No. 19A573

In the Supreme Court of the United States

Daniel Ramet,

Petitioner,

v.

Robert LeGrande, et al.

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for a writ of certiorari

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QUESTION PRESENTED

Mr. Ramet strangled his 20-year-old daughter Amy to death. He admitted he took a break in the middle of strangling her, which made a first-degree murder conviction a foregone conclusion at trial. But Mr. Ramet's trial attorney convinced him to turn down a favorable plea deal for 15 years to life based on an unreasonable belief Mr. Ramet had "a really good shot at a manslaughter" defense. That defense unsurprisingly failed at trial; the jury convicted him of first-degree murder and sentenced him to life without the possibility of parole.

Mr. Ramet pursued habeas relief under the theory he received ineffective assistance during the plea negotiations. See *Lafler* v. *Cooper*, 566 U.S. 156 (2012). The court of appeals below rejected the claim. In its view, even if the attorney "gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial," Mr. Ramet still wouldn't be entitled to relief. The question presented in this case is:

> If a defense attorney advises a client to reject a favorable plea offer based on a grave miscalculation about the viability of a legal defense, has the attorney provided deficient performance?

LIST OF PARTIES

Daniel Ramet is the petitioner. Robert LeGrande, the former warden of Lovelock Correctional Center, is a respondent. (The lower court did not replace his successor, Renee Baker, as a party.) The attorney general of the State of Nevada is also a respondent. No party is a corporate entity.

LIST OF PRIOR PROCEEDINGS

This is a federal habeas case challenging a state court judgment of conviction.

The underlying state trial proceedings took place in *State* v. *Ramet*, Case No. C225406 (Nev. Eighth Jud. Dist. Ct.) (judgment of conviction entered Aug. 31, 2007).

The state direct appeal proceedings took place in *Ramet* v. *Nevada*, Case No. 50204 (Nev. Sup. Ct.) (opinion issued June 4, 2009).

The initial review state collateral proceedings took place in *Ramet* v. *Nevada*, Case No. C225406 (Nev. Eighth Jud. Dist. Ct.) (opinion issued March 11, 2013).

The state collateral appeal proceedings took place in *Ramet* v. *Nevada*, Case No. 56144 (Nev. Sup. Ct.) (order issued Nov. 5, 2010); and *Ramet* v. *Nevada*, Case No. 62993 (Nev. Sup. Ct.) (opinion issued July 22, 2014).

There are no related federal proceedings besides the proceedings in the district court and the Ninth Circuit below.

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Petitioner Daniel Ramet respectfully requests the Court issue a writ of certiorari to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. See Appendix D.

OPINIONS BELOW

The Ninth Circuit issued an unpublished memorandum decision affirming the denial of Mr. Ramet's petition for a writ of habeas corpus. Appendix D; see *Ramet* v. *LeGrande*, 774 F. App'x 390 (9th Cir. 2019). The federal district court's order is likewise unpublished. Appendix E; see *Ramet* v. *LeGrande*, Case No. 3:14-cv-00452-MMD-WGC, 2018 WL 547569 (D. Nev. Jan. 24, 2018).

JURISDICTION

Mr. Ramet sought habeas relief under 28 U.S.C. §2254 to challenge his state court judgment of conviction (Appendix G). The district court denied relief but granted a certificate of appealability on the relevant issue. See Appendix E at App.77-78. Mr. Ramet filed a timely notice of appeal. The Ninth Circuit affirmed the denial of the petition on May 28, 2019 (Appendix D), and denied rehearing on September 5, 2019 (Appendix A). Justice Kagan issued an order on November 20, 2019, extending

the time to file a petition for a writ of certiorari until January 3, 2020. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Under 28 U.S.C. §2254(d), a federal court may grant relief on a claim a state court rejected on the merits if the state court's adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant "the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This habeas case involves a claim under *Lafler* v. *Cooper*, 566 U.S. 166 (2012). The State charged Mr. Ramet with murder, and the undisputed facts overwhelmingly supported a first-degree murder verdict. But

Mr. Ramet's attorney unreasonably told him to reject a favorable plea deal and go to trial to present a manslaughter defense that wasn't colorable under state law. At least one other circuit court of appeals would've recognized this as a straightforward instance of deficient performance. But the Ninth Circuit rejected relief as a categorical matter. This Court should issue a writ of certiorari to review its judgment.

I. Mr. Ramet strangles and kills his daughter Amy.

Mr. Ramet's life began to spiral downhill in 2004. He and his wife, Bernie, divorced. One of his best friends passed away. The Four Queens casino fired him from his longtime job as a bartender. He couldn't find other work, and his money started running out: his house faced foreclosure, utility companies cut off his water and power, and he couldn't even afford food. Instead, he ate leftover dog and cat food with his pets.

While Mr. Ramet was dealing with these problems, his 20-year-old daughter Amy moved back in with him. Their relationship had always been touch-and-go, and as they started living together again, they began to argue. On the morning of April 20, 2006, Amy and Mr. Ramet had another argument: Amy threw a glass object at Mr. Ramet and told him

he was a loser who should kill himself (as his father had). Mr. Ramet responded by strangling Amy to death.

As Mr. Ramet testified, he strangled Amy for about "three or four minutes" at first. Then he "kind of [let] off a little bit and she kind of made a movement." He wasn't sure whether she still "had a pulse at that time." After the pause, he continued strangling her for "a couple more minutes."

In addition to this testimony, Mr. Ramet made materially identical statements in recorded jailhouse phone calls between himself and his surviving daughter. On those calls, he explained Amy "passed out and then came to a little bit and I didn't know what to do," so he "grabbed her again." He reiterated how "she passed out and then when she woke up I did it again." He strangled her the second time because he was afraid she might wake up and be "brain dead" or have "brain damage." He had stopped strangling her for "a few minutes" or "a couple minutes" before "she came back."

Mr. Ramet left his daughter's corpse in his house for about a month. He sent text messages from Amy's phone to deflect suspicion. Eventually, his surviving daughter and ex-wife became concerned. They

attempted to confront Mr. Ramet at his house; the police responded to the disturbance and noticed the smell of decomposition. The police received a warrant and arrested Mr. Ramet. Homicide detectives interrogated him, and he gave a full confession to the murder.

II. The State makes a favorable plea offer, and Mr. Ramet's attorney tells him to turn it down.

The State charged Mr. Ramet with murder in May 2006. The prosecution turned over recorded jailhouse phone calls to the defense on or before December 2006. Those calls included Mr. Ramet's description of the pause he took in the middle of strangling Amy.

At some point in the proceedings (the exact date isn't in the record), the State offered Mr. Ramet a plea deal for a total sentence of 15 years to life. (By way of reference, second-degree murder in Nevada carries sentences of 10 to 25 years or 10 years to life; first-degree murder carries sentences of 20 to 50 years, 20 years to life, or life without the possibility of parole.) Mr. Ramet's appointed attorney, Norman Reed, told him to turn down the plea deal, and Mr. Ramet followed that advice.

The plea offer remained open until at least a week before trial began in May 2007. The court made a record regarding the offer on the first day of trial.

At trial, the jury found Mr. Ramet guilty of first-degree murder and sentenced him to life without the possibility of parole.

III. Mr. Ramet pursues state post-conviction relief regarding his attorney's advice at the plea stage.

After an unsuccessful direct appeal, Mr. Ramet pursued state post-conviction relief. Among other claims, he argued he received ineffective assistance under *Lafler* v. *Cooper*, 566 U.S. 156 (2012), because Mr. Reed incompetently advised him to turn down the plea deal. The state court held an evidentiary hearing, where Mr. Reed and Mr. Ramet testified.

Mr. Reed said he had "discouraged" Mr. Ramet from accepting the plea deal, which he admitted "was a very bad idea on my part." Mr. Reed explained, "I got it wrong. I should've never told him to turn down that offer," and he said he felt "haunt[ed]" by his mistake. He testified he told Mr. Ramet to turn down the deal because he thought Mr. Ramet had "a really good shot at a manslaughter" verdict at trial. But Mr. Ramet made "a number of incriminating statements" on the stand, and Mr. Reed

"completely didn't see that coming." Had Mr. Reed gotten a "better handle on things and really pinned [Mr. Ramet] down better" before trial "on exactly how [the strangling] played out I would've told him to take the deal."

Mr. Ramet agreed with Mr. Reed's testimony. He said when Mr. Reed presented the deal, Mr. Reed "actually was mocking the offer." According to Mr. Ramet, Mr. Reed thought "the offer was a joke," so "he told me not to take it." Mr. Ramet said he voiced concerns that manslaughter incorporated a "reasonably prudent person" standard, and he "was not acting as a reasonably prudent person" at the time of the killing. But Mr. Reed told Mr. Ramet to ignore his concerns and stick with his advice, and Mr. Ramet complied.

Mr. Reed and Mr. Ramet both testified that if Mr. Reed had suggested taking the deal, Mr. Ramet would've accepted it. As Mr. Reed put it, Mr. Ramet was "the type of client" who would "listen to whatever [his] lawyer says." As Mr. Ramet put it, "If Mr. Reed told me he didn't think we had a shot with the manslaughter and that I should take the deal because I could face life without the possibility of parole . . . I definitely would've taken it."

The state district court denied Mr. Ramet's petition, and the Nevada Supreme Court affirmed. In the state appellate court's view, Mr. Ramet gave damaging surprise testimony at trial that Mr. Reed "didn't see coming," and "it was only after hearing [that] testimony" that Mr. Reed "realized he should have counseled [Mr. Ramet] to accept the plea offer." Appendix F at App.81 (cleaned up). The court also said there was "no allegation that counsel misunderstood the applicable law." *Ibid.*

IV. Mr. Ramet pursues this claim in federal court, and the Ninth Circuit affirms the denial of relief.

Mr. Ramet filed a habeas petition under 28 U.S.C. §2254, and the federal district court appointed counsel to represent him. He raised his exhausted *Lafler* claim in a timely counseled amended petition. The district court denied the claim on the merits.

In its analysis, the district court agreed "Reed's assessment of Ramet's chances at trial was clearly misguided." Appendix E at App.63. For one, Mr. Reed "underestimated the possibility that the State would be able to prove first degree murder." *Ibid.* For another, Mr. Reed was "unjustifiably-optimistic" about the chances of a manslaughter verdict. Appendix E at App.64. Nonetheless, the court felt relief would be

warranted only if Mr. Reed relied on an "'incorrect legal rule'" in advising Mr. Ramet, and the court didn't think that had occurred. *Ibid.* The court also thought relief might be warranted if Mr. Reed made a "gross error" in "predict[ing] the outcome of Ramet's trial." *Ibid.* (cleaned up). But while Mr. Reed "inaccurately predicted the outcome," his advice didn't constitute a "gross error." *Ibid.* (cleaned up). However, the court granted a certificate of appealability on this issue. Appendix E at App.77-78.

Mr. Ramet filed an appeal and argued the district court mistakenly denied relief on the *Lafler* claim. The Ninth Circuit disagreed. As it explained, "In substance Ramet is arguing that Reed performed ineffectively because he gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial." Appendix D at App.48. But it believed even that type of grave miscalculation doesn't constitute deficient performance. *Ibid.* It therefore affirmed the district court. *Ibid.* It then rejected a request for rehearing. Appendix A.

REASONS FOR GRANTING THE PETITION

I. Courts have split over whether a grave miscalculation at the plea stage constitutes deficient performance.

A. In the Ninth Circuit, a grave miscalculation doesn't amount to deficient performance.

Mr. Ramet maintains his attorney provided deficient performance because the attorney made a grave miscalculation about the viability of a trial defense, and therefore advised Mr. Ramet to reject a favorable plea deal. The Ninth Circuit erroneously concluded this type of error doesn't amount to deficient performance.

Mr. Ramet presented a claim under *Lafler* v. *Cooper*, 566 U.S. 156 (2012), regarding his attorney's advice at the plea stage. The prosecution had offered Mr. Ramet a plea deal for 15 years to life, which falls between the penalties for second-degree and first-degree murder. Mr. Ramet's attorney, Norman Reed, advised Mr. Ramet to turn down the plea deal because Mr. Reed believed they had "a really good shot at a manslaughter" verdict if they went to trial. Mr. Ramet took that advice; a jury convicted him of first-degree murder and sentenced him to life without the possibility of parole.

As both the district court and the Ninth Circuit recognized, Mr. Reed's advice was wide off the mark. In Nevada, voluntary manslaughter is a lesser-included offense of murder. It applies when a killing occurs "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible." NRS 200.040; see also NRS 200.060. As the jury instructions explained, there must be a "serious and highly provoking injury" for the provocation to qualify. See also *Collins* v. *State*, 133 Nev. 717, 728, 405 P.3d 657, 667 (2017) (stating the provocation must be "extreme"). In addition, the standard requires objective reasonableness: the provocation must produce "such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person" "of average disposition" "in the same circumstances." And even if a killing is adequately provoked, it is still murder (and doesn't amount to voluntary manslaughter) if there's "an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard."

Under this black letter law and the undisputed facts of the case, Mr. Ramet stood no shot, much less "a really good shot," at a manslaughter defense. Manslaughter requires a "serious," "extreme" "provocation"

that would generate a murderous rage in "an ordinarily reasonable person of average disposition." The alleged provocation in this case involved Mr. Ramet's 20-year-old daughter throwing a glass object at him and insulting him. Any reasonable attorney would understand this provocation wasn't going to cut it: even in the light most favorable to the defense, no rational juror would conclude Amy's abrasive behavior was such a serious provocation that an ordinarily reasonable father of average disposition in the same circumstances would react by strangling his own daughter.

Even if a rational jury could find adequate provocation under these facts, the manslaughter defense suffered from a second key flaw. Assuming there's adequate provocation, if there's nonetheless a time lapse between the provocation and the killing that's long enough to allow "the voice of reason and humanity to be heard," a killing is still murder. Here, Mr. Ramet described in recorded jailhouse phone calls how he began to strangle Amy; he stopped for a period; Amy began to come around again; and Mr. Ramet decided to continue strangling Amy out of fear she had suffered brain damage. Any reasonable attorney would've understood the problem: a rational juror would inevitably interpret that pause as "an interval between the assault or provocation and the killing sufficient

for the voice of reason and humanity to be heard." Similarly, this account reflects Mr. Ramet's conscious deliberation over whether to continue strangling Amy, which makes the killing first-degree (as opposed to second-degree) murder. See *Byford* v. *State*, 116 Nev. 215, 994 P.2d 700 (2000) (discussing the element of deliberation).

In short, no rational juror would've voted for manslaughter given (1) the lack of serious provocation, and (2) the break Mr. Ramet took in between strangling his daughter. Any reasonable attorney would've understood these points and would've concluded a manslaughter defense wasn't viable in this case. In turn, any reasonable attorney would've advised Mr. Ramet to accept the plea deal. Given all that, Mr. Ramet's *Lafler* claim alleges Mr. Reed provided deficient performance by insisting the defense had "a really good shot at a manslaughter" verdict and providing corresponding advice to reject the plea offer.

The district court and the Ninth Circuit both accepted the premise of this claim but maintained Mr. Reed's representation didn't rise to the level of deficient performance. As the district court put it, "Reed's assessment of Ramet's chances at trial was clearly misguided" because he "underestimated the possibility that the State would be able to prove first

degree murder" and was "unjustifiably-optimistic" about the manslaughter defense. Appendix E at App.63-64. Nonetheless, the district court denied relief because it felt Mr. Reed hadn't based his advice on "an incorrect legal rule," and his mistakes didn't rise to the level of a "gross error." Appendix E at App.64 (cleaned up). The Ninth Circuit agreed: as it observed, Mr. Ramet argued Mr. Reed "performed ineffectively because he gravely miscalculated Ramet's chances of obtaining a manslaughter conviction at trial," but the court concluded those allegations didn't amount to deficient performance. Appendix D at App.48.

B. In the Sixth Circuit, inaccurate advice regarding a defense's viability amounts to deficient performance.

Unlike the Ninth Circuit, the Sixth Circuit has held a petitioner can prove deficient performance in materially identical circumstances, i.e., by providing inaccurate advice about whether a trial defense is viable. See *Byrd* v. *Skipper*, 940 F.3d 248 (6th Cir. 2019).

In *Byrd*, Mr. Byrd and his girlfriend hatched a plan to rob the victim. Mr. Byrd came up with the scheme, "but at the last minute [he] had a change of heart." 940 F.3d at 251. His girlfriend still wanted to follow through. Mr. Byrd gave her a gun (or let her take it from him); she

attempted to rob the victim and shot him; and Mr. Byrd drove them away. The State charged Mr. Byrd with murder. His attorney declined to initiate plea negotiations and insisted on going to trial, where the attorney represented "he would 'hit a home run' for [Mr. Byrd] by securing an acquittal." *Id.* at 253. Specifically, the attorney believed Mr. Byrd had a viable abandonment defense because of his last-minute change of heart. That belief "reflect[ed] [the attorney's] confusion about—and possibly his abject ignorance of—the law." *Ibid.* In Michigan, similarly situated defendants cannot prove abandonment if they gave a weapon to the co-conspirator, as Mr. Byrd apparently had. *Ibid.* Nonetheless, the attorney "continued to rely on and vastly overestimate the strength of the abandonment defense," which unsurprisingly failed at trial. *Ibid.*

The Sixth Circuit concluded the attorney's advice amounted to deficient performance. As the court explained, the attorney had "a shocking lack of comprehension regarding the pertinent law," which led him to provide "inaccurate advice" to Mr. Byrd "about the likelihood of his acquittal." *Byrd*, 940 F.3d at 257. Rather than giving his client "competent and fully informed advice" (*id.* at 257-58), the attorney incorrectly suggested the possibility of an acquittal under a defense that wasn't viable

under state law. Because the attorney provided deficient performance, and because Mr. Byrd demonstrated prejudice, the court ordered relief under *Lafler*.

Had the Ninth Circuit evaluated Mr. Ramet's *Lafler* claim under the Sixth Circuit's standards, it would've found deficient performance. Like Mr. Byrd's attorney, Mr. Reed in this case had "a shocking lack of comprehension regarding the pertinent law," which led him to provide "inaccurate advice" to Mr. Ramet "about the likelihood of" a manslaughter verdict. *Byrd*, 940 F.3d at 257. Like the attorney in *Byrd*, Mr. Reed "vastly overestimate[d] the strength of the" manslaughter defense, and his advice "reflects his confusion about—and possibly his abject ignorance of—the law." *Id.* at 253. As in *Byrd*, a manslaughter defense in this case wasn't viable under a straightforward application of black letter law to the undisputed facts. Thus, the Sixth Circuit would've concluded Mr. Ramet is entitled to relief.

In sum, unlike the Ninth Circuit, the Sixth Circuit will find deficient performance under *Lafler* when an attorney recommends declining a favorable plea deal based on a grave miscalculation about the viability of a trial defense.

C. The Court should grant certiorari to resolve this split.

The Ninth Circuit and the Sixth Circuit have split over the standards governing deficient performance in plea cases, and the Court should grant certiorari to resolve this split.

"[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri* v. *Frye*, 566 U.S. 134 (2012); see also *Lafler*, 566 U.S. at 170 ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."). In many cases, the most significant impact an attorney can have on a criminal defendant's case is by negotiating a favorable plea deal and encouraging the client to accept the deal by explaining to the client the benefits of the offer and the risks of proceeding to trial.

Despite the significance of an attorney's responsibilities in the plea-bargaining stage, the decision below cheapens the Sixth Amendment's guarantee of counsel by holding attorneys to an artificially low standard in this context—oftentimes the most crucial stage in a criminal case.

Because the lower court's erroneous decision undermines critical constitutional protections for defendants throughout the Ninth Circuit, this Court should grant certiorari to review the lower court's decision.

II. The decision below is incorrect.

The Ninth Circuit mistakenly failed to apply well-worn Sixth Amendment standards in the plea-bargaining context, and this Court should correct its reasoning.

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (2012). To satisfy that requirement, an attorney's representation must fall within the admittedly "wide range of reasonable professional assistance." *Id.* at 689. If an attorney's advice fits within that "wide range," the attorney has satisfied constitutional demands. But if the attorney makes a decision that can't be justified as an "exercise of reasonable professional judgment," the attorney performs deficiently. *Id.* at 690.

An attorney can provide deficient performance in many ways. For example, "[a]n attorney's ignorance of a point of law that is fundamental

to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014) (per curiam). That logic applies to an attorney's misunderstanding of the law governing potential trial defenses. See *Hernandez* v. *Chappell*, 923 F.3d 544, 550 (9th Cir. 2019). Similarly, if attorneys base their advice on "'an incorrect legal rule,'" their advice will fall below the level of reasonable professional assistance. *Lafler*, 566 U.S. at 162-63 (quoting the Sixth Circuit's opinion below and noting the issue was no longer disputed). By the same token, if an attorney understands the relevant law but makes an unreasonable judgment based on an incompetent application of the law to the undisputed facts, the attorney's performance falls outside the wide range of reasonable professional assistance.

The lower court's reasoning flouts these established benchmarks. If an attorney's strategic choice is based on a "grave[] miscalculat[ion]" (Appendix D at App.48) about whether the undisputed facts of the case can rationally support a trial defense, then the attorney's decision doesn't fall within the "wide range of reasonable professional assistance" and cannot be justified as an "exercise of reasonable professional judgment"

(*Strickland*, 466 U.S. at 689-90). Such a decision is akin to a mistake of law about the legal elements of the defense, which is a "quintessential example of unreasonable performance." *Hinton*, 571 U.S. at 274. Whether an attorney isn't aware of the law governing a trial defense, or whether an attorney understands the law but fails to realize the undisputed facts cannot rationally satisfy the relevant legal elements, the attorney's performance is deficient all the same. The lower court's contrary decision is inconsistent with *Strickland* and its progeny: when an attorney bases a strategic decision on a grave miscalculation no reasonable attorney would've made, the attorney commits a mistake within the heartland of deficient performance.

The lower court's decision also conflicts with *Lafler* and *Frye*. As those opinions explain, the normal *Strickland* standards apply to ineffectiveness claims in the plea context. See, e.g., *Frye*, 566 U.S. at 149 (applying "the deficient performance prong of *Strickland*"); see also *Buenrostro* v. *United States*, 697 F.3d 1137, 1140 (9th Cir. 2012) (stating *Frye* and *Lafler* "merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in *Strickland*" and therefore didn't "break new ground"). Yet the lower court's decision

erroneously requires a showing above and beyond the normal *Strickland* deficient performance standard in order to prove a *Lafler* claim.

The opinion below justifies its rationale by quoting *Lafler*'s cautionary advisement that "'an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance.'" Appendix D at App.48 (quoting *Lafler*, 566 U.S. at 174). The lower court interpreted that statement as suggesting even a *gravely* erroneous strategic prediction cannot warrant relief. That is an incorrect statement of the law. Rather, legal advice based on an erroneous strategic prediction amounts to deficient performance if the advice was *unreasonable* at the time the attorney gave it. Cf. *Strickland*, 466 U.S. at 689-90.

Viewed through that lens, some erroneous strategic predictions won't qualify as deficient performance, but others will. For example, an attorney might advise a client to turn down a plea deal because the attorney reasonably believes the jury will find the defense witnesses credible and vote to acquit. If those witnesses in fact testify poorly at trial, but if the attorney made a reasonable prediction that the witnesses would testify credibly, the attorney's prediction likely won't constitute deficient performance. By contrast, some erroneous strategic predictions will, in

fact, amount to deficient performance. For example, as in this case, an attorney might advise a client to turn down a plea deal because the attorney unreasonably believes a trial defense will succeed, even though the undisputed facts of the case can't possibly support that defense. If an attorney advises a client to turn down a favorable plea deal based on this sort of *unreasonable* strategic prediction, the advice amounts to deficient performance.

The lower court failed to recognize the distinction between *reasonable* and *unreasonable* strategic predictions that turn out to be erroneous. It therefore imposed a heightened burden on *Lafler* claims in a manner inconsistent with *Strickland* and its progeny. The Court should grant certiorari to clarify the standards governing deficient performance in the plea-bargaining context.

III. The Court should exercise its supervisory powers in clear cases where habeas relief is warranted.

This appeal presents a straightforward case for habeas relief under *Lafler* v. *Cooper*, 566 U.S. 156 (2012). However, this Court has developed a practice in recent decades of issuing summary reversals in the opposite scenario: when a federal court of appeals orders habeas relief in a

manner inconsistent with 28 U.S.C. §2254(d). As a result of that practice, lower courts have been hesitant to order relief in even the most deserving of cases. The Court should exercise its supervisory powers and grant certiorari to counteract this worrying trend.

In recent years, the Court has frequently issued summary reversals in federal habeas cases. See, e.g., *Nevada* v. *Jackson*, 569 U.S. 505 (2013) (per curiam). See also Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. DENV. CRIM. L. REV. 34, 35 (2015) ("Over the past seven terms (October, 2009 to June, 2015), the Court has issued summary, per curiam reversal of grants of federal habeas corpus relief by circuit courts of appeals at the behest of wardens, without briefing or oral argument, in eighteen cases, including seven involving death sentences."); *id.* at Appendix A (collecting cases).

Some lower courts and commentators have interpreted these decisions as signaling to lower courts they should be hesitant to grant habeas relief. See, e.g., *Kayer* v. *Ryan*, No. 09-99027, __ F.3d __, 2019 WL 6885335, at *10 (9th Cir. Dec. 18, 2019) (Bea, J., dissenting from denial of rehearing en banc); Bentele, *supra*, at 36; Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J.

FORUM 551, 562-63 (2014) ("These rulings send a message to lower courts—sometimes implicitly and sometimes overtly—that relief to criminal defendants, and especially to habeas petitioners, should be granted sparingly."); Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 SEATTLE U. L. REV. 55, 78 (2013).

Because of this practice, the Court has sent a strong message to lower courts about the limits of federal habeas review, and the lower courts may have reacted by erring too far in the other direction—i.e., denying relief in cases where, in fact, the writ should quite obviously issue, notwithstanding the limitations in Section 2254(d). This case perhaps presents an example. Mr. Ramet has a simple argument for habeas relief: his attorney told him to turn down a favorable plea deal because the attorney unreasonably believed they had "a really good shot at a" trial defense that wasn't viable under state law. But the lower court nonetheless refused to order relief. The Court should grant certiorari to ensure lower courts are willing to issue the writ in exceptional cases where relief is warranted under Section 2254(d).

IV. This case is an ideal vehicle.

This appeal presents an excellent opportunity to clarify the deficient performance standard under *Lafler*. Mr. Ramet exhausted this claim in state court, where the court heard testimony from both Mr. Ramet and his attorney. See Appendix D at App.30 n. 3 (rejecting an exhaustion argument on appeal). Mr. Ramet then timely presented this claim in federal court. There are therefore no procedural obstacles to federal merits review.

While the Nevada Supreme Court denied this claim on the merits, its decision isn't entitled to deference under Section 2254(d), and the federal courts are therefore authorized to review the claim de novo.

According to the Nevada Supreme Court, there was no argument Mr. Reed "misunderstood the applicable law." Appendix F at App.81. That flawed rationale does not satisfy Section 2254(d). Even if Mr. Reed understood the law governing manslaughter, his application of the law to the undisputed facts was unreasonable. Any reasonable attorney would've understood there was no adequate provocation, and even if there was, Mr. Ramet's account of the pause he took while strangling Amy would put an end to the defense. But the Nevada Supreme Court

essentially assumed plea advice can be deficient only if the attorney made a pure mistake of law. To the contrary, this Court has clearly established an attorney's performance is deficient so long as it falls outside the "wide range of reasonable professional assistance" (*id.* at 689)—for example, if the attorney provides mistaken advice based on an unreasonable application of the law to the facts. Because the state court nominally mentioned *Strickland* and *Lafler* but failed to apply the proper standards, the court's decision is contrary to and/or an unreasonable application of *Strickland* and its progeny, including *Lafler*. See, e.g., *Lafler*, 566 U.S. at 173; *Mann* v. *Ryan*, 828 F.3d 1143, 1166 (9th Cir. 2016); see also *Harrington* v. *Richter*, 562 U.S. 86, 102-03 (2011); *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003).

The Nevada Supreme Court also argued Mr. Reed was caught off guard by Mr. Ramet's testimony about the pause. Appendix F at App.81. Once again, this incorrect analysis does not satisfy Section 2254(d). Mr. Reed did in fact testify he was unprepared for the "damaging admissions" Mr. Ramet made in his testimony, the most damaging of which included his description of the pause he took while strangling Amy. But the state court went too far by assuming Mr. Reed was *reasonably* caught off guard

by that testimony. In fact, Mr. Reed was *inexcusably* caught off guard, because Mr. Ramet's trial testimony was consistent in all material respects with his pre-trial admissions—in particular his statements in the recorded jailhouse phone calls, which the State turned over to the defense well before the plea deal expired. Mr. Reed's failure to understand the significance of those calls amounts to deficient performance. See *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 526 (2003). In addition, Mr. Reed admitted he had unreasonably failed to "pin . . . down" his client "on exactly how [the strangling] played out." No reasonable attorney would've forgotten to discuss Mr. Ramet's anticipated testimony with him before trial.

Despite all this, the state appellate court simply assumed there was a legitimate reason why Mr. Ramet's testimony caught Mr. Reed off guard. That sort of assumption is contrary to and/or an unreasonable application of *Strickland* and its progeny, including *Rompilla* and *Wiggins*. See, e.g., *Wiggins*, 539 U.S. at 527. The Nevada Supreme Court's reasoning on this front therefore fails to satisfy Section 2254(d).

In short, the Nevada Supreme Court's opinion makes two unreasonable assumptions that are contrary to and/or an unreasonable

application of clearly established precedent from this Court. The state court unreasonably suggested an attorney must make a pure mistake of law in order to provide deficient performance under *Lafler*. The state court also unreasonably concluded Mr. Ramet's attorney was excusably caught off guard by Mr. Ramet's trial testimony, when in fact any reasonable attorney would've known what was coming. The state court's rationale cannot withstand even the heightened level of deference Section 2254(d) mandates. Because the federal courts may review this claim de novo, this case presents an excellent vehicle to resolve the question presented in this petition.

Finally, Mr. Ramet can establish prejudice, in addition to deficient performance. At the state court evidentiary hearing, both Mr. Reed and Mr. Ramet agreed Mr. Ramet would've accepted the plea deal had Mr. Reed given him competent advice. Meanwhile, there's no reason to believe the deal would've somehow fallen apart had the defense accepted it. Because the prejudice inquiry is straightforward, this case presents an ideal opportunity to address *Lafler*'s deficient performance prong.

CONCLUSION

The Court should issue a writ of certiorari.

Dated January 3, 2020.

Respectfully submitted,

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/s/Jeremy C. Baron
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