No. 12-414

IN THE
Supreme Court of the United States

SHERRY L. BURT,

Petitioner,

v.

VONLEE TITLOW,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amicus curiae the National Association of Criminal Defense Lawyers will address the first and second questions presented in the petition for certiorari:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective.

2. Whether a convicted defendant's subjective testimony that she would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association representing at the national level more than 40,000 attorneys, including public defenders and private criminal defense lawyers. NACDL's core mission is to ensure justice and due process for persons accused of crime; foster the integrity, independence, and expertise of the criminal defense profession; and promote the proper and fair administration of criminal justice. NACDL often files *amicus* briefs in this Court, seeking to provide guidance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. NACDL is particularly interested in defending liberties guaranteed to criminal defendants by our Constitution and in ensuring that legal proceedings are handled fairly and properly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Strickland v. Washington established a two-part test for evaluating ineffective assistance of counsel claims under the Sixth Amendment: "First, the defendant must show that counsel's performance was deficient"—*i.e.*, that it "fell below an objective stand-

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the timely filing of any *amicus* briefs in this case, and copies of their letters of consent have been lodged with the Clerk of the Court.

ard of reasonableness . . . under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense"—*i.e.*, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. This Court has made clear that "the negotiation of a plea bargain is a critical phase of litigation," such that a defendant is "entitled to 'the effective assistance of competent counsel'" in "deciding whether to plead guilty," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480–81, 1486 (2010) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)), or instead to reject a plea offer and proceed to trial, *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). In particular, "an accused is entitled to rely upon his counsel [1] to make an independent examination of the facts, circumstances, pleadings and laws involved and then [2] to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

Yet under the state court's and Petitioner's proposed stated-belief-in-innocence exception to *Strickland*, an attorney's abject failure to investigate the facts and law, and to render objective, informed advice at the plea stage, can *never* constitute ineffective assistance so long as his client has uttered the words, "I am innocent." *See* Pet'r Br. 31 ("'When a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—*no matter how 'good' the deal may be*.'" (emphasis added) (quoting the Michigan Court of Appeals)). Thus, Petitioner asks rhetorically, *id.* at 19 (quoting the district court): "[H]ow can a criminal defendant's counsel be ineffective for advising her to go to trial when she . . .

claims to be innocent of the crime?" The answer is simple: the stated-belief-in-innocence exception is wholly at odds with counsel's well-established Sixth Amendment duty to conduct an independent examination of the facts and law, and to offer an informed opinion on what course of action is in the client's best interests. The exception is also incompatible with this Court's frequent exhortation to evaluate attorney performance in a manner that is "case-by-case," *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (internal quotation omitted), "circumstance-specific," *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000), and "context-dependent," *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), and with the Court's repeated rejection of bright-line rules "categorically remov[ing]" advice on certain topics "from the ambit of the Sixth Amendment right to counsel," *Padilla*, 130 S. Ct. at 1482; *accord, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (refusing to carve out category of advice from ineffectiveness review).[2]

"[P]revailing professional norms," *Strickland*, 466 U.S. at 688, give concrete guidance on the contours of counsel's plea-stage duties. Before rendering advice, a competent attorney must, at a minimum, review the basic case documents, have a substantive discussion with his client about the facts, and follow up leads that these initial steps produce, including

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[2] As explained in Respondent's Brief ("Resp't Br.") 18–25, it was unreasonable for the state court to determine that a claim of innocence by Respondent was the impetus for her plea withdrawal. This brief goes on to explain why the Sixth Circuit should be affirmed even if Respondent did tell her new attorney, Toca, that she believed she was innocent.

by interviewing key witnesses and speaking with prior counsel. *See infra* 7–11. Counsel's duties to investigate and to advise go hand-in-hand. Criminal defendants are entitled to the guidance of informed counsel when making the critical decision whether to plead guilty or proceed to trial. The attorney must ensure that his client understands the charges against her, explain the possible sentencing ranges if convicted at trial versus after a guilty plea, and offer his informed opinion as to the plea that should be maintained, in light of the objective evidence mustered by the state and the likely outcome at trial. *See infra* 11–16.

A stated-belief-in-innocence exception would be anathema to these duties: Without a basic investigation, counsel cannot properly evaluate the advantages and disadvantages of a plea offer; and absent counsel's informed advice, neither can the defendant. That is why the criminal defense attorney is required to fulfill his duties of investigation and advice regardless of whether the client professes either guilt or innocence, as authorities of numerous stripes make clear. *See infra* 16–19. A defendant often needs counsel's advice to understand, among other things, whether the facts as a whole make her guilty of a particular crime. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). As such, a defense attorney cannot view a statement of belief in innocence as a client's knowing and informed final decision. Moreover, a properly counseled defendant might rationally decide that a guilty plea is the best path forward where, for example, "the State's case against him [i]s so strong that he w[ill] . . . be[] convicted anyway" by the jury. *Henderson v. Morgan*, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring). If the defendant "must be permitted to judge for himself in

this respect," *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (internal quotation omitted), that judgment needs to be informed by the advice of competent counsel. *See infra* 19–23.

Strickland's second prong addresses prejudice. It can be satisfied in a negotiated-plea context if "but for the ineffective advice of counsel there is a reasonable probability that . . . [the defendant] would have accepted the plea." *Cooper*, 132 S. Ct. at 1385. The Court has not, however, "resolved what, if anything, a petitioner must show in addition to [her] own credible post hoc testimony" to demonstrate prejudice. *Merzbacher v. Shearin*, 706 F.3d 356, 366 (4th Cir. 2013), *petition for cert. filed*, __ U.S.L.W. ___ (U.S. Apr. 25, 2013) (No. 12-9952).

Consistent with the "case-by-case prejudice inquiry that has always been built into the *Strickland* test," *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993), the fact-finding court must determine in each particular case, in light of all available evidence, whether the defendant has demonstrated a "reasonable probability" that she would have accepted the plea but for deficient counsel. *See infra* 24–29. In most meritorious Sixth Amendment violation cases—including this one—there will be corroborating evidence of prejudice. But the Court should not manufacture a new *per se* rule that carves out the rare case in which a defendant's testimony, standing alone, may be sufficiently credible to establish prejudice. Other legal tests, including *Strickland*'s performance prong, also place the bar out of reach for all but a few, *Padilla*, 130 S. Ct. at 1485, yet the Court has not used deterrence of weak claims as a ground to artificially close off relief to an entire category of potentially worthy ones. *See infra* 29–33.

ARGUMENT

I. THE PROPOSED "STATED-BELIEF-IN-INNOCENCE" EXCEPTION ON WHICH THE STATE'S ARGUMENT RESTS WOULD BE INCONSISTENT WITH THE ROLE OF COUNSEL IN OUR LEGAL SYSTEM, AND WITH THIS COURT'S DECISIONS CLEARLY ESTABLISHING AN ATTORNEY'S SIXTH AMENDMENT DUTY TO PROVIDE EFFECTIVE ASSISTANCE AT THE PLEA STAGE.

According to the State, so long as a defendant has asserted her innocence, her attorney is categorically relieved of any obligation to conduct a factual investigation or render informed advice on the advisability of accepting or maintaining a plea. That position runs directly counter to *Strickland* and its progeny, which are built on the fundamental notion that "defendants cannot be presumed to make critical decisions without counsel's advice," *Cooper*, 132 S. Ct. at 1385.

Defendants—even "intelligent and educated" ones—"require[] the guiding hand of counsel at every step in the proceedings," *Powell*, 287 U.S. at 69, "lest [they] be the victim of overzealous prosecutors, of the law's complexity, or of [their] own ignorance or bewilderment." *Williams v. Kaiser*, 323 U.S. 471, 476 (1945). An attorney's bedrock obligation to "serve as the accused's counselor and advocate," ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(b) (3d ed. 1993) [hereinafter ABA Standards], manifests at the plea stage in two specific duties. First, counsel has a duty to conduct a thorough, "independent" investigation of the "facts, circumstances, pleadings and laws involved" before rendering advice. *Von Moltke*, 332 U.S. at 721; *infra*

7–11. Second, he has a duty to provide his objective, "informed opinion as to what plea should be entered," *Von Moltke*, 332 U.S. at 721, based on the advantages and disadvantages of the plea offer, the risks involved in trial, and his factual and legal research, *infra* 11–16. A client making the final decision whether to plead guilty or proceed to trial can only "intelligent[ly] assess[] . . . the relative advantages" of her options with the informed "assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970). Therefore, counsel is not freed of his plea-stage Sixth Amendment duties by a client's stated belief in her innocence. *Infra* 16–23.

A. Criminal Defense Attorneys Have a Duty to Conduct a Thorough, Independent Factual Investigation, in Order to Properly Evaluate the Strengths and Weaknesses of the Case.

1. Counsel's duty to investigate is paramount, as "[t]he lawyer who is ignorant of the facts of the case cannot serve the client effectively." ABA Standards 4-3.2 cmt., at 152; *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive."). Defense counsel thus "has a duty to conduct an independent investigation . . . as promptly as possible," Performance Guidelines for Criminal Defense Representation 4.1(a) (Nat'l Legal Aid & Defender Ass'n 1995) [hereinafter NLADA Guidelines], in which counsel must "explore all avenues leading to [the] facts relevant to the merits of the case and the penalty in the event of conviction," ABA Standards 4-4.1(a); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Counsel's duty to investigate extends both to "'matters of fact'" and "'points of law.'" *Faretta v. California*, 422 U.S. 806, 827 n.35 (1975) (quoting 2 Z. Swift, *A System of Laws of the State of Connecticut* 398–99 (1796)).

Investigation at the plea stage is critical. "[W]ithout adequate investigation the lawyer is not in a position . . . to conduct plea discussions effectively[,]" ABA Standards 4-4.1 cmt., at 183, for example, by pointing out holes in the state's theory, or by highlighting exculpatory evidence, *Rompilla v. Beard*, 545 U.S. 374, 385–86 (2005). Moreover, counsel cannot render informed advice if he is himself uninformed. *Cf.* ABA Standards for Criminal Justice: Pleas of Guilty 14-3.2 (3d ed. 1999) [hereinafter ABA Pleas of Guilty] ("Defense counsel should not recommend . . . acceptance of a plea unless appropriate investigation . . . has been completed."). Without the facts, counsel cannot properly evaluate the advisability of the plea offer and the risks of proceeding to trial.

This Court has often reaffirmed the critical importance of the duty to investigate, finding counsel ineffective for failing to conduct a sufficient factual investigation. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 38–40 (2009) (per curiam); *Wiggins*, 539 U.S. at 521–22; *see also Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (explaining that the "essence" of the right to counsel "is the opportunity for a defendant to consult with an attorney and to have him investigate the case"). The adversarial process simply "[can]not function properly unless defense counsel has done some investigation into the prosecution's case and

into various defense strategies." *Kimmelman*, 477 U.S. at 384–85.

2. Counsel must take concrete steps to satisfy the duty to investigate at the plea stage.

Counsel must—of course—obtain and review the basic case documents, including the charging documents, the state's evidence, and other readily available materials. *See, e.g.*, *Porter*, 558 U.S. at 39–40 (finding counsel's performance deficient in part because he "did not even take the first step of . . . requesting records" prior to a post-conviction hearing); ABA Standards 4-4.1(a) ("[Counsel's] investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities."); NLADA Guidelines 4.1(b) (counsel must "obtain[] and examine[]" any "charging documents"). These documents are critical "to learn what the [state] kn[o]w[s] about the crime, to discover any mitigating evidence . . . , and to anticipate the details . . . the [state] w[ill] emphasize." *Rompilla*, 545 U.S. at 385–86.

Counsel should also "conduct[] an in-depth interview of the client," which "should be used to: (A) seek information concerning the incident or events giving rise to the charge(s) . . .[;] (B) explore the existence of other potential sources of information relating to the offense[; and] (C) collect information relevant to sentencing." NLADA Guidelines 4.1(b)(2); *accord, e.g.*, ABA Standards 4-3.2(a).

Finally, counsel must "pursu[e] th[o]se leads" and take any additional investigative steps that a competent attorney would take based on "the quantum of evidence" known to counsel. *Wiggins*, 539 U.S. at 525, 527; *see also, e.g.*, ABA Standards 4-4.1(a) ("Defense counsel should . . . explore all ave-

nues leading to facts relevant to . . . the penalty in the event of conviction."). In particular, "[c]ounsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused," NLADA Guidelines 4.1(b)(3), as well as prior counsel. *Cf. Porter*, 558 U.S. at 39 (criticizing counsel because he "did not even take the first step of interviewing witnesses"). Thus, in *Wiggins*, although "counsel's investigation" drew from several sources, it "fell short of . . . professional standards" because counsel did not "investigate[] further" based on "what counsel actually discovered" in the records. 539 U.S. at 523–25.[3]

3. This case illustrates why the duty to investigate is vital at the plea stage, and why a stated-belief-in-innocence exception would be incompatible with the role of competent counsel. The inculpatory evidence "revealed" at trial was not substantively different than what Toca would have discovered had he conducted a basic factual investigation—namely, picking up and reading the case file, conducting an in-depth interview of Ms. Titlow, and talking with prior counsel. *See* Resp't Br. 30. This evidence included Ms. Titlow's tape-recorded admission that she poured alcohol down the victim's throat and held his nose, her confession to police, "hush money" payments to the defendant, and the medical examiner's conclusions, *see id.*; Pet'r Br. 6–9; J.A. 44. No rea-

[3] The Court's discussion of failure-to-investigate violations at the "sentencing" stage are pertinent here because "the same . . . standard" is "applicable to ineffective-assistance claims arising out of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

sonably competent attorney could have properly advised the defendant on the risks of abandoning a manslaughter plea without assessing these readily available materials, which easily created a reasonable risk of conviction for aiding and abetting murder. But under the State's proposed rule, counsel had *no* obligation to educate himself about the relevant facts, and he acted entirely reasonably in affirmatively "advising [his client] to go to trial" from a state of abject ignorance, because his client "claim[ed] to be innocent." Pet'r Br. 19. This cannot be: An attorney has a duty to assist a client who is stumbling blindly towards the edge of an abyss, and counsel who blinds *himself* to that readily ascertainable hazard is doubly at fault. "Such a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution,' . . . and the reliability of the adversarial testing process," *Kimmelman*, 477 U.S. at 385 (quoting *Strickland*, 466 U.S. at 685), and clearly constitutes ineffective assistance of counsel, *id*.

B. Criminal Defense Attorneys Have a Duty to Provide Objective, Informed Advice on the Law, the Facts, and the Realistic Risks of Going to Trial, So That the Client Can Understand the Charges and the Evidence and Intelligently Evaluate Her Plea Options.

1. The State's proposed *Strickland* exception is also incompatible with counsel's well-established duty to provide objective, affirmative advice at the plea stage, *Padilla*, 130 S. Ct. at 1485, including "his informed opinion as to what plea should be entered," *Von Moltke*, 332 U.S. at 721; *see also Libretti v. Unit-*

ed States, 516 U.S. 29, 50 (1995) ("[I]t is [generally] the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."). The attorney "must actually and substantially assist his client in deciding whether to plead guilty," *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974), with advice that suffices to permit the defendant to make an "informed and conscious choice" to accept or reject the offer, *Colson v. Smith*, 438 F.2d 1075, 1079 (5th Cir. 1971). This is because an intelligent plea is "the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof," *United States ex rel Healey v. Cannon*, 553 F.2d 1052, 1056 (7th Cir. 1977), and because "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney," *Brady*, 397 U.S. at 748 n.6.[4]

2. To advise properly on whether to follow through on a plea offer—whether with respect to its acceptance, rejection, or withdrawal—an attorney must follow certain minimum steps.

First, counsel must "ensure that the defendant fully understands the plea that is being offered, including all terms of the sentence that could be imposed and other ramifications of that plea." ABA

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[4] *See also Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled th[e] accused to . . . plead intelligently."). An unintelligent plea undermines the Fifth Amendment's Due Process guarantee. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Pleas of Guilty 14-3.2 cmt., at 120. The attorney thus provides straightforward *information* about the potential consequences of the charges the defendant is asked to accept in pleading guilty and those available at trial if the plea is rejected or withdrawn.

Second, counsel must give an "appraisal of the *likelihood* of conviction or acquittal . . . and advise the defendant, when that is possible, what sentence is likely." ABA Standards 4-5.1 cmt., at 198 (emphasis added). The attorney should not only convey basic information on the potential consequences ("you face a and b charges, which have maximum and minimum sentences of x and y"), but also "must actually and substantially assist the client . . . by providing the accused with an understanding of the law in relation to the facts," *Representation Regarding Guilty Plea*, 9 Fed. Proc. L. Ed. § 22:695 (2013), including information on "the probable sentence . . . after trial," and "a realistic appraisal of the value of any concessions offered by the prosecutor," ABA Pleas of Guilty 14-3.2(b) cmt., at 122. The defendant should expect that counsel will "explain[] the elements necessary for the government to secure a conviction [and] discuss the evidence as it bears on those elements," in order to give the defendant an accurate view of the likely outcome at trial. *Smith v. United States*, 348 F. 3d 545, 553 (6th Cir. 2003). Moreover, the attorney should "address considerations [he or the defendant] deem[] important . . . in reaching a decision" to account for the defendant's priorities and particular circumstances. ABA Pleas of Guilty 14-3.2(b).

Finally—and most critically—"an accused is entitled to rely upon his counsel to . . . offer his *informed opinion* as to what plea should be entered." *Von*

Moltke, 332 U.S. at 721 (emphasis added); *Williams*, 323 U.S. at 475–76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."). Thus, "a defense lawyer in a criminal case has the duty to advise his client fully" not only on the parameters of the offer and likely consequences, but also "on whether a particular plea to a charge appears to be desirable" in the attorney's professional opinion. ABA Code of Prof'l Responsibility EC 7-7 (1992); *see also* ABA Pleas of Guilty 14-3.2 cmt., at 117 ("[T]he system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is . . . entered in . . . her best interests."). In other words, "it is not the role of counsel merely to acquiesce in such a decision made independently by his client; *it is the role of counsel to counsel*." 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.3(b) (West 2012) (emphasis added) (quoting *Gallarelli v. United States*, 441 F.2d 1402, 1404 (3d Cir. 1971)). "Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla*, 130 S. Ct. at 1483 (quoting *Libretti*, 516 U.S. at 50–51); *accord id.* at 1494 (Alito, J., concurring).

3. The contrary rule espoused by the Michigan Court of Appeals and the State—that "'[w]hen a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—*no matter how 'good' the deal may be*,'" Pet'r Br. 31 (citation omitted and emphasis added)—could not be more incompatible with counsel's "critical obligation" to "advise the client of the advantages and disadvantages of [the] plea," *Padilla*, 130 S. Ct. at 1483

(quotation marks omitted), and to then "offer his informed opinion" as to what course of action the client should take, *Von Moltke*, 332 U.S. at 721. The State would emasculate counsel's duty to render objective advice about the benefits, risks, and advisability of the plea, offering in its place a rule that categorically authorizes counsel to recommend a particular course of action—withdrawal of a negotiated plea—without investigating, considering, or conveying to his client whether that course of action is in her best interests.

This case well illustrates why informed, circumstance-specific advice on plea withdrawal is essential to the effective assistance of counsel under the Sixth Amendment. After Respondent's original lawyer negotiated a favorable plea agreement, Toca took over and—without the basic precaution of educating himself on the advantages and disadvantages of undoing what the first lawyer had achieved—led his client down a misguided path to a much worse position. That Respondent "voluntarily entered a guilty plea on the advice of counsel" does not absolve Toca of his deficient performance at the next critical stage (plea withdrawal), for it is "equally essential that the attorney advise a defendant of possible consequences" before "the defendant withdraws [the] negotiated plea." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981). Like a new doctor who discontinues the original physician's prescribed course of treatment based solely on his patient's lay self-diagnosis, Toca had a duty to become independently knowledgeable about—and to advise his client of—the risks of reversing what the first professional had accomplished. This is consistent with Toca's *continuing* duty to render effective assistance at each critical stage—including plea withdrawal, *id.*; *Cooper*, 132 S. Ct. at 1385—in response to the dynamics of the case.

C. Authorities of Numerous Stripes—Including Leading Scholars and Practitioners, National Criminal Defense Organizations, Authoritative Treatises, the ABA, and State and Local Public Defender Offices—Universally Require Counsel to Fulfill the Duties of Investigation and Advice Regardless of Whether the Client has Expressed Her Belief that She Is Either Innocent or Guilty.

1. Because informed advice of counsel is critical to a defendant's intelligent evaluation of her plea-stage options, it would make no sense to relieve an attorney of his duties of investigation and advice simply because his client expresses, during an initial conversation, that she believes she should be acquitted. This stated-belief-in-innocence exception would have the perverse result of depriving many defendants of their right to meaningful advice when they need it most. That outcome would be especially pernicious given the "reality that criminal justice today is for the most part a system of pleas," *Cooper*, 132 S. Ct. at 1381, in which "many if not most defendants are initially reluctant to admit guilt," Stephanos Bibas, *Harmonizing Substantive Criminal Law Values & Criminal Procedure: The Case of Alford & Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1377 (2003); *cf.* The Shawshank Redemption at 26:51 (Castle Rock Entertainment 1994) ("Everybody in here is innocent. Didn't you know that?"). This Court has rejected similar attempts to incentivize attorney silence in the Sixth Amendment context, *Padilla*, 130 S. Ct. at 1483, and should do so again here.

2. Given the serious flaws in a stated-belief-in-innocence exception to *Strickland*, it is not surprising that authorities of numerous stripes have rejected the notion that an attorney is relieved of his plea stage duties by his client's expressed belief in either her innocence or guilt—including leading scholars and practitioners,[5] national criminal defense organizations and national judicial conferences,[6] authorita-

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[5] *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1296–97 (1975) ("Whether the defendant denies his guilt . . . should not be determinative."); Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 Santa Clara L. Rev. 1, 6 (2010) (advising defense counsel not to take at face value the statement "I didn't do it; I am innocent"); Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 Hofstra L. Rev. 479, 496 (2007) ("If refusing a plea would be destructive, lawyers should employ the same degree of persuasion [in advising acceptance of the plea] with an avowedly innocent client as with an admittedly guilty one."); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73 (1995) ("[I]t would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining.").

[6] *See* Steven N. Yermish, *Ethical Issues in Indigent Defense*, 33 Champion 22, 25 (2009) (published by *amicus curiae* NACDL) (discussing counsel's "responsibility" to "advise a client to plead guilty" if the case is "'hopeless,' based on the evidence"); NLADA Guidelines 4.1(a) ("Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt."); Hon. Walter F. Rogosheske, Minnesota Supreme Court, Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice, *in* 57 F.R.D. 229,

[Footnote continued on next page]

tive treatises,[7] the American Bar Association,[8] and state and local public defender offices.[9] This Court,

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[Footnote continued from previous page]
366 (1972) ("No matter what the defendant tells his lawyer, he must investigate every aspect of the case.").

[7] *See, e.g.*, 1 Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 215, at 363 (5th ed. 1988) (discussing counsel's duty to advise at the plea stage when the client "asserts that s/he is innocent"); LaFave, *supra*, § 21.3(b) ("[D]efense counsel should not be barred from recommending the negotiated plea route merely because the defendant . . . cannot bring himself to acknowledge his guilt.").

[8] ABA Standards 4-4.1(a) ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."); *see also* Laurence A. Benner, *Expanding the Right to Effective Counsel at Plea Bargaining: Opening Pandora's Box?*, 27 Crim. Just. 4, 8–9 (2012) (published by the ABA) (citing ABA Standards 4-4.1(a) in rejecting notion that "defense counsel is absolved of the responsibility to conduct a reasonable factual investigation because the defendant has agreed to plead guilty").

[9] *See, e.g.*, Ariz. Pub. Defender Ass'n Performance Standards for Indigent Def. Counsel V.A (June 2006) (mirroring language of ABA Standards 4-4.1(a) and NLADA Performance Guidelines 4.1(a)); Gwinnett Judicial Circuit, State of Ga., Indigent Def. Program 4.1 (Jan. 2011) (same); Office of the State Pub. Defender, Standards for Counsel Representing Individuals Pursuant to the Mont. Pub. Defender Act VI.6.A (Dec. 2012) (same); N.D. Comm'n on Legal Counsel for Indigents, Performance Standards, Criminal Matters 7.1 (undated) (same); ADKT No. 411, Ex. A, at 26 (Nev. Jan. 4, 2008) (same); State Bar of Tex., *Performance Guidelines for Non-Capital Criminal Def. Representation*, 74 Tex. Bar J. 616, 624 (July 2011) (same); Commonwealth of Va., Standards of Practice for Indigent Counsel 4.1 (Mar. 15, 2012) (same); La. Admin. Code tit. 22, § 717(A) (2013) (same).

too, has made clear in related contexts that an attorney is not relieved of his Sixth Amendment duties simply because his client has communicated her desired course of action (or inaction) to him,[10] and the circuit courts have recognized this as the prevailing professional norm in the exact scenario now before the Court.[11] The reasons are clear.

First, the defendant cannot possibly understand the charges, and how her conduct will be judged against their elements, without the advice of counsel. *Von Moltke*, 332 U.S. at 721 ("Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman."); *Powell*, 287 U.S. at 69 ("[A lay-

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10 *See, e.g.*, *Porter*, 558 U.S. at 40 ("Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."); *Rompilla*, 545 U.S. at 377 ("[E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on.").

11 *See, e.g.*, *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996) ("[I]t would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice" than for counsel to fail to give his "professional advice" on the decision whether to plead simply because defendant "profess[ed] innocence."); *Smith,* 348 F.3d at 552–54 (holding defendant's protestations of innocence did not justify attorney's failure to adequately advise as to the advantages of accepting the plea offer in the face of "overwhelming" evidence against the client); *see also Silva v. Woodford*, 279 F.3d 825, 840 (9th Cir. 2002) ("[A] lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes.").

man] is incapable, generally, of determining for himself whether the indictment is good or bad."). As such, counsel must allow for the possibility that the client's statement of innocence is misguided, especially if he knows the client has already admitted guilt in open court upon advice of counsel.

For example, the defendant might say "I am innocent" out of an erroneous belief that because she was not the person who had her hands on the victim when he finally succumbed, she is relieved of criminal liability, even though the state's evidence easily supports charges of manslaughter or aiding and abetting murder. Indeed, in some states—Michigan, for example—the definition of murder and manslaughter are found "at common law," rather than in a statute, *People v. Townes*, 218 N.W.2d 136, 140 (Mich. 1974) (manslaughter); *People v. Wilder*, 308 N.W.2d 112 (Mich. 1981), *overruled on other grounds by People v. Ream*, 981 Mich. 223, 242 (Mich. 2008) (murder), making it especially difficult for a layman to determine which crimes she could be found guilty of. Thus, a defendant might "assert[] his legal innocence" even though his "factual contentions, when accepted as true, make out no legally cognizable defense to the charges." *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975). In such a case, it would be anathema to the obligations of counsel for him to look on quietly (and ignorantly) as his client chooses to cancel a favorable plea offer on the mistaken impression that the facts show she is innocent.

Second, even assuming the defendant understands the legal and factual threshold for the charges and truly "believe[s] himself to be innocent," it might nevertheless be in the defendant's best interests to

plead guilty, because "the State's case against him [i]s so strong that he w[ill] . . . be[] convicted anyway." *Henderson*, 426 U.S. at 648 n.1 (White, J., concurring); *see also Alford*, 400 U.S. at 37–38 (permitting defendant to enter a guilty plea "because in his view he had absolutely nothing to gain by a trial and much to gain by pleading," in light of the state's "strong case"). And the defendant might rationally decide that a guilty plea is in his best interests for other valid reasons: The defendant might, for example, "make[] a conscious choice to plead simply to avoid the expenses or vicissitudes of trial," *United States v. Vonn*, 535 U.S. 55, 69 n.8 (2002); "to have some control over the next steps and . . . certainty over the outcome of [her] case," Anne D. Gooch, Note, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional*, 63 Vand. L. Rev. 1755, 1763 (2010); or "to avoid worse outcomes at trial," Bibas, *supra*, at 1373. Whether in the context of an *Alford* plea, or otherwise,[12] if there is a "factual basis for the plea," *Alford*, 400 U.S. at 38 n.10, the defendant should not be denied "the opportunity to act in his own best interest [in pleading guilty], *as advised by his trial*

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[12] *See, e.g.*, *Brady*, 397 U.S. at 751 (noting "the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); *see also Blackledge v. Allison*, 431 U.S. 63, 72 (1977) (listing "finality" as a "chief virtue[] of the plea system"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1975 (1992) (plea bargaining provides defendants with finality and certainty).

counsel," *United States v. Gaskins*, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (emphasis added). Indeed, this Court has made clear that the defendant "must be permitted to judge for himself in this respect." *Alford*, 400 U.S. at 33 (internal quotation marks omitted).

Third, wary of "acknowledg[ing] guilt," even defendants who ultimately provide a factual basis for a guilty plea frequently assert their innocence at an earlier stage in the proceedings—including "to their lawyers." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2502 (2004); *see also* Paul G. Cassell, *Some Skeptical Observations On the Proposed New "Innocence" Procedures*, 56 N.Y.L. Sch. L. Rev. 1063, 1070 (2011) ("[M]ost of the defendants who have already denied their involvement in the crime to the police would feel comfortable denying their involvement to their defense attorney."). Such assertions do not relieve the attorney of his duty to counsel effectively, including by explaining the plea offer and the risks of trial, so his client can decide intelligently whether to admit guilt. Otherwise, many defendants would lose their constitutional right to informed plea-stage advice.

3. A world in which the stated-belief-in-innocence rule is the law would look a lot like the one the Second Circuit faced (and rejected) in *Boria*: Although defense counsel's opinion was that "his client's decision to reject the plea bargain was suicidal," because of the state's bulletproof case, he did not communicate that opinion to his client, and he "did nothing to persuade [his client] of the absurdity of a decision" to go to trial—all because his client had

"profess[ed] innocence," 99 F.3d at 495–96. The defendant rejected the plea offer, went to trial, and was convicted, resulting in a sentence of twenty years to life in prison, where the sentence would have been one to three years under the plea offer. *Id.* at 494–95. The court rightly held that "it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice." *Id.* at 497.

II. *STRICKLAND* ALLOWS COURTS TO FIND A REASONABLE PROBABILITY THAT A DEFENDANT WOULD HAVE PLEADED GUILTY BUT FOR DEFICIENT COUNSEL WHEN EITHER: (A) HER TESTIMONY TO THAT EFFECT IS BOLSTERED BY OBJECTIVE CORROBORATING EVIDENCE; OR (B) HER TESTIMONY IS INHERENTLY CREDIBLE.

Under *Strickland's* second prong, the defendant must, in the negotiated-plea context, establish that "but for the ineffective advice of counsel there is a reasonable probability that . . . [she] would have accepted the plea." *Cooper*, 132 S. Ct. at 1385.[13] The Court has not, however, "resolved what, if anything, a petitioner must show in addition to [her] own credible post hoc testimony" to demonstrate prejudice. *Merzbacher*, 706 F.3d at 366.

Consistent with the "case-by-case prejudice inquiry that has always been built into the *Strickland* test," *Lockhart*, 506 U.S. at 369 n.2, the fact-finding

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[13] It is undisputed (Pet'r Br. 40) that Respondent satisfied *Cooper*'s remaining prejudice requirements, *see* 132 S. Ct. at 1385.

court should survey all available evidence in determining whether the defendant has demonstrated a "reasonable probability" that she would have followed through on the plea but for deficient counsel. *See infra* 24–25. In most cases—including this one—the totality of the circumstances will include corroborating evidence. *See infra* 26–29. But the State's speculation that no case could ever exist in which a defendant's testimony, standing alone, is credible enough to establish prejudice is scant reason to erect an arbitrary, *per se* bar to granting relief in the event the State is wrong. The only thing the proposed rule would accomplish is needless litigation over the line between "corroborated" and "standing alone." *See infra* 29–33.

A. There Is No Dispute that a Defendant May Demonstrate Prejudice by Identifying "Objective" Evidence that Corroborates Her Testimony, as Respondent Did in this Case.

1. There is no dispute in this case that courts, in deciding a claim of prejudice, "must consider the totality of the evidence," *Strickland*, 466 US. at 695, including all of "the factual circumstances surrounding the plea," *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001), and that they may properly find prejudice where "objective" evidence corroborates the defendant's substantive testimony that she would have followed through on a guilty plea but for deficient counsel. *See* Pet'r Br. 41. Objective evidence has been held to include affidavits submitted by someone other than the defendant, *see, e.g.*, *Paters v. United States*, 159 F.3d 1043, 1047–48 & n.6 (7th Cir. 1998) (family, counsel, and government attor-

ney); *United States v. Day*, 969 F.2d 39, 45–46 (3d Cir. 1992) (counsel), government concessions, *Paters*, 159 F.3d at 1048 & n.6, consistency with the record, *cf. United States v. Morris*, 106 F. App'x 656, 659 (10th Cir. 2004) (proposed plea agreement contradicted the defendant's assertions); *Moses v. United States*, No. 97-3938, 1999 WL 195675, at *2 (8th Cir. 1999), prior willingness to plead (or lack thereof), *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012) (prior willingness demonstrates that petitioner was amenable to pleading guilty when properly represented); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), the defendant's demeanor, *see Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reinstated*, 726 F. Supp. 1113 (M.D. Tenn. 1989) (defendant "at all times appeared to be under [counsel's] control"), her reluctance to go to trial, *see Magana v. Hofbauer*, 263 F.3d 542, 552 (6th Cir. 2001), the strength of the state's case, *see Merzbacher*, 706 F.3d at 367, and a significant disparity between the sentence a defendant was offered and the sentence she receives, *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998) ("[S]uch a disparity provides sufficient objective evidence . . . to support a finding of prejudice."); *Smith*, 348 F.3d at 552 (collecting cases).[14] The Solicitor General concedes as much. S.G. Br. 19–21.

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[14] *But see Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (finding insufficient that the defendant "would have received a lesser sentence had he accepted the plea agreement").

2. The State claims that objective evidence of prejudice was absent here (Pet'r Br. 41), but what the State actually objects to is how the Sixth Circuit weighed the *quality* of that evidence under these particular facts (*id.* at 41–45). A disagreement over the quantum of objective evidence in a particular case is no reason to abandon *Strickland*'s "totality of the evidence" test, 466 U.S. at 695. A review of that evidence illustrates the point.

First, Ms. Titlow initially accepted a plea agreement on the record, *Titlow v. Burt*, 680 F.3d 577, 591 (6th Cir. 2012), which demonstrates that she was amenable to pleading guilty when properly represented. *Cf. Frye*, 132 S. Ct. at 1411 (defendant's acceptance of a later plea offer "indicated that he would have accepted the earlier . . . offer" had counsel apprised him of it). The State would bar *any* consideration of this corroborating evidence, arguing that Ms. Titlow's initial plea is irrelevant because she later withdrew it and maintained her innocence. *See* Pet'r Br. 40. But her guilty plea while represented by prior counsel, followed by a quick withdrawal through deficient counsel, supports her testimony that she *would have maintained her plea* had it not been for the ineffective assistance of the latter attorney. *Compare, e.g.*, *Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991) (prejudice demonstrated where defendant accepted plea, and then withdrew it after receiving ineffective assistance), *with Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (defendant maintained his innocence before, during, and after trial and never asserted that he would have accepted a plea).

Second, Ms. Titlow's sentence "was nearly three times the punishment that she was offered under the plea agreement." *Titlow*, 680 F.3d at 591. This "substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer." *Dedvukovic v. Martin*, 36 F. App'x 795, 798 (6th Cir. 2002). The State, again, would give this evidence no weight, reasoning that, because *Cooper* always requires a disparity to demonstrate prejudice, such evidence cannot corroborate the defendant's testimony that she would have accepted the plea. Pet'r Br. 40. The State misses a critical point. Sentencing disparities play *two* important roles in the prejudice analysis: (1) they confirm that a defendant was deprived of a favorable outcome, *see Frye*, 132 S. Ct. at 1409 ("To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable."); and (2) they can be probative of whether she would have accepted the plea offer had she not been led astray, *cf. id.* at 1411 ("There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer . . . because he pleaded guilty to a more serious charge."). These overlapping roles are not coextensive: Any amount of disparity may suffice to show the former, *id.* at 1409 ("Any amount of additional jail time has Sixth Amendment significance." (brackets, quotation marks, and cita-

tion omitted)), but only a disparity of sufficient degree to induce a plea—such as the disparity here—may show the latter.[15]

Third, the statements of Ms. Titlow's original and trial attorneys, and the prosecutor's own unguarded comments, corroborate Ms. Titlow's testimony that Toca's advice prompted her to reject the plea. *See* Resp't Br. 41; J.A. 300–01. The State does not respond to this significant evidence.

The State's quarrel with the weight given to these three categories of evidence is no excuse for categorically denying their probative value. Such evidence satisfies the prejudice standard accepted by all of the lower courts. Indeed, in *Cooper*, this Court found that the "[defendant] ha[d] shown . . . a reasonable probability [that] he . . . would have accepted the guilty plea" based on the very same types and quantity of corroborating evidence. *See* 132 S. Ct. at 1391 (citing *Lafler v. Cooper*, 376 Fed. App'x 563, 571–72 (6th Cir. 2010), which relied solely on "the significant disparity between the prison sentence under the plea offer and exposure after trial" and

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[15] *Compare, e.g.*, *Raysor v. United States*, 647 F.3d 491, 495–96 (2d Cir. 2011) (requiring a "significant" or "substantial" disparity), *and Hofbauer*, 263 F.3d at 551 (noting a "large" disparity), *with, e.g.*, *United States v. Nigro*, 419 F. App'x 244, 247 n.7 (3d Cir. 2011) ("the relative disparity between potential sentences is not that apparent"). *Cf.* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 Stan. L. Rev. 887, 895 (1980) ("The greater the defendant's desire for trial, the greater the sentencing disparity must be in order to induce a guilty plea.").

"confirm[ation]" from prior counsel that the defendant "was open to pleading guilty" as "independent corroboration" of the defendant's subjective testimony).

B. This Court Need Not Foreclose the Possibility of the Rare Case In Which a "Reasonable Probability" of Prejudice Is Satisfied by a Defendant's Credible Testimony.

1. Many circuits have held that a defendant *must* present corroborating evidence of the kinds discussed above to establish prejudice in the plea context. *See, e.g.*, *Paters*, 159 F.3d at 1047; *Gordon*, 156 F.3d at 381; *Engelen*, 68 F.3d at 241; *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991). By contrast, the Sixth Circuit has stated that while objective evidence properly corroborates the defendant's testimony, a fact-finder may in the rare case determine, based on the credibility of defendant's testimony standing alone, that there is a reasonable probability that the defendant would have accepted the plea. *See, e.g.*, *Hofbauer*, 263 F.3d at 548.[16]

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[16] In application, there is no daylight between the approach of the Sixth Circuit and its sister circuits, *see* Resp't Br. 37–39, because the Sixth Circuit in fact relies (as here) on objective evidence that corroborates the defendant's subjective testimony in finding a "reasonable probability" of prejudice. *See, e.g.*, *United States v. Morris*, 470 F.3d 596, 602–03 (6th Cir. 2006); *Smith*, 348 F.3d at 551; *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *Hofbauer*, 263 F.3d at 547 n.1, 551–52; *Turner*, 858 F.2d at 1206; *Lewandowski*, 949 F.2d at 889; *Dedvukovic*, 36 F. App'x at 798. *Amicus* agrees with Respondent that this case does not present the question whether credi-

[Footnote continued on next page]

2. The Sixth Circuit's statement correctly aligns with this Court's Sixth Amendment jurisprudence, and with the discretion fact-finders have in all areas of law when assessing credibility. The decision below will not "open the floodgates" to frivolous litigation, because it is the rare claim in which the defendant's testimony is inherently credible despite the absence of any external evidence, and because courts do not need a *per se* rule to be able to dispose of meritless claims.

A "case-by-case prejudice inquiry . . . has always been built into the *Strickland* test." *Lockhart*, 506 U.S. at 369 n.2; *see also Strickland*, 466 U.S. at 692 (characterizing prejudice in most cases as a "case-by-case inquiry"); *id.* at 695–96 ("Some errors will have had a pervasive effect . . . and some will have had an isolated, trivial effect."). Thus, this Court has rejected "mechanical rules" for the "adjudicat[ion of] a claim of actual ineffectiveness of counsel." *Strickland*, 466 U.S. at 696.

An artificial restriction on the power of courts to give determinative weight to credible testimony would be particularly inappropriate here. First, the categories of available objective evidence are limited by the very nature of the inquiry. *See, e.g., Paters*, 159 F.3d at 1050 (Rovner, J., concurring) (noting the

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[Footnote continued from previous page]
ble testimony alone is sufficient to show prejudice under *Cooper*. *See* Resp't Br. 35–37. If the Court nonetheless reaches that question, this Section II.B explains why it should reject the State's proposed *per se* rule.

"difficulty of producing so-called objective evidence in this context"); *Lewandowski*, 949 F.2d at 889 ("[T]he amount of objective evidence will quite understandably be sparse."). Often, the defendant's testimony may be the *only* direct evidence available as to what she would have done. *Cf.* Stephanos Bibas, Comment, *Incompetent Plea Bargaining & Extrajudicial Reforms*, 126 Harv. L. Rev. 150, 161 (2011) ("Few defendants have documentary or other evidence that their attorneys . . . gave them incorrect advice."). Thus, while some objective evidence will support the vast majority of valid prejudice claims, truly external evidence is uncommon, and should not be required.

Moreover, courts have no hesitation in relying on a defendant's "self-serving" statements to *deny* relief where those statements seem non-credible. *See, e.g.*, *United States v. Nigro*, 419 F. App'x 244, 248 (3d Cir. 2011). Likewise, courts have considered probative the *absence* of subjective statements that the defendant would have accepted a plea. *See, e.g.*, *Engelen*, 68 F.3d at 241; *Duckworth*, 793 F.2d at 902 n.3. A double-standard in which a defendant's statements can only be used against her is inconsistent with *Strickland's* instructions that, in determining prejudice, a court "must consider the totality of the evidence." 466 US. at 695.

The State's rule would also be inconsistent with courts' long-recognized expertise in determining whether a defendant is testifying credibly. *See, e.g.*, *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855–56 (1982) (trial judges have the "unique opportunity . . . to evaluate the credibility of witnesses and to weigh the evidence," and doing so is the "special province of the trier of fact"). Judges should have

"discretion to make those sorts of determinations under the facts of a particular case." *Paters*, 159 F.3d at 1050 (Rovner, J., concurring).

3. Nor is an "objective evidence" rule necessary to prevent a flood of frivolous claims. This Court has rejected "floodgate" concerns in analogous contexts. *See, e.g.*, *Cooper*, 132 S. Ct. at 1389–90. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla*, 130 S. Ct. at 1485 (citing *Strickland*, 466 U.S. at 689). Thus, in most cases, the challenge is dismissed without even reaching the prejudice prong. And there is little incentive for either defendants or lawyers to try to "game" the system, as "incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business," *Day*, 969 F.2d at 46 n.9, and "'[d]eliberate ineffective assistance of counsel is . . . usually bad strategy as well.'" *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (quoting *Day*, 969 F.2d at 46 n.9).

Moreover, "[t]o the extent that petitioners and their trial counsel may jointly fabricate these claims . . . , the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Day*, 969 F.2d at 46 n.9. Even absent foul play, "[i]f all the petitioner were to offer . . . was his own self-serving statement that he would have pled guilty . . . a district judge would certainly have the discretion to find such evidence insufficient under the facts of a given case." *Paters*, 159 F.3d at 1050 (Rovner, J., concurring). Indeed, because uncorroborated statements are necessarily less reliable, the defendant whose testimony is uncorroborated would, inherently, bear a heavier burden than one whose testimony was buttressed by corroborating evidence. This hurdle by

itself limits successful prejudice claims based solely on subjective testimony to only the most extraordinary cases. "There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *Padilla*, 130 S. Ct. at 1485.

On the other side of the ledger is confusion and needless litigation over when "subjective" testimony can be said to "stand alone." This case is a good example: Was there truly no objective evidence corroborating Ms. Titlow's testimony, or is the State really attacking the *weight* of that evidence? Forcing courts to split hairs in the mine run of cases in order to fend off the possibility that they might in rare cases be hoodwinked by self-serving testimony is hardly worth the bargain.

Finally, to the extent a court determined—as most would—that a defendant's testimony alone was *insufficient* to establish prejudice, such a finding would be difficult to challenge in habeas proceedings, 28 U.S.C. § 2254(d)(2) & (e)(1), or on appeal, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), protecting the finality of convictions.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted.

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