No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

EMOND DUREA LOGAN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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11 March 2019

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Logan asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. The district court initially appointed counsel to Logan on the finding that he was indigent. His father has retained counsel for representation since that time. Logan has been incarcerated since February 2010 and remains indigent.

Dated: 11 March 2019

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QUESTION PRESENTED FOR REVIEW

This Court has long held that a defendant has the right to the effective assistance of counsel at all critical stages of a criminal proceeding. *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376 (2012); *Strickland v. Washington*, 466 U. S. 668, 685, 104 S. Ct. 2052 (1984). Thus, in plea negotiations, for example, counsel must give good advice on whether to accept a plea deal or reject it and proceed to trial. *Lafler*, 566 U.S. at 165; *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366 (1985). In deciding whether to appeal, counsel must give advice on the pros and cons of appealing. *Roe v. Flores-Ortega*, 528 U. S. 470, 481, 120 S. Ct. 1029 (2000). Each case is examined based upon all the circumstances on a case-by-case basis. *Strickland*, 466 U.S. at 688.

Unanswered in these opinions is what happens when a defendant has two or more attorneys, one attorney gives objectively unreasonable advice that the defendant takes, to his detriment, but at least one other attorney had offered good advice. Does the fact that one attorney offered reasonable advice necessarily preclude a defendant from relief—no matter the totality of circumstances, and even when a court has ruled that another attorney's advice was objectively unreasonable and that it prejudiced the defendant? The Sixth Circuit has answered, yes. This appears to be an issue of first impression for the Court.

In this case, one attorney passively suggested that Petitioner accept a ten-year plea deal while another attorney—motivated by money to proceed to trial—passionately advised Petitioner to reject the plea offer with promises of freedom. Petitioner rejected the early plea deal but accepted a later plea offer, leading to a sentence of 35 years. Petitioner submitted that, just as any other question under *Strickland*, a court should view the totality of the circumstances in a case-by-case basis to determine whether relief is warranted. See *id*. The district court agreed that the attorney advising Petitioner to reject the ten-year plea deal was ineffective, describing the advice as "abysmal." But the district court denied relief, finding that Petitioner was precluded from relief under *Strickland* because at least one attorney gave him reasonable advice. "That's all the Sixth Amendment of the Constitutional required." Pet. App. 29a

The Sixth Circuit affirmed in a published decision. Without citation to any authority from this Court on its legal position in support of its decision, the Sixth Circuit held that a defendant is precluded from relief under *Strickland* as a matter of law so long as one attorney offered good advice. Pet. App. 8a.

The question before the Court is whether a defendant may be entitled, at least under some circumstances, to relief as a result of an attorney's ineffective assistance, even if another attorney offered reasonable advice.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Emond Durea Logan respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's sentence. *Emond Durea Logan v. United States*, No. 17-1996, 910 F.3d 864 (6th Cir., Dec. 17, 2018). Pet.App. at 1a. The district court had denied Logan's motion under 28 U.S.C. § 2255. *United States v. Emond Durea Logan*, No. 1:08-cr-00274 (W.D. MI., Jun. 30, 2017). Pet.App. at 31a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court initially had jurisdiction under 18 U.S.C. § 3231, as the superceding indictment charged Logan with violations of the U.S. criminal code, including a violation of 21 U.S.C. § 846. The district court re-obtained jurisdiction when Logan timely filed a motion to correct his sentence within a year of the date his conviction became final. 28 U.S.C. § 2255(f)(1); *Clay v. United States*, 537 U.S. 522, 525, 123 S. Ct. 1072 (2003).

The Sixth Court had jurisdiction under 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), 28 U.S.C. § 2253(c) and Fed. R. App. P. 4(a)(1)(B)(i), as the district court certified the issue for appeal and Logan timely filed a notice of appeal within 60 days of the district court's final judgment order denying Logan relief.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered a final decision, affirming the district court, and because Logan is filing this petition within 90 days of that order. See Sup. Ct. R. 13.1, 13.3, 29.2.

RELEVANT CONSTITUTIONAL PROVISIONS

> In all criminal prosecutions, the accused shall enjoy to right to * * * have the Assistance of Counsel for his defence.

U.S. Const., amend. VI.

STATEMENT OF THE CASE

The Court has made clear that a defendant has the right to the effective assistance of counsel at all critical stages of a criminal proceeding. *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376 (2012); *Strickland v. Washington*, 466 U. S. 668, 685, 104 S. Ct. 2052 (1984). In each stage, the standard is the same: The attorney's advice must be objectively reasonable and not result in a less-favorable outcome for the defendant. *Strickland*, 466 U.S. at 688, 692.

Unanswered in these opinions is what happens when a defendant has two or more attorneys, one attorney gives objectively unreasonable advice but at least one attorney offers good advice. In this case, the district court found that Petitioner's received "abysmal advice" from one attorney that likely led to a higher sentence. Thus, that attorney was ineffective under *Strickland*. But the district court denied relief, and the Sixth Circuit affirmed, with the view that the Sixth Amendment only requires that one attorney offer objectively reasonable advice. The totality of the circumstances, including that one attorney was aggressively counseling rejection of the plea deal because he would earn $100,000 by taking the case to trial, while the other had passively favored the plea deal by describing the plea deal as a "good one," were not relevant to the lower courts.

1. Logan was charged with a cocaine trafficking conspiracy. The district court appointed Richard Zambon to represent Logan. Logan openly admitted his guilt to Zambon.

Logan's father sought to retain a family friend as counsel for Logan, however. Leo Terrell was an attorney in California. Logan's father cashed in stock to pay Terrell $100,000 to represent Logan and take the case to trial and, if needed, represent Logan on appeal.

2. Zambon negotiated a plea deal through which Logan would receive a sentence of no greater than ten years of imprisonment. Zambon testified that he had never advised a client whether to enter a plea deal or go to trial. Specific to this case, he simply told Logan that the plea deal was "a very good" one. On a Friday before a change-of-plea hearing set for Monday, Logan accepted the plea deal and signed the agreement. But between that Friday and Monday, Terrell spoke to Logan four times by phone. Terrell aggressively advised Logan to back out of the plea agreement and not to plead guilty on Monday because Terrell claimed he could "beat the charges" at trial so that Logan would not go to prison. Terrell advised Logan to go to court and explain that he did not want to plead guilty and that he had signed the plea agreement "under duress." Following that direct advice, Logan went into court the following Monday and refused to plead guilty.

3. After the filing of a superseding indictment, Terrell and a second court-appointed attorney advised Logan to plead guilty. But this time, the government's plea offer no longer included a ten-year cap. The district court sentenced Logan to serve 420 months in prison.

4. Logan appealed. Although Logan's father had paid Terrell $100,000—an amount that was supposed to include representation on appeal—Terrell did not handle the appeal. The Sixth Circuit ruled that the government had breached the plea agreement but affirmed.

5. Logan timely filed a motion under 28 U.S.C. § 2255. The sole argument was that Terrell was prejudicially ineffective for advising Logan to turn down the ten-year plea deal, as it

led Logan to receive a sentence of 420 months. Following an evidentiary hearing, the district court found that Terrell was prejudicially ineffective for advising Logan to withdraw from a favorable and already-signed plea agreement. "Logan received abysmal advice from an attorney who had no business giving it at the critical juncture when the favorable plea offer was on the table." Pet. App. 29a. The district court denied relief, however, finding that Zambon's passive "advice" that the initial plea offer was a "very good" one was "all the Sixth Amendment of the Constitution required." Pet. App. 29a.

6. The district court issued a certificate of appealability. Pet. App. 29-30a. Logan appealed. The Sixth Circuit agreed that Terrell was deficient. Pet. App. 6a-7a. Although not citing a single case standing for its dispostive proposition of law, the Sixth Circuit interpreted this Court's case law concerning the right to effective assistance as precluding Logan from obtaining relief:

> [A]s these recitations have been framed and phrased, they encompass an affirmative right (the right to the effective assistance of counsel at critical proceedings), not a negative right (the right to be completely free from ineffective assistance).

Pet. App. 8a.

7. Logan remains in the custody of the U.S. Bureau of Prisons at Federal Correctional Institution Victorville Medium I in Adelanto, California under a sentence of imprisonment of 420 months (35 years).

REASONS FOR GRANTING THE PETITION FOR WRIT

This case presents an important constitutional question that remains unanswered by the Court's precedent. While the Court has made clear a defendant has the right to the effective assistance of counsel at critical stages, it has not expressly addressed whether a defendant who receives conflicting advice may, under at least some circumstances, present a successful claim of ineffective assistance of counsel against the attorney found to have been ineffective.

The district court concluded that Petitioner had received the ineffective assistance of an attorney that gave "abysmal" advice to reject an early-offered ten-year plea deal. But without citation to any decision from this Court in support, it ruled that it was precluded from granting Petitioner relief because a second attorney had passively advised that the plea deal was favorable. The Sixth Circuit affirmed, also without citation to any authority of this Court standing for the proposition of law it set forth in support of denying relief.

Despite the Sixth Circuit's phrasing of the issue, Logan is <u>not</u> urging the Court to rule that a right exists "to be completely free" from ineffective assistance. *Strickland* and other cases already set the framework for courts to review instances of conflicting attorney advice on a case-by-case basis to determine whether the circumstances of the case and collective legal advice given deprived a defendant of the right to the effective assistance of counsel. This case represents circumstances where the overall advice was deficient: one attorney aggressively gave bad advice, outright lying to Petitioner in the process, while the other attorney passively noted that the plea offer was "very good."

The question for the Court, then, is whether a defendant may be entitled to relief from an attorney's ineffective assistance, at least is some circumstances, even if another attorney gave objectively reasonable advice.

I. The Court Should Grant Certiorari to Address whether a Defendant may be Entitled to Relief from an Attorney's Ineffective Assistance under Some Circumstances, Even if Another Attorney Offered Reasonable Advice.

A. Defendants have the Right to the Effective Assistance of Counsel as to whether to Accept a Plea Deal or Proceed to Trial.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const., amend. VI; *Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841 (2009). The right to assistance of counsel means the right to the "effective" assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970); *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574 (1986). And in part because today's criminal justice system is one of plea bargains, not trials, the Court has made clear that the right to effective assistance of counsel extends to the plea negotiation stage of a case. *Missouri v. Frye*, 566 U.S. 134, 144, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162-63, 132 S. Ct. 1376 (2012).

B. The *Strickland* Standard is Applied Case-by-case based upon the Circumstances Presented.

To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate two separate points. First, the defendant must show that the representation he received "fell below an objective standard of reasonableness." Second, he must show that "a reasonable

probability that but for counsel's unprofessional errors, the results of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2055, 2063 (1984); see, also, *Stanford v. Parker*, 266 F.3d 442, 454 (6th Cir. 2001).

Application of *Strickland* has always been fact specific. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. "That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495 (2000) (internal citation omitted). See *Rompilla v. Beard*, 545 U.S. 374, 377, 125 S. Ct. 2456 (2005). The circuit courts have recognized this case-by-case characteristic of the test. See, e.g., *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010) ("*Strickland* requires a case-by-case analysis of whether counsel's deficiencies affected the outcome * * *."); *Cone v. Stegall*, 14 Fed. Appx. 439, 448 (6th Cir. 2001) ("The test is fact specific.").

C. Contrary to the Decisions below, it is Not Established Case Law that a Defendant is Precluded from Relief from Ineffective Assistance of Counsel as a Matter of Law so Long as One Other Attorney Offered Reasonable Advice.

Both the district and circuit courts found that, because Zambon was present to offer good advice, Logan was not entitled to relief from Terrell's exceptionally bad advice. They reached this conclusion based upon a finding that good advice from one attorney is necessarily sufficient, as a matter of law, to satisfy the Sixth Amendment regardless of the conduct of another attorney. But this broad conclusion was not supported by the case law the lower courts cited or any other case law.

The district court asserted that "all the Sixth Amendment of the Constitution required" was that Logan have one attorney giving good advice. Pet. App. 29a. It did not provide a citation to this Court's authority in support of that statement. Near that statement in the opinion is a citation to *Strickland*, 466 U.S. at 686, where that case cites *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708 (1980). But neither *Strickland* nor *Cuyler* address the question here or support the statement that relief from ineffective counsel is precluded as long as the defendant is offered reasonable advice from at least one attorney.

The district court also cited *United States v. Martini*, 31 F.3d 781 (9th Cir. 1994), and *Stoia v. United States*, 22 F.3d 766 (7th Cir. 1994). Both cases pre-date *Lafler* and *Frye*. Thus, as the district court noted, their legal holdings are now questionable.[1] Moreover, *Martini* and *Stoia* are materially distinguishable because the decisions to deny relief were largely based upon the fact that the lawyers giving bad advice had either not been retained or had not appeared on the defendant's behalf. *Martini*, 31 F.3d at 782; *Stoia*, 22 F.3d at 769. That issue is not present here.[2]

Similarly, the case law the Sixth Circuit court cited did not establish that a defendant is precluded from relief from ineffective assistance of counsel as a matter of law so long as

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[1] The district court recognized that the holding that a defendant cannot make a claim of ineffective assistance after acting upon bad advice to reject a plea and go to trial is no longer accurate as a result of (or, in the district court's terms, "blunted" by) this Court's decisions in *Lafler* and *Frye*. "[I]n both *Lafler* and *Frye*, the Court made clear that the scenario that [an unpublished Sixth Circuit opinion] cautioned against can indeed be the basis for a valid ineffective assistance claim." Pet. App. 26a-27a.

[2] See Pet. App. 23a-24a (district court noting that because Terrell had been retained for months, the district court was aware that he was involved in the case and, in fact, had attempted to appear pro hac vice, Terrell was "counsel" for the purposes of an ineffective assistance of counsel claim).

reasonable advice is offered. After citing a string of this Court's opinions,[3] the Sixth Circuit noted that it was interpreting those cases—not relying on any holding or even dicta in those cases—to find that the way the Court's "recitations have been framed and phrased," meant that Logan was precluded from relief as a matter of law. Pet. App. 8a.

In conclusion, the legal proposition used by both the district court and Sixth Circuit to deny Logan relief is not one found in this Court's case law. It is not precedential and—if not already addressed by *Strickland* as Logan suggests below—may be an issue of first impression. Regardless, the Court should grant this petition to address this important Sixth Amendment question and clarify whether a defendant can obtain relief through an ineffective assistance of counsel claim when represented by two or more attorneys giving conflicting advice.

D. A Holding that a Defendant May Obtain Relief as the Result of Ineffective Assistance of Counsel in Some Cases, even if Another Attorney is Ineffective, is Consistent with *Strickland*.

As noted above, this Court's case law already establishes that ineffective assistance of counsel claims should be reviewed case-by-case and under the totality of the circumstances. See *Taylor*, 529 U.S. at 391; *Rompilla*, 545 U.S. at 377. As a result, the Sixth Circuit's blanket prohibition on relief from ineffective assistance of counsel when another attorney offers reasonable advice conflicts with this Court's precedent. That precedent appears to stand for the position that a defendant may, in some circumstances, be eligible for relief from the prejudicial ineffectiveness of an attorney even if another attorney provided effective assistance.

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[3] *Frye*, 566 U.S. at 144; *Dist. of Columbia v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783 (2008); *United States v. Gouveia*, 467 U.S. 180, 189, 104 S. Ct. 2292 (1984); *Reece v. Georgia*, 350 U.S. 85, 90, 76 S. Ct. 167 (1955); *Johnson v. Zerbst*, 304 U.S. 458, 462-63, 58 S. Ct. 1019 (1938); and *United States v. Sprague*, 282 U.S. 716, 731, 51 S. Ct. 220 (1931). Pet. App. 7a.

This approach of looking to the overall advice given by all attorneys case-by-case, rather than precluding relief as a matter of law, to determine whether the performance was ineffective is found elsewhere. In *Harrison v. Motley*, 478 F.3d 750 (6th Cir. 2007), the defendant had two attorneys, and they disagreed on whether to call alibi witness. *Id*. at 752-53. Rather than conclude that the defendant was precluded from relief as a matter of law because one of the attorneys gave reasonable advice, the Sixth Circuit considered the claim on the facts of the case, reviewing whether the defendant was prejudiced.[4] *Id*. at 758.

In *Railey v. Webb*, 540 F.3d 393 (6th Cir. 2008), the defendant had two attorneys who disagreed over whether the defendant should plead guilty. *Id*. at 416. The panel did not conclude that the defendant was precluded from relief as a matter of law because one of the attorneys gave reasonable advice. Instead, the Sixth Circuit considered the claim on the facts of the case, reviewing whether the state courts had ruled contrary to this Court's precedent when finding that the attorneys were not, viewed together, deficient. *Id*. ("Citing *Strickland*, the Kentucky court found no clear error in the trial court's determination that Railey's counsel were not ineffective," having "educated him on the range of options available to all defendants, entering a plea or proceeding to trial.").

Where more than one attorney is involved at trial, Indiana appellate courts consider the "collective performance" of the attorneys in determining effective assistance of counsel. *Woods v. State*, 701 N.E.2d 1208, 1227 n.1 (Ind. 1998), cert. denied, 528 U.S. 861, 120 S. Ct. 150

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[4] The Sixth Circuit concluded that the defendant had not presented a successful claim of ineffective assistance of counsel. *Harrison*, 478 F.3d at 758. But this was because the state court had heard from the witnesses in an earlier proceeding and concluded that they did not establish an alibi. *Id*.

(1999). "[W]here more than one attorney is involved," the Indiana appellate courts "view ineffectiveness of counsel as an issue ultimately turning on the overall performance of counsel" and it is "the collective performance that counts." *Id*.

Logan draws analogy to whether a defendant would be precluded from relief if, instead of two attorneys, one attorney had given him the same conflicting advice involved here. What if one attorney reported that the government had presented a "very good" plea agreement but, on false promises of victory at trial, nevertheless aggressively advised the defendant withdrew from the agreement? Logan submits that he would not have been precluded from obtaining relief as a matter of law. The only difference is that the advice in his case came from two attorneys and not one.

In the end, to be consistent with *Strickland*, the approach used in cases such as this one must allow a defendant to obtain relief as a result of a Sixth Amendment error if the overall advice fell below an objective standard of reasonableness and prejudiced the defendant. The fact that one attorney involved offered good advice cannot preclude relief. For these reasons, Logan asks the Court to grant this petition and set the matter for full briefing.

E. Applying *Strickland* here, Logan would be entitled to relief, as the balance of advice he received was "abysmal," objectively unreasonable, and prejudiced Logan.

One attorney who testified that he never tells clients whether to plead guilty or proceed to trial described the government's plea deal offered to Logan "very good" and may have passively recommended accepting it. A second attorney, motivated to earn $100,000 that Logan's father had taken from a retirement fund, aggressively urged Logan to pass on the ten-year plea deal with assertions that Logan could be acquitted, only to later advise Logan to accept a much worse

agreement leading to a sentence of 420 months. Pet. App. 14a, 16a. With those two voices, one direct, confident and hopeful, and another passive and indecisive, the louder voice and the overall advice was bad advice—that Logan should proceed to trial. The balance of the advice given Logan was objectively unreasonable and prejudicial. Pet. App. 24a n.2 (district court finding a reasonable probability exists that, but for Terrell's advice, Logan's sentence would have been lower than 420 months). Accordingly, Logan has been deprived of his right to the effective assistance of counsel, and relief is appropriate. *Strickland*, 466 U.S. at 688, 694.

Logan asks the Court to reject the Sixth Circuit's blanket rule that a defendant receiving effective assistance from one attorney necessarily precludes relief from the prejudicial ineffectiveness of another attorney. Logan asks the Court to grant this petition and accept review of the case. He eventually seeks on order granting relief in the form of requiring the government to re–offer the plea agreement with a ten-year cap on prison time. See *Lafler*, 566 U.S. at 174 ("The correct remedy in these circumstances, however, is to order the [government] to reoffer the plea agreement.").

CONCLUSION

The Court should grant Petitioner Emond Durea Logan's petition for writ of certiorari for the compelling reasons noted above. He respectfully asks the Court to grant his petition and order that the matter proceed to briefs on the merits of the constitutional question presented above.

Respectfully submitted,

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Dated:11 March 2019

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari, motion for leave to proceed in forma pauperis, and the following appendix were served upon by U.S. Priority Mail on the date reported below upon Sally Berens, Office of the U.S. Attorney, P.O. Box 208, Grand Rapids, MI 49501; and the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and by email to SupremeCtBriefs@USDOJ.gov.

Dated:11 March 2019

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.

APPENDIX