No. 12-414

In the
# Supreme Court of the United States

SHERRY L. BURT, WARDEN
*Petitioner*,
*v.*
VONLEE NICOLE TITLOW,
*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENT

NANCY HOPPOCK
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 998-6612

DANIEL MERON
*Counsel of Record*
LORI ALVINO MCGILL
STEPHANIE N. GRACE
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
Daniel.Meron@lw.com
(202) 637-2218

*Counsel for Amicus Curiae*

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STATUTES AND RULES

## INTEREST OF AMICUS CURIAE

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to aid this Court's decision by describing what evidence courts have actually required in order to find prejudice in instances where a defendant has received ineffective assistance of counsel during the plea bargaining process. In addition to surveying how courts have traditionally made prejudice determinations in this context, this brief also evaluates the constitutional and practical concerns that would arise if the "objective evidence" test for prejudice proposed by Petitioner State of Michigan ("State") were adopted by this Court.[1]

## SUMMARY OF ARGUMENT

Just two Terms ago, this Court recognized a fundamental Sixth Amendment right to counsel during

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

plea bargain negotiations, even where a plea agreement is not reached and the defendant is subsequently convicted in a fair trial. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399 (2012). This Court held that defendants claiming ineffective assistance may obtain relief if they can make the showing required by *Strickland v. Washington*, 466 U.S. 668 (1984): first, that counsel's performance fell below an objective standard of reasonableness and second, that this deficiency had a reasonable probability of affecting the outcome of his case. Applied to the plea-bargain context, *Strickland*'s prejudice prong requires a defendant to show a "reasonable probability" that, but for counsel's ineffectiveness, "the plea offer would have been [accepted and] presented to the court . . ., that the court would have accepted its terms, and that the conviction or sentence . . . would have been less severe than . . . the judgment and sentence that in fact were imposed." *Lafler*, 132 S. Ct. at 1385. The Court did not suggest that anything more was required.

Despite *Lafler*'s clarity on this point, the State urges this Court to adopt a far more stringent standard—one that would require a defendant to come up with some quantum of unspecified "objective evidence" that he would have accepted a plea—and would consequently forbid the trial judge from concluding that relief is warranted in the absence of such evidence. Under the State's theory, absent this "objective evidence," a defendant who testifies credibly that he would have accepted the plea, where the sentence offered was less than the sentence the defendant received after trial, is categorically ineligible for a remedy for the violation of his or her Sixth

Amendment rights. *See* Petr. Br. 39–45. But the State's position is made up out of whole cloth—and, once unraveled, is supported by neither *Lafler*, nor *Strickland*, nor the very court of appeals decisions the State relies on for support.

A survey of existing jurisprudence reveals that in reality, the circuit courts have, without exception, looked to all of the circumstances surrounding a rejected plea offer, without limiting themselves to a particular type of evidence in determining whether there is a "reasonable probability" of prejudice. And with good reason: The "reasonable probability" test articulated by *Strickland* is not a particularly stringent one. In many cases, once a petitioner establishes that his counsel's performance during the plea bargain process was constitutionally deficient, the record itself makes plain that, but for the misadvice of counsel, the defendant would have accepted the plea. Yet under the State's position, courts faced with both a defendant's credible testimony that he would have taken the plea and a significant disparity between the sentence offered and the sentence imposed would now be prohibited from making the commonsense finding that the defendant was prejudiced. Such a radical departure from precedent would do nothing but restrict the discretion normally afforded to trial courts to engage in such fact-specific inquiries and, in the end, force courts to over-punish defendants who would otherwise be entitled to relief under *Lafler*.

For these reasons, the Court should adhere to its recent ruling in *Lafler* and allow trial courts to continue to employ their traditional and well-grounded discretion to review the facts of a particular case, hear the evidence, make credibility determinations, and

ultimately decide whether or not there is a "reasonable probability" that a particular defendant would have accepted a plea based upon the totality of the factual circumstances. No additional "objective evidence" test should be required.

## ARGUMENT

### I. THE STATE'S POSITION IS FORECLOSED BY THIS COURT'S PRECEDENT

The State argues that "self-serving, post-trial litigation assertions [that a defendant would have taken a plea] are insufficient," as a matter of law, to show prejudice. Petr. Br. 4. It urges this Court to superimpose a so-called "objective evidence" standard requiring a defendant who was deprived of his constitutional right to effective assistance of counsel to adduce some additional "evidence" beyond his credible testimony to prove that he would have accepted the plea. *See id.* But neither the Constitution nor this Court have ever required a defendant to adduce a particular type of evidence to establish prejudice, and there is no basis in law or policy for this Court to adopt the State's proposed additional requirement.

As a threshold matter, the State's argument is foreclosed by *Lafler*, which applied the *Strickland v. Washington* test, without additional varnish, to a Sixth Amendment violation at the plea bargain phase. That test has been applied by the courts in ineffective assistance cases for almost four decades and does not contain an "objective evidence" requirement. Under *Strickland*, a defendant need only show "that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result in the proceeding

would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). As the Court has repeatedly explained, a "reasonable probability" standard is less demanding than a preponderance standard. *See id.* at 693; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Yet by requiring a defendant to produce "objective evidence," the State's position arbitrarily requires more. Under the State's theory, a trial judge could be convinced beyond a reasonable doubt that, under the facts of the case, the defendant would have taken the plea. Yet he would be powerless to grant relief unless that finding was made on a record that included some specific type of evidence. There is no basis in *Strickland* or *Lafler* or otherwise for heightening a defendant's burden to show prejudice merely because the constitutional violation occurred during the plea bargain stage.

Instead, the determination of prejudice requires a holistic inquiry based on the totality of the factual circumstances as to whether a "reasonable probability" of prejudice has been shown on the record. This approach is not only sound as a matter of Supreme Court precedent, but is the approach that has, in practice, been used by every circuit court to decide the issue, regardless of whether they speak of requiring "objective evidence."

## II. THE STATE'S POSITION IS CONTRADICTED BY CIRCUIT COURT PRECEDENT AS WELL

### A. There Is No Meaningful Circuit Split Because Every Circuit In Practice Employs A "Totality Of The Circumstances" Test

In lieu of supporting its proffered "objective evidence" argument with precedent or reason, the State offers a conclusory string-cite of circuit cases that it claims require "objective evidence." Petr. Br. 41. But not one of those cases stands for the proposition the State urges: Even the circuits that invoke an "objective evidence" requirement have found that requirement met where the circumstances themselves reflect a likelihood of prejudice. Not one circuit has adopted the proposed one-size-fits-all requirement that a defendant must adduce "objective evidence" beyond the defendant's credible testimony (coupled with an actual disparity between the sentence offered and that received) or suffer automatic denial of his claim, regardless of the nomenclature used.

The State argues that the Second, Seventh, Eighth, Tenth and Eleventh Circuits "have all held . . . that a defendant's post-conviction statement that he would have accepted a plea offer is *not* sufficient to show *Strickland* prejudice, and that some objective evidence of the defendant's intent is required." Petr. Br. 41 (emphasis in original). Not so.

In *United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998), for example, the Second Circuit held that a defendant's post-conviction statement concerning his intentions *did* suffice to show prejudice—at least

where that statement was coupled with a significant disparity between defendant's actual maximum sentencing exposure and the sentencing exposure represented by his attorney. *See id.* at 381 ("[S]uch a disparity provides sufficient objective evidence—when combined with a petitioner's statement concerning his intentions—to support a finding of prejudice under *Strickland*."). Indeed, the United States essentially concedes as much in its amicus brief. U.S. Br. 19–20 (explaining *Gordon* found that "'a great disparity between the actual maximum sentencing exposure represented by defendant's attorney' was 'sufficient objective evidence to establish prejudice'" under the facts of the case).

The Second Circuit has since found, under *Gordon*, that "a great disparity between the actual sentence and the sentence that effective counsel would have secured for the defendant [in a plea deal] provides sufficient objective evidence . . . to support a finding of prejudice under *Strickland*." *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000) (internal brackets omitted); *see also Raysor v. United States*, 647 F.3d 491, 495–96 (2d Cir. 2011) (same). Of course, both *Lafler* and common sense dictate that a sentencing disparity must be present to show prejudice: if the defendant is ultimately given the same sentence as that offered under the plea, it would be logically impossible to show the outcome would have been any different had he pled guilty, at least in cases where the conviction under the plea was the same as the judgment at trial. Thus, in essence, the Second Circuit is not really requiring any "objective evidence" at all.

Resolving any doubt on this score, the Second Circuit has since clarified that "*Gordon* is a simple

recognition that in most circumstances a convicted felon's self-serving testimony is not likely to be credible," not a *per se* rule that "objective evidence" is required in every case. *Purdy v. Zeldes*, 337 F.3d 253, 259 (2d Cir. 2003). As such, a mere lack of a corroboration "does not relieve habeas courts of their responsibility to actually make a credibility finding in each case, even absent objective evidence." *Id.* The Second Circuit's rule could not be clearer: prejudice turns on whether, under the totality of the circumstances, the defendant's testimony that he would have accepted a plea offer for a lesser sentence is to be believed. It emphatically does not require any "objective evidence" before prejudice can be found.

Nor has the Seventh Circuit required "objective evidence" as a rule. The State's reliance on *Paters v. United States*, 159 F.3d 1043 (7th Cir. 1998), and *Toro v. Fairman*, 940 F.2d 1065 (7th Cir. 1991), for the proposition that "objective evidence" is a mandatory requirement for prejudice claims is misplaced. Petr. Br. 41. To be sure, those cases use the phrase "objective evidence." But the Seventh Circuit plainly has not established a rule that credible testimony is insufficient in all cases. As that court stated in *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007), *Paters* and *Toro* "merely comment on the insufficiency of solitary pieces of evidence" specific to those cases. *Id.* at 499.

In *Julian* itself, the court found the defendant had shown prejudice based on his post-conviction testimony that he would have taken a 23-year plea had he been properly advised the maximum possible term was 60, not 30, years. *Id.* at 498–99. As the court explained, "[i]t [would be] hard to imagine . . . [in such circumstances] that any reasonable defendant would be

willing to risk thirty-seven years for the remote chance of acquittal." *Id.* at 499. In so finding, the Seventh Circuit made no mention of an "objective evidence" requirement. *See id.*

Nor has the Eleventh Circuit adopted the State's proposed test. *Diaz v. United States*, 930 F.2d 832 (11th Cir. 1991), cited by the State, is entirely inapposite. Petr. Br. 41. In that case, the defendant claimed his attorney erred in advising him that a 5-year plea offer was "bullshit." *Diaz*, 930 F.2d at 834. As to prejudice, however, the defendant failed to even "*allege* that but for his attorney's errors, he would have accepted the plea offer." *Id.* at 835. Accordingly, *Diaz* stands only for the unremarkable proposition that a defendant who has presented *no* evidence of his intent to plea—subjective, objective or otherwise—cannot show prejudice. *Id.* It does not come close to establishing a *per se* rule that "objective evidence" beyond credible testimony is required.

The unpublished Eighth and Tenth Circuit cases offered by the State equally miss the mark. The State claims the Eighth Circuit has adopted the objective evidence test. *See* Petr. Br. 41. It has not. *Moses v. United States*, 175 F.3d 1025 (8th Cir. 1999) (per curiam) (unpublished), simply does not stand for the proposition the State asserts. In that case, the Eighth Circuit stated only that a defendant "must present some non-conclusory, credible evidence" and that a defendant's allegations need not be credited where they are "contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.*; *see also Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003). Critically, however, the Eighth Circuit has never said that a defendant's own

testimony can never suffice to show prejudice even where that testimony is found credible. To the contrary, the Eighth Circuit has explained only that a lack of corroborating evidence may make it less likely that the trial court will find the defendant credible in the first instance. *See United States v. Luke*, 686 F.3d 600, 606 (8th Cir. 2012) (finding the "district court did not clearly err in finding [defendant] not credible" in part because there were "[n]o emails, letters, or any other communication documents" to corroborate his testimony).

Nor has the Tenth Circuit ever required "objective evidence" as the State claims. The State relies on *Bachicha v. Shanks*, 66 F.3d 338 (10th Cir. 1995) (unpublished), *reported in full at* 1995 WL 539467 (10th Cir. Aug. 31, 1995).[2] But in that case, the defendant's testimony was supported by his sister's testimony. Nonetheless, the Court ruled that the district court "heard the testimony and observed the witnesses firsthand" and, therefore, his conclusion that the "petitioner failed to provide objective evidence" was not clear error. *Id.* at *2. In context, then, it is evident that the Tenth Circuit was not adopting a requirement for all cases for all time that objective evidence is required before a court can find prejudice, but rather

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[2] The State's two other Tenth Circuit citations offer even less support. Neither *Maldonado v. Archuleta*, 61 F. App'x 524 (10th Cir. 2003) (unpublished), nor *United States v. Morris*, 106 F. App'x 656 (10th Cir. 2004) (unpublished), even use the phrase "objective evidence," much less announce a rule that such evidence is required in every case, regardless of the credibility of the defendant. Moreover, both of those cases arose in situations where the defendant claimed ineffective assistance in accepting a plea bargain, not, as here, where the defendant claimed ineffective assistance in rejecting one. *See id.*

found that the defendant's sister in that particular case was not credible.

The State's mischaracterization of these decisions is very troubling. A plain reading of the cases in the lower courts makes obvious that there is simply no circuit conflict on this issue. Although in many instances a defendant's uncorroborated, self-serving statement is unlikely to be believed without some additional evidence (which may consist of a significant disparity in sentence), this does not mean that circuit courts have instituted some rigid, threshold requirement that "objective evidence" of prejudice must be produced before a court is permitted to grant relief. Instead, each and every circuit[3] employs a

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[3] The First, Third, Fourth, Fifth and Ninth Circuits have not adopted the purported "objective evidence" test. Although some circuits have expressly declined to rule on the issue while others have remained silent, all circuits, in practice, undertake a holistic, totality of the circumstances test. *See, e.g.*, *Tse v. United States*, 290 F.3d 462, 464 (1st Cir. 2002) (declining to rule on whether "objective evidence" is required because district court did not make final determination as to prejudice); *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992) (acknowledging that the Seventh Circuit claims to use an "objective evidence" test but declining to rule on the issue because on remand the defendant could provide evidence from his lawyer to confirm prejudice); *Merzbacher v. Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013) (acknowledging that the Seventh Circuit claims to use an "objective evidence" test, but declining to rule on the issue because defendant was not credible); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (not acknowledging "objective evidence" test and finding defendant provided sufficient basis to find prejudice where he stated that he "would have obviously taken the offer into serious consideration," even though he did not "unequivocally state that he would have accepted the plea"); *Nunes v. Mueller*, 350 F.3d 1045, 1055 n.6 (9th Cir. 2003) (noting that a "universal requirement of corroboration is in substantial tension with *Strickland*," but refusing to decide the

*Strickland*-based inquiry grounded in the facts of the case to determine whether the defendant's statements that he would have taken the plea are credible and whether the facts as a whole establish a "reasonable probability" of prejudice. Under this universal approach, a defendant is deemed to have demonstrated a "reasonable probability" he would have taken the plea where: (1) counsel's conduct is truly egregious in misadvising or failing to advise the defendant about the plea deal, (2) the sentencing disparity is significant, and (3) the defendant credibly testifies that he would have accepted the plea had he been properly advised. This list is not exhaustive, but rather illustrative of the fact that there is no basis for requiring evidence of a particular type.

### B. Even The Isolated Cases That Have Used The "Objective Evidence" Terminology Have Construed It So Broadly As To Render It Meaningless And Confusing

Importantly, even those courts that have used the phrase "objective evidence" have, much like the State, failed to define it in a meaningful way. Instead, these courts generally define the requirement in the negative—i.e., that a defendant's self-serving testimony is not enough—without explaining, affirmatively, what is required by "objective evidence." *See, e.g.*, *Toro*, 940 F.2d at 1068. Rather than state a general rule, these courts have taken a case-by-case approach, either cherry picking examples of "objective evidence" based on the specific facts of the case

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issue because in that case, the defendant "*did* present objective corroborative evidence" (emphasis in original)).

immediately before it or stating in a conclusory manner that no objective evidence exists. Without any guiding principle, the courts have found satisfactory a wide variety of such "evidence," without ever defining what such a requirement really means.

To give just a few examples, courts have found a defendant satisfies his burden to produce "objective evidence" through (1) testimony from counsel that he believes his client would have taken the plea, *see, e.g.*, *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992); *Illinois v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997), (2) testimony from the prosecutor that the deal had been offered, *see, e.g.*, *Paters v. United States*, 159 F.3d 1043, 1047 n.6 (7th Cir. 1998), (3) testimony from co-defendants that the defendant had a generally compliant personality, and so probably would have followed counsel's advice if he had been advised to plead, *see, e.g.*, *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *vacated as moot by* 552 U.S. 117 (2008), (4) evidence that the attorney had "good control" of his client, *see, e.g.*, *In re Alvernaz*, 830 P.2d 747, 757 (Cal. 1992), (5) evidence that the defendant generally followed counsel's advice on other issues, such as whether to testify at trial, *see, e.g.*, *Williams v. Maryland*, 605 A.2d 103, 110 (Md. Ct. App. 1992), (6) the defendant's admission of some level of guilt, *see, e.g.*, *Wolford v. United States*, 722 F. Supp. 2d 664, 691 (E.D. Va. 2010), (7) affidavits from parents or friends that the defendant was seriously considering the deal, *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 795 (S.D. Cal. 1993), (8) a pro se letter from the defendant proposing a plea, *see, e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012), (9) the defendant's counteroffer to a plea offer, *Turner v. Tennessee*, 858 F.2d 1201, 1206

(1988), *vacated on other grounds*, 492 U.S. 902 (1989), (10) the active pursuit of a plea until the day before trial, *see, e.g.*, *Carmichael v. Colorado*, 206 P.3d 800, 807 (Colo. 2009) (en banc), (11) the defendant's participation in multiple settlement conferences, *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 795 (S.D. Cal. 1993), (12) "[t]he potential strength of the state's case," *see, e.g.*, *Ostrander v. Green*, 46 F.3d 347, 356 (4th Cir. 1995), (13) the fact that the defendant had only a "legal" defense to present at trial that would merely reduce the offense if successful, *see, e.g.*, *Wanatee v. Ault*, 101 F. Supp. 2d 1189, 1206 (N.D. Iowa 2000), (14) the fact that the attorney misconduct is of the type that would normally affect a defendant's decision to plead, *see, e.g.*, *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007), (15) the disparity between the actual maximum sentence and the maximum sentence represented by counsel, *see, e.g.*, *United States v. Hernandez*, 450 F. Supp. 2d 950, 978 (N.D. Iowa 2006), (16) a significant disparity between the sentence offered in the plea and the sentence received, *Mask v. McGinnis*, 233 F.3d 132, 142–43 (2d Cir. 2000), and, perhaps most relevant here, (17) evidence that the defendant had previously pled guilty in the same case, which "suggests that he was willing to forego his day in court, at least before he was [misadvised]," *see, e.g.*, *Lewandowski v. Makel*, 949 F.2d 884, 890 (6th Cir. 1990).

The only common thread among these pieces of so-called "objective evidence" is that they all, at bottom, simply reflect a trial court's judgment that the defendant has demonstrated a "reasonable probability" that he would have taken the plea. Thus, although some courts have indeed used the term "objective evidence," they use that term to refer merely to the

wide array of information, facts, testimony and evidence—from testimony from family members to the actual entry of a guilty plea—that might affect a court's evaluation of the factual circumstances as a whole. As such, the "objective evidence" label favored by some judges is not only unnecessary, but confusing.

Given the uncertain meaning of the "objective evidence" requirement, it is unsurprising that courts have been wildly inconsistent in what they require under this "standard." In *Mask*, for example, the Second Circuit found that a significant disparity between the sentence offered and the sentence received constituted "objective evidence" that the defendant would have accepted the plea had he been properly advised. 233 F.3d at 141. In *Paters*, however, the Seventh Circuit held just the opposite, instructing lower courts to "focus[] exclusively on the objective evidence standard and disregard[] the degree of disparity between the . . . proposed plea agreement and . . . actual sentence." 159 F.3d at 1046. Similarly, while some courts have held that a family member's testimony that the defendant would have taken a plea can constitute "objective evidence," *see, e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790, 794 (S.D. Cal. 1993), other courts have squarely held that it cannot, *see, e.g.*, *Broadwater v. United States*, Nos. 204CV307+, 2005 WL 1712261, at *10 (N.D. Ind. July 21, 2005); *Slevin v. United States*, 71 F. Supp. 2d 348, 362 (S.D.N.Y. 1999). In light of this confusion, this Court would do best to eliminate this arbitrary and meaningless label, and instead require all courts to evaluate evidence of all types—including the defendant's own statements and the disparity between the sentence offered and received—to determine whether there is a reasonable

probability that the defendant would have accepted the plea.

## III. ADOPTING THE STATE'S POSITION WOULD LEAD TO UNJUST RESULTS

In addition to lack of jurisprudential or constitutional grounding, an inflexible rule forbidding a trial court from finding prejudice absent "objective evidence" of the type the State would require would raise grave fairness concerns. Specifically, superimposing the "objective evidence" test on the prejudice requirement deprives a trial judge of the discretion to grant relief to a person who received constitutionally inadequate advice and credibly testifies that he relied on that advice to his detriment. Such a rule would lead to several categories of problematic outcomes.

As an initial matter, there are many cases of egregious attorney misconduct where it would be incredibly unjust to require the over-punishment of an individual merely because he may not have anyone willing to testify on his behalf in post-conviction proceedings. In such cases, courts should be able to recognize that the attorney's conduct is so outrageous that it is obvious from the record itself that there is a "reasonable probability" that the defendant would have pled guilty had he not been actively misled by the attorney who is supposed to be acting in his interest.

In *Pennsylvania v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978), for example, prosecutors offered a plea deal involving a sentence of one to three years' imprisonment for multiple robberies and associated charges. Defense counsel mentioned the offer only in an "offhand" way to the defendant without advising him of the benefits of taking the deal or his potential

exposure at trial because he was eager to have his first jury trial, and so did not want his client to plead. *Id.* at 523. The case "was a stone cold loser" with no potential defenses. *Id.* Unsurprisingly, the defendant was found guilty on all counts and sentenced to ten to forty years. *Id.* at 521. In such a case, the circumstances alone demonstrate a "reasonable probability" that the defendant would have taken the deal had he been properly advised.

Similarly, in *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981), defense counsel negotiated a five-year plea deal for robbery and associated charges, which the defendant accepted. Defense counsel then recommended the defendant withdraw the plea, advising that the defendant could have a trial only on the issue of whether he was sane at the time of the offense. *Id.* at 266. Counsel advised that even if he was found sane, the five-year agreement on the sentence would still stand. *Id.* Defense counsel was very wrong. Upon this advice, the defendant not only withdrew his plea, but stipulated to the elements of the offense. *Id.* at 263–64. The jury found him guilty and sane, and the court sentenced him to fifty years in prison. *Id.* at 263. This level of ineffectiveness is astounding, and no "objective evidence" is needed to show that there is a "reasonable probability" that the defendant would not have withdrawn his five-year plea agreement—and stipulated to the elements of the crime—had he known he could have been sentenced to fifty years.

A more recent case demonstrating this principle is *United States v. Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012) (unpublished). In *Soto-Lopez*, the public defender negotiated a four-year deal for his client, Soto-Lopez, who was charged with illegal reentry into the United States. *Id.* at 146. A private attorney, De Olivas,

convinced Soto-Lopez to fire his publicly-appointed attorney and pay him $4000, promising he could secure a better two to two-and-a-half year deal, despite the fact that he had no experience negotiating with the prosecutors in that district and that such a deal was utterly unlikely. *Id.* Once hired, De Olivas advised Soto-Lopez to withdraw his plea, sent one letter to the prosecutor asking for a two-and-a-half-year deal, and ultimately advised Soto-Lopez to plead guilty without any plea agreement at all. *Id.* Soto-Lopez was then sentenced to approximately six and a half years in prison. *See Soto-Lopez v. United States*, Nos. 07cr3475+, 2011 WL 176026, at *22 (S.D. Cal. Jan. 19, 2011). Between Soto-Lopez's plea hearing and sentencing, De Olivas was disbarred for "a dizzying range of unprofessional conduct," including for "plac[ing his] financial motivations above the interests of his client." *Soto-Lopez*, 475 F. App'x at 146. The district court described Soto-Lopez as "'probably . . . the victim of why [the attorney] was no longer practicing.'" *Id.* The Ninth Circuit found prejudice based on the facts of the case alone, reasoning that "[i]f De Olivas had not counseled Soto-Lopez that he could receive a 24-or 30-month sentence, and instead been adequately advised as to the dramatic differences in potential sentences, Soto-Lopez would not have rejected the government's plea." *Id.* at 147.

Notably, the Ninth Circuit did not mention if Soto-Lopez ever submitted a declaration that he would have accepted the plea. Instead, the Ninth Circuit based its prejudice finding entirely on the fact that "[u]ntil De Olivas advised Soto-Lopez to withdraw from the deal, both the government and Soto-Lopez were taking the procedural steps towards satisfying the terms of the fast-track deal" and that he "abruptly changed course

once he encountered De Olivas." *Id.* Here, too, the fact that Titlow was taking steps to enter the plea but "abruptly changed course" suggests that counsel's deficient advice affected the outcome of the case. In cases like this—where the sequence of events speak volumes about prejudice—courts should not be unreasonably prevented from granting relief because the defendant could not come up with "objective evidence" (whatever that means) to support his claim of prejudice.

These cases exemplify why trial judges need flexibility and discretion: Trial judges oversee plea agreements and criminal trials day in and day out. These frontline judges are in the best position to evaluate whether, under the facts of the case as a whole, common sense dictates that any properly-advised defendant would have taken a plea. Requiring more than the defendant's credible testimony in such cases would deprive the defendant of any remedy for the abject constitutional deficiency of counsel during the critical plea negotiation stage.

To find that the defendant's credible testimony could *never* suffice to show prejudice is also unfair to defendants who may not have the ability to provide "objective evidence" through no fault of their own. Under the rule proposed by the State, a defendant who has shown constitutionally defective counsel would be unable to get relief because he does not have a friend, family member or attorney willing to submit a declaration on his behalf, when almost identically situated defendants may be able to make a successful claim. As various Justices have explained, "the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment 'hardly comports with the ideal

of 'administration of justice with an even hand.'" *Teague v. Lane*, 489 U.S. 288, 315 (1989) (O'Connor, J., concurring) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring in judgment)); *see also Henderson v. United States*, 133 S. Ct. 1121, 1127 (2013) (rejecting prosecutor's argument because "[t]o hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals"). Yet the State's position here flies in the face of these long-standing principles of evenhandedness by denying a trial court any discretion to grant habeas relief merely because a given defendant may not have anyone willing to vouch for his claim of prejudice.

Such a miscarriage of justice is of greatest concern in capital cases, where defendants sometimes reject life-saving plea offers based on the deficient or nonexistent advice of counsel. *See, e.g.*, *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *vacated as moot by* 128 S. Ct. 749 (2008). As Justice Blackmun once recognized, "[t]he consequences of . . . poor trial representation for the capital defendant, of course, can be lethal." *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from the denial of the writ of certiorari); *see also Kennedy v. Louisiana*, 554 U.S. 407, 428 (2008) ("[T]he death penalty . . . 'is unique in its severity and irrevocability.'"). This statement is equally true in the plea-bargain context. To allow the execution of individuals solely because they cannot come up with "objective evidence" cannot be squared with fundamental principles of justice that permit capital punishment only where society can be confident in the constitutionality of the proceedings leading to the conviction and sentence. *See Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is

the most severe punishment, . . . [it] must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); *Whitmore v. Arkansas*, 495 U.S. 149, 168 (1990) (Marshall, J., dissenting) ("Because there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" (internal brackets and quotation marks omitted)).

## IV. PRESERVING TRIAL COURTS' DISCRETION TO FIND PREJUDICE UNDER *STRICKLAND* WILL NOT RESULT IN A FLOOD OF FRIVOLOUS CLAIMS

Finally, there is no reason to believe that rejecting the State's position will cause a sudden deluge of frivolous claims.

As discussed above, the fact-intensive inquiry advocated here is, in reality, the approach already taken by every circuit in the country—the State's misleading arguments notwithstanding. As such, there are simply no "floodgates" to be thrown open. As the Court explained in *Lafler*, "[c]ourts have recognized claims of this sort for over 30 years, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims." *Lafler*, 132 S. Ct. at 1389–90 (internal citation omitted). Accordingly, there is demonstrably no risk that affirming the Sixth Circuit's test will cause an *increase* in such claims.

Nor are lower courts overwhelmed by the current level of these ineffective assistance claims. Trial judges are highly experienced in distinguishing legitimate claims from wishful thinking in a timely and efficient manner. As multiple courts have explained in rejecting this precise argument, "to the extent that petitioners and their trial counsel may jointly fabricate these claims [of ineffective assistance in plea negotiations] later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (quoting *United States v. Day*, 969 F.2d 39, 46 n.9 (1992)); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 799 (S.D. Cal. 1993) (same). If the courts that are tasked with applying these principles are unconcerned, this Court need not be concerned on their behalf.

At bottom, because the trial court has the ability to hold hearings and make factual findings on these issues, there is little danger that courts would be inundated with meritless petitions or that they would somehow be forced to release defendants who rely on nothing but their own self-serving testimony that they would have accepted the plea. Trial courts know a simple case of "buyer's remorse" when they see it.

Just because the defendant's testimony that he would have taken the deal might, in some circumstances, suffice to show a "reasonable probability" of prejudice does not mean that it always will. Judges have the wisdom and experience to make credibility determinations, and can discount a defendant's statements if his testimony appears to be mere gamesmanship in an attempt to get the benefit of a rejected plea deal. The flexibility to weigh all the evidence, make credibility determinations, and

evaluate whether or not prejudice has been shown under the specific facts of a given case is exactly the type of fact-finding trial courts routinely make—even in this very context.

For similar reasons, any concern that federal courts will somehow be forced to grant relief for meritless claims and thereby undermine principles of comity is equally misplaced. *Cf.* Conn. Br. 20–25. Under AEDPA's highly-deferential standard of review, federal courts would not be able to overturn the state's determination unless it was based on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Thus, there is little reason to doubt that instances in which a federal court is required to overturn a state's finding on prejudice will remain rare.

If anything, empowering state courts to evaluate all the facts and circumstances of a given case in determining whether a defendant has been prejudiced by ineffective assistance of counsel will likely insulate that fact-intensive decision from inappropriate second-guessing by the federal courts—at least compared to the "objective evidence" test the State implores the Court to adopt without defining what such a test would mean. Such an approach would do nothing but reap confusion and invite error in the courts below. Remaining faithful to *Lafler*, however, and continuing to give state courts broad discretion in the types of evidence they can consider in evaluating Sixth Amendment claims in the plea bargain context neither infringes states' rights nor implicates comity concerns.

The irony of the State's position is evident: When it comes to deciding the remedy, the State would give the state trial judge all the discretion in the world. Petr. Br. 48 (complaining that "the Sixth Circuit improperly

limited the trial court's discretion" in fashioning a remedy). For prejudice, however, the State believes the trial judge should be deprived of any discretion to grant relief to a defendant who has received constitutionally defective assistance in the plea bargain stage even if he credibly testifies he would have taken the deal and the sentence imposed is significantly higher than the original plea.

Every court to have addressed the issue—including this Court in *Lafler* just two Terms ago—has properly concluded that the decision to grant habeas relief on an ineffective assistance of counsel claim turns on whether there is a "reasonable probability" that the outcome of the proceedings would have been different had counsel provided adequate advice. The Court's conclusion should be no different here. There is no reason—and the State has offered none—to depart from this well-grounded precedent and impose an additional and unclear requirement of "objective evidence." Such a rule would do nothing but deprive the trial court of the flexibility to make prejudice determinations and deprive deserving defendants of the ability to obtain habeas relief for their constitutional claims.

## CONCLUSION

This Court should reject the State's proposed "objective evidence" test in favor of directing courts to examine the totality of the factual circumstances and hold that a defendant need not adduce any particular type of evidence to demonstrate a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors. In short, this Court should defer to the trial courts as to type of evidence required in a particular case for the defendant to make this showing.

Respectfully submitted,

NANCY HOPPOCK
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
139 MacDougal Street
3rd Floor
New York, NY 10012
(212) 998-6612

DANIEL MERON
*Counsel of Record*
LORI ALVINO MCGILL
STEPHANIE N. GRACE
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
Daniel.Meron@lw.com
(202) 637-2218

*Counsel for Amicus Curiae*