Nos. 10-209 & 10-444

IN THE

Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

MISSOURI,
Petitioner,
v.
GALIN E. FRYE,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Supreme Court of Missouri

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the Connecticut Criminal Defense Lawyers Association ("CCDLA"), and the American Civil Liberties Union Foundation ("ACLU") as *amici curiae* in support of respondents in both *Lafler v. Cooper*, No. 10-209, and *Missouri v. Frye*, No. 10-444.[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

CCDLA, an affiliate of NACDL, is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut.

The ACLU is a nationwide nonprofit, nonpartisan organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the Constitution.

SUMMARY OF ARGUMENT

The decisions of the lower courts in both *Lafler* and *Frye* are correct. The Sixth Amendment is violated when a defendant forgoes a plea due to ineffective assistance of counsel and is then convicted and receives a more severe sentence than would have resulted from the plea. Neither a subsequent trial nor a less favorable plea can cure that violation or undo the prejudice suffered from the counsel's deficient performance. Instead, courts must fashion a remedy that places the parties as close as possible to the position they were in before the ineffective assistance occurred.

Amici emphasize three points. First, plea bargaining occupies a central role in the criminal justice system, with the overwhelming majority of criminal cases in state and federal court resulting in guilty pleas. Given the predominance of plea bargaining and this Court's recognition that it is a "critical stage" of the proceedings, the Sixth Amendment requires that defendants receive effective assistance of counsel when considering whether to accept a plea, and it requires a remedy when a defendant can es-

tablish that he received ineffective assistance under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Next, when faced with a Sixth Amendment violation in the context of a forgone plea, courts must fashion a remedy that "neutralize[s] the taint [and] tailor[s] relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). The various approaches employed by the lower courts demonstrate that it is possible to craft a remedy that addresses the prejudice caused by the constitutional violation—i.e., a harsher conviction and sentence than the defendant would have received absent the violation—and puts the parties as close as possible to the position they occupied before the ineffective assistance was rendered.

Finally, recognizing a remedy in the forgone-plea context will not encourage defense counsel to engage in "sandbagging" by failing to convey (or convey adequately) plea offers, nor will it "open the floodgates" of habeas litigation. Defense attorneys, just like prosecutors, are members of the bar and officers of the court, and it is both preposterous and insulting to suggest that they would deliberately engage in ineffective assistance. Nor is there any reason to believe that recognizing a remedy in this context will result in a cavalcade of frivolous habeas litigation. Indeed, the state and federal courts have been recognizing and remedying these claims for three decades without being overwhelmed by them.

ARGUMENT

I. THE SIXTH AMENDMENT GUARANTEES EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS

A. Plea Negotiations Are A Critical Stage Of The Criminal Trial Process

Plea negotiations are "a defining, if not the defining, feature" of the contemporary American criminal justice system. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1064 (2006). In the most recent years for which data is available, approximately 97% of federal and 94% of state convictions were the result of guilty pleas. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, tbl. 5.22.2009;[2] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 – Statistical Tables* 1 (Dec. 2009).[3] This Court has repeatedly noted the predominance of plea bargaining in criminal adjudications, recently observing that "[p]leas account for nearly 95% of all criminal convictions." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

In a system where the overwhelming majority of criminal cases are resolved through pleas, the decision to plead guilty is "ordinarily the most important

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[2] *Available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf.

[3] *Available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

single decision in any criminal case." Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 201 (4th ed. 1984); *see also Brady v. United States*, 397 U.S. 742, 748 (1970) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."). It follows from this that "[t]he most important service that criminal defense lawyers perform . . . is advising [the defendant] whether to plead guilty and on what terms." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 698 (2002).

B. A Sixth Amendment Violation In Plea Bargaining Necessarily Entails Prejudice To The Defendant

Given the centrality of plea negotiations in the criminal justice system, it is no surprise that this Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (noting that the Court has "recognize[d] the importance of counsel during plea negotiations"). The Sixth Amendment guarantee of effective assistance during plea negotiations stems from the longstanding recognition that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

In order to establish a claim of ineffective assistance of counsel during a "critical stage" of a criminal proceeding, the defendant must show that his

counsel's performance "fell below an objective standard of reasonableness," and that he suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687-88, 694. To establish prejudice, the defendant need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court confirmed that the two-part *Strickland* test was "applicable to ineffective-assistance claims arising out of the plea process." *Id.* at 57. The Court explained that in determining whether the prejudice prong is satisfied, the focus should be "on whether counsel's constitutionally ineffective performance affected the *outcome of the plea process*." *Id.* at 59 (emphasis added).

Where, as in respondents' cases, counsel's deficient performance causes a criminal defendant to reject the prosecution's offer of plea that he would have otherwise accepted, the ineffective performance necessarily "affect[s] the outcome of the plea process." *Hill*, 474 U.S. at 59. And where the defendant can show, as respondents have done, that "he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence," the prejudice prong of *Strickland* is satisfied. *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001); *see also Carmichael v. People*, 206 P.3d 800, 807 (Colo. 2009) (holding that the test for prejudice is "a reasonable probability that, but for counsel's errors, [the defendant] would have accepted the plea offer rather than going to trial"). In other words, respondents have shown that, as a result of the defi-

cient performance, they were denied the opportunity to accept a plea that would have resulted in convictions for lesser offenses, and much shorter sentences, than they received as a result of the trial and/or subsequent plea.

This Court has already held that "any amount of actual jail time has Sixth Amendment significance" when evaluating *Strickland*'s prejudice prong. *Glover v. United States*, 531 U.S. 198, 203 (2001). In this way, the result of the proceedings against both respondents was irrevocably tainted by their counsels' constitutionally deficient performance at the plea stage. Simply put, they received much more jail time than they would have but for the constitutional violation that occurred in the plea process. That result is incompatible with this Court's Sixth Amendment jurisprudence.

Petitioners and the United States suggest that because criminal defendants do not have a right to a plea bargain, a defendant who forgoes a plea due to ineffective assistance has not been deprived of any "'substantive or procedural right to which the law entitles him.'" *Lafler* Pet. Br. at 21 (quoting *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000)); *see also Lafler* U.S. Br. at 18-19; *Frye* U.S. Br. at 18-19. That argument is incorrect. The question is not whether a criminal defendant has a right to engage in plea negotiations or ask for a plea bargain. The question is whether, when the prosecution has decided to offer a plea, the defendant has a right to have his counsel inform him of that offer and provide reasonable information about the consequences of accepting or rejecting it. That right has been clearly and consistently recognized by this Court. *See*

Padilla, 130 S. Ct. at 1480-81 ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel."); *Libretti v. United States*, 516 U.S. 29, 50 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *Strickland*, 466 U.S. at 688 (explaining counsel's "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"). Where defense counsel is derelict in those duties, and the defendant forgoes a favorable plea as a result, the defendant has established ineffective assistance of counsel under *Strickland*'s two-prong test.

Petitioners and the United States also suggest that a defendant who forgoes a plea as a result of deficient counsel cannot establish prejudice under *Strickland* because he cannot show that the prosecutor would not have withdrawn the offer or that the court would have accepted the plea. *See, e.g.*, *Lafler* U.S. Br. at 19-21. But under *Strickland*, a defendant is only required to show a "reasonable probability" that counsel's deficient performance affected the outcome of the proceeding. 466 U.S. at 694. Where a prosecutor has offered a plea agreement and there is no indication in the record that it would have been withdrawn or that the court would not have accepted it, there is at least a "reasonable probability" that

the defendant would have successfully pled guilty in accordance with the plea offer.

II. THE LOWER COURTS CAN AND MUST FASHION APPROPRIATE RELIEF TO REMEDY INEFFECTIVE ASSISTANCE AT THE PLEA STAGE

"Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. The court must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *Id.* at 365.

As discussed *supra* in Part I.B, the "injury suffered" in a forgone plea is a conviction and/or sentence more severe than the defendant would have received had the defendant been appropriately counseled and accepted the plea. That outcome is not a "just result[]," *Strickland*, 466 U.S. at 685, because it would not exist absent counsel's "constitutional deficiency," *Padilla*, 130 S. Ct. at 1482. In order to "neutralize th[at] taint," courts must fashion a remedy that places the defendant as close as possible to the position he would have occupied absent the ineffective assistance. *See Morrison*, 449 U.S. at 365.

The court reviewing the ineffective-assistance claim is in the best position to consider the particular circumstances of the case and fashion a remedy that "neutralize[s] the taint" without unduly infringing on competing interests. *Morrison*, 449 U.S. at 365. Various considerations—including the procedural posture of the case, the offense of conviction compared to the offense at issue in the plea offer,

and the factual circumstances surrounding the plea offer—will factor into the calculus of an appropriate remedy. In some cases, the most efficient course to "neutralize the taint" could be to fashion a remedy that approximates the original plea offer, such as by reducing the sentence or conditionally vacating the conviction unless the prosecutor reoffers the original plea or reopens plea negotiations. In other cases, the appropriate remedy might be to vacate the conviction and remand for a new trial (with the possibility of new plea negotiations). Each of these is a constitutionally permissible remedy, and the choice between them should be within the discretion of the court, guided by the parties' recommendations as to an appropriate remedy on the facts of the case.

A. Trial Courts Are Best Situated To Select A Remedy Appropriate To The Circumstances

This Court has previously recognized that the appropriate remedy for malfeasance at the plea stage will depend on the particular circumstances of the case, and that lower courts are best suited to make this determination. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971). In *Santobello*, the Court considered the appropriate remedy to be imposed after the prosecution breached a plea agreement with the defendant. Rather than selecting a particular remedy, the Court remanded the case, concluding that "[t]he ultimate relief to which petitioner is entitled" should be left "to the discretion of the state court, which is in a better position to decide whether the circumstances" of the case necessitated specific performance of the plea agreement or the opportunity for the defendant to withdraw his plea

entirely. *Id.* at 263.

Just as in *Santobello*, the court reviewing the ineffective-assistance claim is in the best position to craft a remedy that addresses the "injury suffered from the constitutional violation" without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 364. Indeed, the variety of approaches developed by state and federal courts confirms that courts are capable of fashioning appropriate remedies for ineffective assistance in the forgone-plea context.

For example, in a case where the offense of conviction is the same as the offense at issue in the forgone plea and the difference is the sentence imposed, the most efficient remedy may be to reduce the sentence to what it would have been under the plea agreement rather than vacate the conviction and remand for further proceedings. *See Becton v. Hun*, 205 W. Va. 139, 145 (W. Va. 1999) ("Because the Appellant's trial outcome and plea offer both resulted in a conviction of one count of aggravated robbery, we conclude that specific performance of the sentencing portion of the plea agreement proposal wherein the State would recommend a ten-year sentence is the appropriate remedy in this case."); *see also Jiminez v. State*, 144 P.3d 903, 907 (Okla. Crim. App. 2006) (same).

In other cases, the court could consider vacating the conviction and requiring reinstatement of the original plea agreement, *see, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994), or vacating and remanding for plea negotiations with a presumption of prosecutorial vindictiveness for any

plea offer less favorable than the original, *see, e.g.*, *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001). In those situations, the prosecutor is free to "seek to demonstrate that intervening circumstances have so changed the factual premises of its original offer that, with just cause, it would have modified or withdrawn its offer prior to its expiration date." *Blaylock*, 20 F.3d at 1468-69.[4]

Finally, a court could vacate the conviction and remand for a new trial, leaving available the possibility that parties will simply re-negotiate a plea, whether or not precisely the same as before. *See, e.g.*, *Riggs v. Fairman*, 399 F.3d 1179, 1184 (9th Cir. 2005); *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998). Vacatur at least "places the defendant at a stage in the proceedings prior to the point at which he or she failed to receive the effective assistance of counsel." *State v. Lentowski*, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997). And vacatur is the very minimum necessary to remedy the core Sixth Amendment violation, which, as discussed, is counsel's deficient plea performance resulting in a conviction and/or sentence more severe than would have occurred in the absence of the deficient performance. Vacatur of the harsher conviction and/or longer sentence resulting from the violation thus should follow as a matter of course once the violation itself is es-

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[4] The possibility of a post-acceptance withdrawal of the plea does not negate a finding of prejudice, which requires a showing only of a "reasonable probability" that but for defense counsel's ineffective assistance, the defendant would have accepted the plea. *See, e.g.*, *Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). It may nevertheless be a consideration in determining what the appropriate remedy should be on the facts of the case. *Id.*

tablished, unless one of the other options better fits the circumstances of the case.

B. Petitioners' And The United States' Counter-Arguments Are Unavailing

Petitioners and the United States contend that because no one remedy is necessarily appropriate for every case, the Sixth Amendment violation should simply go unremedied in all cases. *See Lafler* Pet. Br. at 22-26; *Lafler* U.S. Br. at 24-32; *Frye* U.S. Br. at 25-32. But this Court recognized in *Santobello* that there can be a range of constitutionally appropriate remedies for a particular violation, and it concluded that lower courts are competent to select a remedy that best suits the circumstances of the case. *See* 404 U.S. at 262-63; *id.* at 268-69 (Marshall, J., concurring in part and dissenting in part); *see also Mabry v. Johnson*, 467 U.S. 504, 511 n.11 (1984).

The same is true here. Depending on the unique circumstances of the case, the appropriately tailored remedy might be specific performance of the plea agreement, or it might be vacatur of the conviction and remand for a new trial. The United States' objections to these remedies merely confirms that no one remedy will be appropriate in every case, and thus courts should have discretion to fashion a remedy that "neutralize[s] the taint" of the constitutional violation without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 365.

1. The United States contends that a specific performance remedy is inappropriate because it gives the defendant the benefits of the original plea offer, without recognizing the risk that the prosecution could have revoked it or the trial court could have rejected it before it came to fruition. *See Lafler*

U.S. Br. at 28; *Frye* U.S. Br. at 29. But, as explained *supra*, courts can and do consider the possibility of post-acceptance withdrawal or trial-court rejection of the plea offer in determining whether a specific performance remedy is appropriate on the facts of the case. *See Blaylock*, 20 F.3d at 1468-69. Where the court concludes that the prosecutor would have withdrawn the plea or the trial court would have rejected it, then the court will decline to award specific performance. *See Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). Indeed, if there is a sufficient evidentiary basis for concluding that the plea would not have been consummated for these reasons—more than just rank speculation of the "anything could happen" variety—there would not even be the underlying prejudice necessary to establish the violation. The question of remedy would be irrelevant.

2. The United States also argues that specific performance is inappropriate because the "mutuality of advantage" underpinning the original plea offer—that is, the incentives that led the prosecution to offer the plea in the first instance, such as the opportunity to secure the defendant's cooperation against a codefendant or the ability to avoid a trial—may no longer be present at the time the ineffective-assistance claim is adjudicated, and thus specific performance of the plea could result in a windfall for the defendant. *Lafler* U.S. Br. at 29. But again the United States fails to recognize that courts do consider changed circumstances when evaluating whether to fashion a specific performance remedy. *See United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992) (in fashioning appropriate remedy, court could consider "any legitimate (nonvindictive) reasons why

the prosecution may no longer favor the plea agreement"). To be sure, changed circumstances might countenance against reinstatement of a plea offer in a particular case, but it does not follow from this that "the relief of 'specific performance' of a plea bargain is *never* appropriate." *Id.*

3. The United States' argument that specific performance remedies violate separation-of-powers principles also misses the mark. *See Lafler* U.S. Br. at 30-31 & n.16; *Frye* U.S. Br. at 30-31 & n.9; *see also Lafler* Pet. Br. at 24. First, many ineffective-assistance plea cases arise on federal habeas review of a state conviction, and, as the United States concedes, the federal habeas court is not bound by state separation-of-powers principles. Next, to the extent petitioners and their *amici* are worried about federal courts encroaching on the authority of state prosecutors, the proper course is for the federal court to grant a conditional writ of habeas, which provides the State with the option of adopting the habeas court's proposed remedy or accepting the defendant's release. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief."). With a conditional writ, "the state is given various alternatives which include release of petitioner as one of the alternatives, or which provides for release of petitioner if the alternatives are not met." 39A C.J.S. *Habeas Corpus* § 373; *see, e.g.*, *Lafler* Pet. App. 42a (granting conditional writ for defendant's release unless the State reoffers the original plea); *Riggs*, 178 F. Supp. 2d at 1142 (granting conditional writ unless prisoner "brought to retrial [including new plea bargaining

phase] within ninety (90) days"). Conditional writs provide the State the option of curing the constitutional defect, but do not require it, which alleviates concerns about federal interference with state proceedings. *See Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003).

Additionally, even assuming that imposition of a specific performance remedy in a particular case might raise separation-of-powers concerns, that is a consideration for the reviewing court to take into account in fashioning a remedy that does not "unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. But again, that specific performance might not be the appropriate remedy in a particular case does not mean that is inappropriate in *every* case. *See Day*, 969 F.2d at 47.

4. The United States' concerns about the new-trial remedy fare no better. The United States contends that because respondents sought to plead guilty, "any remedy that upsets the finding of [their] guilt has nothing to do with [their] constitutional claim." *Lafler* U.S. Br. at 25. That argument misunderstands the nature of the constitutional violation. Where a trial or subsequent plea *would not have happened but for a constitutional violation*, the harsher conviction and sentence that results cannot be a constitutionally valid outcome. *Strickland*, 466 U.S. at 685. A defendant who receives vacatur of his conviction certainly is not put "in a better position than if he had never received the deficient advice." *Lafler* U.S. Br. at 25 (emphasis omitted). Rather, he is placed in the same position he occupied before his lawyer's unconstitutionally deficient performance.

5. The United States also objects that vacating

the conviction to allow the parties to resume plea negotiations is unwarranted because the parties' incentives will have changed over time. *See Lafler* U.S. Br. at 27. Perhaps so. But it is hardly clear that the incentives will change in only one direction. A new trial will create a new set of risks and incentives for *both parties* to balance, which may very well lead to new plea negotiations and a successful plea. The passage of time might diminish witness memories or availability to the benefit of some defendants in some cases, but, where the case has been to trial, both sides will also know that at least one jury found that the facts established guilt beyond a reasonable doubt. And the defendant may be concerned that a new trial will result in an even longer sentence. In short, the incentives to plead, if perhaps somewhat different, will unquestionably continue to drive the parties toward another negotiated resolution.

III. RECOGNIZING A REMEDY FOR INEFFECTIVE ASSISTANCE IN THE CONTEXT OF A FORGONE PLEA WILL NOT IMPAIR THE ADMINISTRATION OF JUSTICE

Petitioners and their *amici* raise two related concerns about the administrative implications of recognizing a remedy for ineffective assistance in the context of a forgone plea. First, they assert that it will "perversely encourage[] sandbagging." *Lafler* U.S. Br. at 29; *see also Frye* Pet. Br. at 36-37. Second, they allege that recognizing the claim would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *accord* CJLF Br. at 12. Both concerns are unfounded.

A. Defendants And Defense Lawyers Will Have No Incentive To Sandbag

Missouri and the United States contend that a defendant with a colorable claim that his lawyer mishandled his plea offer might "take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Lafler* U.S. Br. at 29 (quoting *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting)). Missouri goes further, warning darkly that "shrewd defense attorney[s]" will willfully violate their ethical duties and "strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." *Frye* Pet. Br. at 36. Those concerns are baseless.

1. Defendants who reject pleas because of ineffective assistance go to trial not to game the criminal justice system, but because they have no choice. The definition of prejudice courts have applied in the forgone-plea context confirms this point. To show prejudice, the defendant must "show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence." *Wanatee*, 259 F.3d at 703-04. A defendant who rejected a plea offer because he could bring an ineffective-assistance challenge if trial turned out poorly could not meet this standard. The defendant's strategic choice, not "counsel's advice," would be the reason for denying the plea. *Id.*

But perhaps the concern is that, in any case where there was plea bargaining, a defendant might assert that his lawyer failed to inform him of a fa-

vorable plea offer, regardless of what actually happened. Such claims, however, have little chance of success. Defendants alleging ineffective assistance bear the burden of proving both deficient performance and prejudice. *See Strickland*, 466 U.S. at 690, 694. Absent concrete evidence, a claim that counsel failed to inform a defendant of a plea offer is a swearing contest between the defendant and his attorney. Petitioners' own *amici* starkly demonstrate how difficult it is in practice for defendants to meet their burden under *Strickland*. *See* CJLF Br. at 12 ("of a sample of 2,384 cases, there was only one meritorious ineffective assistance claim") (citing N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 52 (2007)). It is absurd to think that defendants will commonly prevail on these claims without solid evidence of their counsel's deficient plea performance.

2. Missouri's further concern that defense lawyers will intentionally neglect to inform their clients of plea offers to create "a sort of insurance policy," *Frye* Pet. Br. at 36, is not only unfounded, but outrageous. Defense lawyers are no less devoted than prosecutors to "serv[ing] their clients and the judicial system with integrity." *Day*, 969 F.2d at 46, n.9. Pocketing a plea offer runs afoul of the American Bar Association's Model Rules of Professional Conduct, which provide: "[a] lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required." Model Rules of Prof'l Conduct R. 1.4(a)(1) (2007). Moreover, "deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. . . . [B]ecause incompetent lawyers risk disciplinary action, malpractice suits,

and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate." *Day*, 969 F.2d at 46, n.9; *see also In re De Rycke*, 707 N.W.2d 370 (Minn. 2006) (holding that disbarment was appropriate remedy for attorney who, among other ethical violations, failed to inform clients of plea offers); *Lawyer Disciplinary Bd. v. Turgeon*, 557 S.E.2d 235 (W. Va. 2000) (imposing two-year suspension for failure to inform client of plea offer).

3. While each of these reasons belies the claim that defense counsel will deliberately engage in ineffective assistance by failing to convey a plea offer, it is also worth noting that the prosecutor himself can guard against this potential problem by placing any plea offer on the record in the case. Courts in Arizona, for example, will often hold what is known as a "*Donald* hearing" before trial to ensure that the defendant understands the State's plea offer and the consequences of trial and conviction. *See State v. Donald*, 10 P.3d 1193 (Ariz. Ct. App. 2000); *see, e.g.*, *State v. Ware*, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011) (explaining pre-trial *Donald* hearing). By placing a plea offer on the record, all parties can have a sound "insurance policy" against a post-trial claim that the offer was not properly conveyed to the defendant.

B. There Will Be No Flood Of Post-Conviction Litigation

Petitioners and their *amici* also contend that recognizing ineffective assistance in the context of a forgone plea would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *see also* CJLF Br. at 12. That, too, is incorrect.

1. This Court has considered—and rejected—this very argument in its two prior cases addressing ineffective assistance during plea negotiations. *See Padilla*, 130 S. Ct. at 1485; *Hill*, 474 U.S. at 58. As this Court explained, "[s]urmounting *Strickland*'s high bar is never an easy task," and "[t]here 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.

The Court's recognition last Term in *Padilla* that lower courts are well-equipped to consider *Strickland* claims has even more force in the context of ineffective-assistance claims based on forgone pleas because state and federal courts have been entertaining these claims for three decades. *See, e.g.*, *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982). Continuing to acknowledge such claims is unlikely to have a significant impact on the overall amount of post-conviction litigation in the courts.

Indeed, the recent experience in Connecticut belies any suggestion that recognizing ineffective assistance in the forgone-plea context will result in a flood of habeas litigation. In 2004, the Connecticut Appellate Court held that a defendant can establish ineffective assistance of counsel where defense counsel fails to meaningfully explain the State's plea offer, the defendant rejects the offer, and he is subsequently convicted and receives a higher sentence. *See Sanders v. Comm'r of Correction*, 851 A.2d 313 (2004). The State had offered the defendant a plea

in which he would serve a 12-year sentence for the offense to run concurrently with a nine-year sentence that had already been imposed in a separate case, but defense counsel failed to meaningfully explain the plea and the consequences of going to trial. The defendant proceeded to trial, where he was convicted and sentenced to a 25-year sentence to run consecutively to the sentence in his other case. *Id.* at 315-16. On a petition for habeas, the lower court concluded that the defendant had established ineffective assistance under *Strickland* and ordered that the defendant's sentence be reduced to reflect the plea offer pending the defendant's entry of guilty pleas in accordance with the terms of the offer. *Id.* at 316. The Connecticut Appellate Court affirmed. *Id.* at 320.

In the years since *Sanders*, the Connecticut courts have not been inundated with claims of ineffective assistance in the context of forgone pleas. *Sanders* claims have been raised in approximately twenty cases, of which Connecticut courts granted habeas relief only three times. *See H.P.T. v. Comm'r of Correction*, 14 A.3d 1047 (Conn. App. Ct. 2011); *Ebron v. Comm'r of Correction*, 992 A.2d 1200 (Conn. App. Ct.), *cert. granted on other grounds*, 995 A.2d 954 (2010); *Valle v. Warden*, 2008 WL 2313664, at *13 (Conn. Super. Ct. May 15, 2008).

2. But even if recognizing a remedy in this context would precipitate some additional litigation, that is no reason to deny defendants their Sixth Amendment right to counsel during plea negotiations, a most critical stage of the criminal trial process. Judicial administration is an important value, but "[i]t goes without saying that 'the fact that a

given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)); *see also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment) ("[C]urrent limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.").

Moreover, to the extent any frivolous claims are raised, the habeas statutes provide a variety of mechanisms to facilitate their expedient dismissal. *See, e.g.*, 28 U.S.C. § 2255(b) (allowing for dismissal of frivolous claims without a hearing); 28 U.S.C. § 2254, Habeas Rule 4 (same).[5] But "[t]o the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason . . . to keep them from being heard." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 640 n.1 (2007) (Souter, J., dissenting).

[5] Similarly, § 2254's limitation on second or successive petitions, 28 U.S.C. § 2254(d), and its presumption in favor of state-court fact-finding, *id.* § 2254(e)(1), minimize frivolous collateral challenges by erecting stringent procedural barriers.

CONCLUSION

For the foregoing reasons and those stated in respondents' briefs, this Court should affirm the judgments below.

Respectfully submitted,

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July 22, 2011