction and ordered a remedy sometimes styled as "specific performance" of the lost plea deal. *Id.* at 1548-50. The court in No. 10-444 appears to have elected the first approach, while the court in No. 10-209 chose the second. Each court appears to have fashioned a remedy reasonably calculated to place the

defendant insofar as possible in the position he would have been in had the right to effective assistance not been violated.

The key to the question of remedy in cases where a defendant has lost the benefit of a favorable plea offer because of counsel's deficient performance, the ABA suggests, is to recognize that the purpose of plea negotiations is for "the defense and prosecution to reach agreements that . . . satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486. The prevalence of plea bargaining in today's justice system guarantees that almost every criminal prosecution is susceptible to more than one mutually acceptable outcome. Similarly, the role of the post-conviction court in fashioning a remedy for constitutional violations in the plea process should be to approximate a just outcome in light of present circumstances. This may include consideration of a plea agreement that was on the table (but not communicated or adequately explained to the defendant) or modifications that were reasonably probable through further negotiation. Where a court concludes that it is impracticable for the government to retry the case, a remedy may be one that approximates the probable outcome had there been no constitutional violation.

The remedy should be one reasonably calculated to leave the defendant no worse off – but not necessarily better off – than he would have been had counsel performed effectively in the first place. Since the State bears responsibility under the Sixth and Fourteenth Amendments for ensuring that each defendant enjoys effective assistance of counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980), any prejudice to the State from undoing a constitutional harm of this kind is

simply an inevitable cost, once the constitutional harm is identified, of compliance with the Constitution that should be given little weight.

Petitioner in No. 10-209 contends that providing a remedy for Sixth Amendment violations resulting in the loss of an advantageous plea “allows a defendant to play with house money.” Brief for Petitioner Lafler at 20. This colorful but cynical description of how a defendant can “take his chances at a fair trial” and still “demand and receive the benefit of the forgone plea,” would require that defense lawyers collude with their clients to “game the system,” and assumes that courts cannot detect and punish any such unethical conduct if it should occur. Petitioner in No. 10-444 similarly warns that affirming the state court’s judgment will encourage lawyers to engage in unethical conduct: *e.g.*, “a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial.” Brief for Petitioner State of Missouri at 36.

This Court should reject Petitioners’ invitation to base a constitutional rule on an assumption that members of the Bar will choose to violate their own ethical responsibilities and their states’ rules of professional conduct. In doing so, counsel would first impose on the judicial system, their clients and themselves the increased costs and risks of going to trial, following which they would either have to commit perjury at the post-conviction hearing – if one were granted, which it seldom is – or confess at such a hearing to conduct that would warrant the imposition

of professional discipline.<sup>22</sup> See Model Rules, R. 1.4(a)(1); R. 3.3(a) (a lawyer “shall not knowingly . . . make a false statement of fact or law to a tribunal”).

Further, a court considering whether counsel had performed to the required standard would weigh the testimony of those involved as it would weigh the testimony of any witness. And the court would consider the interest that any or all of them have in the outcome of such proceedings. See, e.g., *United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992). Several federal circuits have long conducted such proceedings. See, e.g., *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996), cert. denied, 521 U.S. 1118 (1997); *Day*, 969 F.2d at 47; *Blaylock*, 20 F.3d at 1468-69; *Turner v. Tennessee*, 858 F.2d 1201, 1208 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989). In addition, prosecutors can minimize the opportunity for unethical “gaming” of the system by placing a plea offer on the record in the presence of the defendant.<sup>23</sup>

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<sup>22</sup> The ABA suggests that Petitioners’ position should be equally offensive if, instead, it were asserted that prosecutors would routinely lie in responding to post-conviction petitions of this kind by denying that a particular plea offer had been extended, when in fact it had.

<sup>23</sup> Such a procedure would also give the court an opportunity to inquire whether counsel has explained to the client the consequences of taking or not taking the plea offer. See, e.g., *Rivera-Longoria v. Slayton*, 242 P.3d 171, 174 (Ariz. Ct. App. 2010) (holding that under ARIZ. R. CRIM. P. 15.8 the prosecutor must place on the record a plea offer 30 days prior to withdrawing it). The *Rivera-Longoria* court explained that Rule 15.8 was enacted in response to the holding in *Donald*, 10 P.3d at 1205 (finding ineffective assistance based on counsel’s failure to convey plea offer), and is “designed to protect a defendant’s constitutional

Finally, the concern to “protect[] the finality of convictions,” *Padilla*, 130 S. Ct. at 1485, whether obtained through a guilty plea, as in 10-444, or through a jury verdict, as in 10-209, is significant. However, whether constitutionally deficient lawyering has resulted in a plea that is accepted, as in *Hill* and *Padilla*, or is undelivered or rejected, as in these cases, “[s]urmounting *Strickland*’s high bar is never an easy task.” *Id.* The concern that some frivolous or fraudulent motions may be filed must be balanced against the lack of remedy for violations of a defendant’s constitutional right to effective assistance of counsel.

For these reasons, the Court should reject any suggestion that a defendant is entitled to no relief for constitutionally ineffective assistance of counsel that results in loss of an advantageous plea offer. Further, the question of remedy should be left to the discretion of post-conviction courts to fashion relief that is reasonably calculated to place the defendant insofar as

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right to effective assistance of counsel when considering a plea offer. . . [by ensuring that] if a plea offer is extended, the defendant will have all material information to make an informed decision.” *Id.*; see also ARIZ. R. CRIM. P. 15.8 cmt. (stating that Rule 15.8 is designed “to enable the defendant to make an informed decision on the plea offer with the effective assistance of counsel”); see also Standard 19-2.3(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) (“court [should] ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction,” a “requirement [that] may be satisfied by confirming on the record that defense counsel’s duty of advisement under Standard 14-3.2(f) has been discharged”).

possible in the position he or she would have been in had the constitutional violation not occurred.

### CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the judgment of the court below should be affirmed in each of these cases.

Respectfully submitted,

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