No. 20-____

IN THE

Supreme Court of the United States

GREGORY WILLIAMS,

Petitioner,

v.

LEONTA JACKSON,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a criminal defendant is considering whether to accept a plea offer, is defense counsel's failure to advise the defendant of his or her sentencing exposure if he or she rejects the plea offer and proceeds to trial sufficient to establish deficient performance under *Strickland*?

2. Is requesting an evidentiary hearing in state court sufficient for a habeas petitioner to show the diligence necessary to avoid 28 U.S.C. § 2254(e)(2)'s limitations on evidentiary hearings?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Gregory Williams and Respondent Leonta Jackson (the warden of Petitioner's correctional facility). There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

People of the State of Illinois v. Gregory Williams, No. 06 CR 02627-01, Circuit Court of Cook County, Illinois County Department, Criminal Division. Judgment entered January 12, 2009.

People of the State of Illinois v. Gregory Williams, No. 06 CR 02627-01, Circuit Court of Cook County, Illinois County Department, Criminal Division. Judgment entered May 20, 2011.

People of the State of Illinois v. Gregory Williams, No. 1-11-1913, Appellate Court of Illinois, First Judicial District. Judgment entered December 26, 2013.

People of the State of Illinois v. Gregory Williams, No. 117190, Supreme Court of Illinois. Judgment entered March 26, 2014.

Gregory Williams v. Tarry Williams, No. 1:14-cv-07407-JZL, U.S. District Court for the Northern District of Illinois. Judgment entered June 29, 2018.

Gregory Williams v. Leonta Jackson, No. 18-2631, U.S. Court of Appeals for the Seventh Circuit. Judgment entered July 6, 2020.

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INTRODUCTION

This petition raises two important questions for criminal defendants and habeas petitioners.

First, two circuit courts and at least five state high courts have held that the failure to advise defendants of their sentencing exposure if they reject a plea offer and proceed to trial constitutes deficient performance under *Strickland*. Three other circuit courts have suggested they would agree. Creating a split, the Seventh Circuit here necessarily though not explicitly concluded that such a failure to advise is not sufficient to establish deficient performance.

Second, circuit courts disagree over whether requesting an evidentiary hearing in state court is sufficient to establish the diligence necessary to avoid 28 U.S.C. § 2254(e)(2)'s limitations on evidentiary hearings. The Fifth, Seventh, and Tenth Circuits say no; the Third and Eleventh say yes.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet.App. 1a–19a) is published at 964 F.3d 621 (7th Cir. 2020). The District Court's opinion (Pet.App. 20a–42a) is unpublished but available at 2018 WL 3208535.

JURISDICTION

The Seventh Circuit entered judgment on July 6, 2020. Pet.App. 1a. This Court's March 19, 2020 order extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The appendix contains the relevant constitutional (the Sixth Amendment) and statutory (28 U.S.C. § 2254) provisions.

STATEMENT

This case presents important questions concerning the effective assistance of counsel that criminal defendants are entitled to receive when contemplating a plea offer, as well as the proper interpretation of 28 U.S.C. § 2254(e)(2)'s limitations on evidentiary hearings.

1. Legal background.

a. If a state court adjudicated the merits of a federal habeas petitioner's claim, the petitioner must show that the state court's "adjudication of the claim . . . 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." 28 U.S.C. § 2254(d)(1). A state court's adjudication is unreasonable when it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

For purposes of § 2254(d)(1), *Strickland v. Washington*, 466 U.S. 668 (1984), was controlling precedent at the time of Petitioner's state court proceedings. *See, e.g.*, *Terry Williams v. Taylor*, 529 U.S. 362, 391 (2000). *Strickland* sets forth a familiar two-part test for claims of ineffective assistance of counsel.

First, a criminal "defendant must show that counsel's performance was deficient." *Id.* at 390 (quoting

Strickland, 466 U.S. at 687). This requires showing that "an attorney's representation amounted to incompetence under 'prevailing professional norms.'" *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690).[1]

Second, a "defendant must show that the deficient performance prejudiced the defense." *Terry Williams*, 529 U.S. at 390 (quoting *Strickland*, 466 U.S. at 687). In the context of rejected plea offers, this requires "show[ing] that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to [and accepted by] the court . . . , and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012).

b. Even if habeas petitioners satisfy § 2254(d), they must also establish, under § 2254(a), that they are "in custody in violation of the Constitution or laws . . . of the United States." *E.g.*, *Campbell v. Rear-*

[1] As Petitioner explained below (and as the Seventh Circuit did not dispute), the absence of Supreme Court precedent addressing a specific form of deficient performance (e.g., failing to inform clients of their sentencing exposure) is irrelevant to the § 2254(d)(1) inquiry: *Strickland*, not its application to specific circumstances, provides the controlling precedent for purposes of § 2254(d)(1). *See Terry Williams*, 529 U.S. at 391; *Chaidez v. United States*, 568 U.S. 342, 348 (2013). And, under *Strickland*, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688).

don, 780 F.3d 752, 772 (7th Cir. 2015). But a court cannot answer that question on an incomplete record, and an evidentiary hearing is needed when a petitioner's allegations, if true, would entitle him or her to relief. *See id.* "For example, if the state-court rejection assumed the habeas petitioner's facts (deciding that, *even if* those facts were true, federal law was not violated), then (after finding the state court wrong on a [§ 2254](d) ground)[,] [a § 2254](e) hearing might be needed to determine whether the facts alleged were indeed true." *Cullen v. Pinholster*, 563 U.S. 170, 205 (2011) (Breyer, J., concurring in part and dissenting in part); *see also Deere v. Cullen*, 718 F.3d 1124, 1148 (9th Cir. 2013) ("The district court must conduct an evidentiary hearing if the facts are disputed, the facts alleged would entitle the petitioner to habeas relief, if true, and if the petitioner did not receive a full and fair opportunity to develop the facts in state court.").

But a petitioner who "has failed to develop the factual basis of a claim in State court proceedings" is barred from receiving "an evidentiary hearing on the claim unless" he or she can satisfy the strict requirements of § 2254(e)(2). Interpreting "failed to develop," this Court has held that § 2254(e)(2)'s limitations on evidentiary hearings do not apply to petitioners who were "diligent" in developing the factual basis of their claim in state court. *Michael Williams v. Taylor*, 529 U.S. 420, 432, 437 (2000). "Diligence," the Court explained, "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

2. Factual background.

a. On January 9, 2006, Chicago police arrested Petitioner after a woman, J.H., informed the police that he had forced her to accompany him to his apartment where he sexually assaulted her, committing three separate sexual acts against her will. Pet.App. 46a–53a. Petitioner's post-arrest statement largely confirmed J.H.'s allegations. Pet.App. 51a–53a.

A grand jury indicted Petitioner on 37 counts of sexual assault and kidnapping based on different permutations of possible enhancements (e.g., for use or display of a weapon) and greater and lesser included offenses (e.g., aggravated criminal sexual assault, criminal sexual assault, aggravated kidnapping, kidnapping, aggravated unlawful restraint, and unlawful restraint). Pet.App. 3a, 46a; D.Ct. Dkt. 23-1 at 13–50.

Because the 37 counts were based on three separate sexual acts plus a kidnapping, under Illinois's "one-act, one-crime rule," Petitioner's sentencing exposure was limited to the most serious charges for the four separate physical acts. *People v. Garcia*, 688 N.E.2d 57, 64 (Ill. 1997); *see also People v. Johnson*, 927 N.E.2d 1179, 1189 (Ill. 2010) ("Under the rule, a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act.").

Each of the four most serious charges—three counts of aggravated criminal sexual assault and one count of aggravated kidnapping—carried sentencing ranges of at least 6 to 30 years, *see* 730 ILCS 5/5-8-1(a)(3) (West 2006), that must be served consecutively, *see* 730 ILCS 5/5-8-4(a) (West 2006); *see also People v. Curry*, 687 N.E.2d 877, 891–92 (Ill. 1997), *abrogated*

on other grounds by Lafler, 566 U.S. at 164; *People v. Siguenza-Brito*, 920 N.E.2d 233, 245 (Ill. 2009). Petitioner thus faced between 24 and 120 years in prison; even if acquitted of aggravated kidnapping, he faced between 18 and 90 years in prison.

b. At Petitioner's arraignment in February 2006, the trial court appointed a public defender to represent him in the case involving J.H. and another case pending against him involving a different victim (S.D.) but similar allegations and charges. SA 1, 291.[2]

Shortly after Petitioner's arraignment, the defense requested a behavioral clinical exam to assess Petitioner's mental fitness. Pet.App. 47a; SA 10. Although the defense expert later testified that he had determined that Petitioner "had an overall I.Q. of 80 which indicated the lowest percentile of the low average right above mental retardation" and suffered from substantial disorders of thought, mood, and behavior that affected Petitioner's judgment and perceptions at the time of the offense, both parties' experts ultimately concluded Petitioner was legally sane at the time of the offense. Pet.App. 5a, 47a, 54a–55a; SA 8, 107–08.

During a pretrial conference on July 27, 2007, the public defender informed the presiding judge, Joseph M. Claps, that the parties anticipated requesting a "402 conference." SA 12. Unlike federal judges, who may not participate in plea negotiations, *see* Fed. R. Crim. P. 11(c)(1), Illinois state court judges may, and often do, participate in plea negotiations, *see* Ill. Sup. Ct. R. 402(d)(1). In these "402 conferences," both sides

[2] SA refers to Petitioner-Appellant's Supplemental Appendix filed below. CA Dkt. 19.

advise the judge of the facts and their view of the case, and the judge then makes a recommendation as to an appropriate sentence. *Id.*

At a later status conference, the public defender also asked Judge Claps to schedule a "hearing or resolution now" on whether Petitioner was "guilty but mentally ill" (GBMI). SA 16. Unlike insanity, a GBMI finding has no effect on a defendant's culpability or possible sentence; it affects only whether the defendant may receive treatment after conviction. *See* 730 ILCS 5/5-2-6(a)–(c) (West 2006); *see also People v. Crews*, 522 N.E.2d 1167, 1173 (Ill. 1988).

During a conference on February 14, 2008, the parties again discussed what the public defender described as her planned GBMI "defense," which prompted Judge Claps to ask: "How would that be a defense? Guilty but mentally ill will get you sentenced to the penitentiary in treatment." SA 23–24.

The 402 conference finally occurred on March 11, 2008. SA 25. The public defender again raised the GBMI issue. SA 26. Judge Claps then asked the public defender to "[j]ust help me with this," noting, "[i]f there are mental health issues, what difference would it make to a sentencing judge, because that sentence really is only a direction to the Department of Corrections to get [Petitioner] mental health treatment. It doesn't change anything." *Id.* The public defender said it might affect the order of the proceedings, and Judge Claps informed her that she was misreading the relevant statute. SA 26–28.

Judge Claps further explained that, based on the two experts' reports, he did not "even see anything that says [Petitioner is] mentally ill," so he could not

accept such a plea without a fitness hearing. SA 29. But he also stated that he would be willing to do the 402 conference at that time because, even if Petitioner were GBMI, it would not affect the recommended sentence. SA 30.

Before conducting the 402 conference, Judge Claps told Petitioner, "your attorney has asked that I participate in a conference to determine whether or not these charges pending against you in both of these indictments can be resolved by a plea of guilty to one or more of these charges." *Id.* Judge Claps further warned Petitioner that he would not be able to change or substitute Judge Claps if he rejected the plea and proceeded to trial. SA 31. Petitioner acknowledged that he wished to have the conference, and the proceedings went off the record. SA 32.

Once the proceedings were back on the record, Judge Claps offered Petitioner 20 years "on the first case" consecutive to 21 years "on the second case." *Id.*; Pet.App. 47a–48a. It is unclear from the record which offer related to which case. This petition assumes, as the parties did in state court, that Judge Claps offered 21 years in the case involving J.H. and 20 years in the case involving S.D. The prosecutor did not object to the proposed sentence, nor did Petitioner or his attorney.

After several continuances (to permit the public defender to consult with Petitioner), SA 34, 36–37, the public defender stated at a conference on April 28, 2008, that "we do intend to pursue a guilty but mentally ill resolution to this case," and asked for a bench trial. SA 39. The statement indicated that Petitioner had rejected the plea offer. *Id.*

c. Following a bench trial, Judge Claps found Petitioner guilty on 18 counts. SA 159–66, 169; Pet.App. 57a. Judge Claps merged multiple offenses into others, resulting in convictions on six counts of aggravated sexual assault (Counts 1, 5, 8, 12, 15, and 19), one count of aggravated kidnapping (Count 22), and one count of kidnapping (Count 33). Judge Claps further agreed with the State's expert that Petitioner was not GBMI. SA 164–65.

At Petitioner's sentencing in February 2009, Judge Claps concluded that, because Counts "1, 8, and 15 are all aggravated sexual assaults, but different assaults, those would be consecutive." SA 172; Pet.App. 57a. And he ultimately sentenced Petitioner to 22 years on each of Counts 1, 8, and 15, to be served consecutively, and 22 years on each of Counts 5, 12, 19, 22, and 33, to be served concurrently. SA 181; Pet.App. 57a. Petitioner's ultimate sentence was thus 66 years in the case involving J.H.

The only issue presented in Petitioner's direct appeal was whether he was entitled to two days of credit for time served. Pet.App. 58a. On February 4, 2011, the Illinois Appellate Court affirmed, but corrected the mittimus to reflect an additional day of credit. *Id.*

d. On August 5, 2010, Petitioner pleaded guilty before a different judge to two counts of aggravated criminal sexual assault and one count of aggravated kidnapping in the case involving S.D. SA 292. The judge ordered that the sentence on each of those three counts (10 years) be served consecutively to each other but concurrently to Petitioner's sentence in the case involving J.H. *Id.* Given the concurrent sentence between the two cases, Petitioner's ultimate sentence remained 66 years.

3. State post-conviction proceedings.

a. Post-conviction relief in Illinois is "adjudicated through a three-stage process." *Davis v. Lambert*, 388 F.3d 1052, 1060 (7th Cir. 2004) (quoting *People v. Gardner*, 810 N.E.2d 180, 184 (Ill. App. Ct. 2d Div. 2004)). As the Seventh Circuit has explained, "[i]n the first stage, the petition must state the gist of a constitutional claim or it will be summarily dismissed . . . . At the second stage, the petitioner must make a substantial showing of a constitutional violation to survive dismissal. Only then will the petition advance to the third stage, an evidentiary hearing." *Id.* (quoting *Gardner*, 810 N.E.2d at 184).

b. Petitioner submitted his *pro se* petition for post-conviction relief in February 2011. Pet.App. 96a–97a, 100a–115a. He alleged, among other things, that his "counsel wouldn't answer [his] questions, or take reasonable steps to ensure [he] possessed a basic knowledge or understanding of the numerous crimes, counts and actions that encompassed him in the instant proceedings." Pet.App. 103a. He further alleged that, after the 402 conference, his "counsel never advised [him] as to the possible consequences of rejecting the plea offer," or "that in the instant case alone, there were 37 counts for which [he] could receive multiple or consecutive sentences." Pet.App. 104a. As Petitioner stated, "it is a far cry to contend that had [he] been fully cognizant and appreciative of the potential detriment following a finding of guilt, he would have knowingly rejected the court's merciful offer." Pet.App. 104a–05a.

He also alleged that counsel "furnished [him] with erroneous advice, which consequently misled him into rejecting the Court's plea offer." Pet.App. 105a. More

specifically, he alleged that "defense counsel expressed that the Court's offer was 'too much time' and that the State had no evidence" and "that with a plea offer of that much time it would be best to just go to trial." *Id*. He further noted that counsel's advice was particularly questionable given that GBMI is not a defense, that his counsel had no other defense, and that it was "inexplicable" for his counsel to advise him to proceed to a bench trial after he had declined Judge Claps's offer. Pet.App. 105a–08a.

c. The petition was referred to Judge Claps, who summarily dismissed it at the first stage. Pet.App. 94a. Judge Claps acknowledged that "a criminal defense attorney is obligated to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." Pet.App. 89a (citing *Curry*, 687 N.E.2d at 887). But he disregarded Petitioner's allegation that his counsel had failed to do just that. Judge Claps instead focused on the affirmative advice the public defender allegedly offered and found "[n]othing . . . unreasonable or misleading" about that affirmative advice. *Id.*

d. On appeal, Petitioner, now represented by appointed counsel, noted that his *pro se* petition had alleged, *first*, that he "was unaware of the possibility of consecutive sentencing of an aggregate term of 120-years," and, *second*, that his counsel unreasonably advised him to reject the plea offer because "no reasonable attorney would have advised a similarly situated client to turn" it down. SA 220.

Petitioner argued that Judge Claps should not have summarily dismissed his petition because he had

"set out a legally and factually arguable claim of ineffective assistance of counsel" by alleging "that he was not properly advised about the potential sentences *and* was given erroneous advice about his chances at trial, since the plea offer was nearly the minimum sentence for these offenses and the State's evidence of his guilt was overwhelming." SA 223 (emphasis added); *see also* SA 225. Petitioner also argued that he "plead[ed] that he would have accepted the offer when he said that it was a 'far cry to contend' that he would have rejected the court's 'merciful offer' had he been 'fully cognizant and appreciative of the potential detriment following a finding of guilty.'" SA 232.

e. The Illinois Appellate Court affirmed. Pet.App. 44a–81a. It acknowledged at the beginning of its opinion that Petitioner had argued that the "dismissal of his petition should be reversed because . . . 'he claimed that he was not properly advised about the potential sentences *and* was given erroneous advice about his chances at trial.'" Pet.App. 46a (emphasis added). But when the state court discussed the merits of Petitioner's claim, it omitted any reference to the first basis for deficient performance and focused exclusively on the second. Pet.App. 71a–81a.

With respect to the second basis for deficient performance, the Illinois Appellate Court believed that the primary dispute among the parties was the "minimum sentence that could have been available to [Petitioner] following a trial." Pet.App. 76a. On this point, the court "agree[d] with the State" that Petitioner "could have been acquitted of aggravated kidnapping" and therefore could have faced a mandatory minimum of only 18 years—not 24 years—which was less than Judge Claps's offer. Pet.App. 78a. The court then went

on to conclude that, "[e]ven if [it] agreed with [Petitioner] that defense counsel's advice to reject the guilty plea was unsound as to this case, [he] ignores that the offer pertained to two cases," and "[i]t is entirely possible that counsel advised [Petitioner] to reject the plea offer, because he stood a chance of acquittal or a lesser sentence in the second case." *Id.*

Finally, the court stated that, because it found the first *Strickland* prong was not met, it "need not consider the 'prejudice' prong." Pet.App. 79a. Nonetheless, it went on to state that "even read liberally in light of defendant's *pro se* status, we do not see any express statement in defendant's postconviction petition that, absent his counsel's alleged deficient performance . . . he would have accepted the plea offer." *Id.*

The Supreme Court of Illinois denied Petitioner's petition for leave to appeal on March 26, 2014. Pet.App. 43a.

4. Procedural background.

a. Petitioner timely filed a *pro se* § 2254 petition on September 22, 2014. D.Ct. Dkt. 1; *see also* 28 U.S.C. § 2255(f)(1). He raised the same claim of ineffective assistance of counsel presented to the Illinois Appellate Court and summarized the allegations presented in his state petition. D.Ct. Dkt. 1 at 5. He also later requested an evidentiary hearing. D.Ct. Dkt. 26.

The District Court denied the petition on June 29, 2018. Pet.App. 42a. The District Court held that the Illinois Appellate Court reasonably rejected the deficient-performance prong of Petitioner's *Strickland* claim, and, applying *de novo* review, it rejected the prejudice prong as well. Pet.App. 38a–40a. It also rejected Petitioner's request for an evidentiary hearing

as barred under § 2254(e)(2) solely because Petitioner did not claim actual innocence. Pet.App. 40a. The District Court denied a certificate of appealability under 28 U.S.C. § 2253(c). Pet.App. 41a.

b. Petitioner timely filed a *pro se* notice of appeal on July 27, 2018. CA Dkt. 1; *see also* Fed. R. App. P. 4(a)(1). The Seventh Circuit granted Petitioner's request for a certificate of appealability on April 2, 2019, finding that Petitioner "made a substantial showing that trial counsel may have been ineffective, and that his claim should have received further record development." CA Dkt. 7 at 2. The Seventh Circuit also recruited counsel for Petitioner, *id.*, and later appointed the undersigned to represent him, CA Dkt. 8.

On appeal, Petitioner argued that the state court unreasonably held that he did not adequately allege deficient performance under *Strickland*, identifying the two distinct bases for his claim: *first*, that his attorney performed deficiently by failing to advise him of his sentencing exposure at trial; and, *second*, that his attorney performed deficiently for the separate and independent reason that she advised him to reject the plea offer as "too much time." Petitioner further argued that the state court unreasonably held that he did not adequately allege *Strickland* prejudice, and that the District Court's similar conclusion on *de novo* review was also wrong. Finally, Petitioner argued that he is entitled to an evidentiary hearing, and that the District Court committed a clear error of law when it held that only petitioners claiming innocence are entitled to evidentiary hearings under § 2254(e)(2).

c. On July 6, 2020, the Seventh Circuit affirmed. Pet.App. 1a, 19a. The Seventh Circuit admitted that

"[t]here is little doubt that [Petitioner] raised a serious question about the adequacy and quality of the advice he received in [the] case" involving J.H. Pet.App. 19a. For example, the Seventh Circuit noted that defense "[c]ounsel's comments in open court in the weeks leading to the 402 conference suggested that she did not fully understand the nature of GBMI." Pet.App. 3a. And, the court observed, "[a]t the ensuing bench trial," which defense counsel had advised Petitioner to pursue, "defense counsel did little to contest the sexual assault charges against" Petitioner. Pet.App. 5a.

The Seventh Circuit notably acknowledged that Petitioner "alleged that his trial counsel's performance fell short in two ways." Pet.App. 6a. "First he contended that she failed to inform him of the consequences of rejecting the 41-year sentence and proceeding to trial in the J.H. and S.D. cases." *Id*. Petitioner alleged this was a "significant" failing, the Seventh Circuit observed, "because of the consecutive nature of the sentences he faced under Illinois law." Pet.App. 7a ("Stacking his sentences for sexual assault and kidnapping, [Petitioner] argued that he faced at least 24 to 120 years' imprisonment in J.H.'s case—more than the 20 or 21 years recommended at the 402 conference—and that his trial counsel failed to inform him of this sentencing exposure.").

Second, the Seventh Circuit noted, "[*s*]*eparate and apart* from her alleged failure to inform him of the sentences he faced if convicted of kidnapping and raping J.H., [Petitioner] claimed that her recommendation to reject the 41-year plea offer was ill-advised." *Id.* (emphasis added).

The Seventh Circuit further agreed that the Illinois Appellate Court "did not address [Petitioner's first] claim of deficient performance—that his counsel failed to even inform him of the consequences of rejecting the plea offer and proceeding to trial." Pet.App. 8a. But when it analyzed the reasonableness of the Illinois Appellate Court's decision, the Seventh Circuit similarly glossed over the first basis for Petitioner's *Strickland* claim (the lack of advice regarding sentencing exposure), focusing only on the second (the bad advice to proceed to trial). *See* Pet.App. 13a–15a.

The Seventh Circuit began its legal analysis by stating that "we know much too little about the case involving S.D. and the advice [Petitioner] received from his counsel in that case." Pet.App. 14a. "Absent such information," the court concluded, "we have no meaningful way of evaluating counsel's *advice to* [*Petitioner*] *to reject* the 41-year sentence." *Id.* (emphasis added). In other words, the Seventh Circuit concluded it had no meaningful way of evaluating the *second* basis for Petitioner's *Strickland* claim.

But the Seventh Circuit never grappled with the *first* basis for Petitioner's *Strickland* claim, which alleged that he had not been advised of his sentencing exposure if he rejected the plea offer and went to trial. Nor did the Seventh Circuit explain why, even if that allegation pertained only to the case involving J.H., it would have been insufficient to demonstrate deficient performance, regardless of what was known or unknown about the case involving S.D.

Instead, the Seventh Circuit confusingly suggested that it need not decide the issue:

> [Petitioner] highlights the part of his petition where he alleged that his counsel "never advised [him] as to the possible consequences of rejecting the plea offer." That plea offer related to both cases, [Petitioner's] argument goes, so we should interpret his petition to allege that he received inadequate advice as to both. We need not reach a conclusion on whether [Petitioner] met his burden of showing deficient performance. Section 2254(d) requires us to ask merely whether the state court's answer to that question reflected an unreasonable application of federal law or was based on an unreasonable determination of the facts. On this record, the Illinois Appellate Court sensibly concluded that it had too little information to judge the advice [Petitioner] received in connection with the 41-year plea offer.

Pet.App. 15a. As the Seventh Circuit recognized, however, the first basis for Petitioner's *Strickland* claim was "[s]eparate and apart" from the second basis, and, as it further recognized, the Illinois Appellate Court did not address the first basis. Pet.App. 7a–8a. It is thus unclear how the state court could have "sensibly concluded" the first basis failed when the state court did not even address it.

Turning to prejudice, the Seventh Circuit correctly noted that "[t]o show prejudice [Petitioner] had to establish a reasonable probability that but for his attorney's errors, he would have accepted the 41-year plea

offer at the 402 conference." Pet.App. 16a. But, applying *de novo review* (because it determined the Illinois Appellate Court had not reached prejudice), the Seventh Circuit concluded that Petitioner's "failure to supply information about S.D.'s case impedes this inquiry as well. Without even a superficial familiarity with that case, we cannot know with confidence that [Petitioner] would have accepted a combined 41-year plea." *Id.* "For this reason, too," the court held that Petitioner's "ineffective assistance claim fails when we consider his allegation that his counsel failed to inform him of the sentencing exposure he faced if convicted in both the J.H. and S.D. cases." *Id.*

The Seventh Circuit did not probe Petitioner's allegation that "it is a far cry to contend that had [he] been fully cognizant and appreciative of the potential detriment following a finding of guilt, he would have knowingly rejected the Court's merciful offer." Pet.App. 104a–05a. Instead, the court concluded that Petitioner's claim failed, because "[e]ven if [it] assumed deficient performance, [it] lack[ed] the information necessary to measure the probability that he would have accepted the plea under the circumstances." Pet.App. 16a. But the Seventh Circuit did not explain how it reached that conclusion on *de novo* review with the limited existing record, despite longstanding precedent explaining that courts "conduct de novo review with the benefit of evidentiary hearings," *Quintana v. Chandler*, 723 F.3d 849, 855 (7th Cir. 2013), because "[a]n adequate record is imperative to properly evaluate ineffective assistance claims," *Matheney v. Anderson*, 253 F.3d 1025, 1040 (7th Cir. 2001); *see also Avila v. Richardson*, 751 F.3d 534, 538 (7th Cir. 2014) (noting that, where a habeas petitioner

has "alleged a viable claim, he is entitled to develop that claim through an evidentiary hearing in the district court").[3]

Finally, the Seventh Circuit addressed Petitioner's request for an evidentiary hearing. The court agreed with the district court's decision to deny the request, but through different reasoning. Pet.App. 16a–19a.

All but reversing the district court's plainly erroneous ruling that only petitioners claiming innocence are entitled to evidentiary hearings, the Seventh Circuit agreed with Petitioner that § 2254(e)(2)'s limitations apply "only if the petitioner 'has failed to develop the factual basis of a claim in State court proceedings.'" Pet.App. 17a (quoting § 2254(e)(2)). "Put differently, § 2254(e)(2) does not bar an evidentiary hearing 'unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" *Id.* (quoting *Michael Williams*, 529 U.S. at 432).

And the Seventh Circuit acknowledged that "[w]hether [Petitioner] exercised diligence in developing the factual basis for his claim is a close and difficult question, in no small part because he did seek an evidentiary hearing in state court." *Id.* "In his state postconviction petition," the court explained, Petitioner "requested a hearing, described the basis for his claim, and included an affidavit swearing to the truth of his allegations." Pet.App. 17a–18a. And "[t]he state appellate court recognized that the only evidence he

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[3] Given the Seventh Circuit's *de novo* prejudice ruling, which is premised on evidentiary gaps that could be filled in with an evidentiary hearing, the questions presented are outcome determinative for Petitioner even if this Court does not address the prejudice prong of Petitioner's *Strickland* claim.

could present of private discussions with his attorney would be his own testimony and his counsel's, and that at the pleading stage, he could be excused for failing to present an affidavit by counsel." Pet.App. 18a. Given all this, the Seventh Circuit noted that "[i]f J.H.'s case were the only one at issue, [Petitioner's] efforts may have been enough to show diligence." *Id.*

The Seventh Circuit nonetheless "conclude[d] that [Petitioner] failed to show the diligence necessary to obtain an evidentiary hearing for the same reason his claim fails on the merits." *Id.* According to the Seventh Circuit, "[Petitioner] had to do more than allege that his trial counsel provided ineffective assistance regarding the 41-year plea offer for two cases. He had to color in that claim with information relevant to *both* the J.H. and S.D. cases." *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

This petition raises two important questions for criminal defendants and habeas petitioners. *First*, whether the failure to advise a defendant considering whether to accept a plea offer of his or her sentencing exposure at trial is sufficient to establish deficient performance under *Strickland*. The Seventh Circuit necessarily though not explicitly concluded that this lack of advice was insufficient, parting ways with multiple sister circuits and state high courts. *Second*, whether requesting an evidentiary hearing is sufficient to establish diligence under § 2254(e)(2). The Seventh Circuit concluded that requesting an evidentiary hearing is insufficient, joining one side of an existing circuit split. Finally, both questions presented

are important to the hundreds of defendants who confront plea offers and who file § 2254 petitions every year.

I. The Seventh Circuit's deficient-performance ruling conflicts with rulings from multiple circuit courts and state high courts.

A. The Seventh Circuit necessarily held that failing to advise of sentencing exposure is not sufficient to establish deficient performance.

The Seventh Circuit necessarily determined that Petitioner's counsel's failure to advise him of his sentencing exposure at trial is insufficient to establish deficient performance under *Strickland*.

As the Seventh Circuit acknowledged, Petitioner alleged two separate and independent bases for his *Strickland* claim: *first*, that his "counsel failed to inform him of [his] sentencing exposure" if he rejected the combined 41-year offer and proceeded to trial; and, *second*, that his counsel's "recommendation to reject the 41-year plea offer was ill-advised." Pet.App. 6a–7a. Like the state court, however, the Seventh Circuit glossed over the first basis, and instead focused on the second. Pet.App. 13a–15a. The Seventh Circuit then concluded its analysis of the deficient-performance prong by oddly stating: "We *need not reach a conclusion* on whether [Petitioner] met his burden of showing deficient performance . . . . On this record, the Illinois Appellate Court sensibly concluded that it had too little information to judge the advice [Petitioner] received in connection with the 41-year plea offer." Pet.App. 15a (emphasis added). The Seventh Circuit's

statement is odd not least because the adequacy of Petitioner's showing of deficient performance is central to determining whether the state court unreasonably applied controlling law to Petitioner's *Strickland* claim.

And the absence of allegations regarding the case involving S.D. does not mean Petitioner's other allegations may be ignored. Rather, even if the absence of allegations about the case involving S.D. means one can assume that Petitioner was fully and adequately advised as to that case (an implausible assumption given his other allegations), there is no dispute that he alleged he was not advised of his sentencing exposure at trial in the case involving J.H. And, because Judge Claps's offer applied to *both* cases, the lack of advice in the case involving J.H. means that Petitioner could not make an informed decision as to the plea as a whole, regardless of whether he was advised (or advised properly) as to the case involving S.D.

Yet, on the Seventh Circuit's reading of Petitioner's claim, it does not matter that defense counsel said nothing about the sentence he faced at trial in the case involving J.H., because defense counsel *may* have advised Petitioner of the sentence he faced at a trial in the case involving S.D.—and then left it to Petitioner to decide whether the combined 41-year offer was a good deal or whether he should try his luck at trial. That is not effective assistance of counsel: Even if the Seventh Circuit were right that "[h]alf of the equation remains empty" because it "kn[e]w much too little about the case involving S.D. and the advice [Petitioner] received from his counsel in that case," Pet.App. 14a, it knew that Petitioner alleged he was told, at best, only 50 percent of what he fully needed

to know given that he received *no* advice as to his sentencing exposure at trial in the case involving J.H.

In short, the Seventh Circuit recognized that Petitioner alleged he was not advised of his sentencing exposure in the case involving J.H., and it further recognized that the Illinois Appellate Court was well aware of this allegation, too. If defense counsel's failure to advise Petitioner of his sentencing exposure at trial were sufficient to establish deficient performance (as court after court has held, *see infra*), then the Seventh Circuit should have determined that the Illinois Appellate Court unreasonably rejected Petitioner's *Strickland* claim. The Seventh Circuit's failure to do so, while fully aware of Petitioner's allegations, means that it necessarily concluded that counsel's failure to advise Petitioner of his sentencing exposure was not sufficient to constitute deficient performance.

B. The Seventh Circuit's conclusion creates a split.

The Seventh Circuit's disposition on this issue gives rise to a split: Two circuit courts and at least five state high courts have held that defense attorneys render deficient performance during plea discussions when they do not advise their clients of sentencing exposure at trial, and three circuit courts have suggested they would hold similarly.

1. Starting with the Sixth Circuit, it has explained that a "criminal defendant has a right to expect *at least* that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the

sentencing exposure the defendant will face as a consequence of exercising each of the options available." *Smith v. United States*, 348 F.3d 545, 553 (6th Cir. 2003) (citation omitted) (emphasis added); *see also Thompson v. United States*, 728 F. App'x 527, 533 (6th Cir. 2018) ("Competent representation thus demands that counsel explore the range of penalties a defendant is facing under likely guidelines calculation scenarios as completely as possible."). Of particular relevance here given the Seventh Circuit's prejudice ruling, the Sixth Circuit further noted that whether a defendant "had this information before he rejected the plea offer is also an important factor in the consideration of the reasonable likelihood that a properly counseled defendant would have accepted the government's guilty plea offer." *Smith*, 348 F.3d at 554.

And the D.C. Circuit has noted that "there is no relevant difference between an act of commission and an act of omission in this context." *United States v. Aguiar*, 894 F.3d 351, 358 (D.C. Cir. 2018) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010)). In other words, *Strickland* is not "limited to situations where the defendant has received 'affirmative misadvice' on matters in the criminal case." *Id.* (quoting *Padilla*, 559 U.S. at 369–70). Rather, "[r]easonably effective assistance under *Strickland*'s first prong require[s] counsel to advise [defendants] of the[] sentencing consequences of rejecting [a] plea offer. A failure to do so is legally indistinguishable from affirmatively misinforming the defendant as a result of ignorance of relevant law." *Id.* at 359; *see also id.* at 361 ("What Aguiar needed to know before he decided whether or not to accept the plea offer was the worst-case scenario if he rejected the plea and went to trial.").

2. At least five state high courts agree with the Sixth and D.C. Circuits. In *People v. Curry*, cited repeatedly in Petitioner's state post-conviction filings, the Illinois Supreme Court held that "[a] criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." 687 N.E.2d at 887. "Concomitantly," the court continued, "a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged," including the possibility of mandatory consecutive sentences. *Id.* Failure to fulfill this obligation constitutes deficient performance under *Strickland*. *Id.*

The highest courts of California, Georgia, Maryland, and Tennessee have issued similar opinions. *See In re Alvernaz*, 830 P.2d 747, 755 (Cal. 1992) ("D]efense counsel must communicate accurately to a defendant the terms of any offer made by the prosecution, and inform the defendant of the consequences of rejecting it, including the maximum and minimum sentences which may be imposed in the event of a conviction."); *Gramiak v. Beasley*, 820 S.E.2d 50, 54 (Ga. 2018) ("A defendant is entitled to be fully informed of certain consequences of his decision to accept or reject a plea offer, including the right to the informed legal advice of counsel regarding the possible sentences that could be imposed following a conviction at trial."); *Williams v. State*, 605 A.2d 103, 109 (Md. 1992) (failure of counsel to advise petitioner in course of plea discussions "of his exposure of the imposition of a mandatory 25 year sentence was deficient conduct" where

"plea offer that would expose him to a maximum sentence of ten years was an option available to petitioner"); *Calvert v. State*, 342 S.W.3d 477, 490 (Tenn. 2011) ("[W]e now hold that a lawyer's failure to advise his or her client about the mandatory lifetime community supervision sentence, where the client is considering a plea to one or more of the relevant offenses, is deficient performance.").

3. The Third, Fifth, and Eleventh Circuits, while not expressly holding that the failure to advise of sentencing exposure constitutes deficient performance, have indicated they would agree with the Sixth and D.C. Circuits' holdings.

In a case involving affirmative misadvice (rather than no advice) and an accepted (rather than rejected) plea offer, the Third Circuit noted that, "[w]hen addressing a guilty plea, counsel is required to give a defendant enough information 'to make a reasonably informed decision whether to accept a plea offer.'" *United States v. Bui*, 795 F.3d 363, 367 (3d Cir. 2015) (quoting *Shotts v. Wetzel*, 724 F.3d 364, 376 (3d Cir. 2013)). And it has "identified potential sentencing exposure as an important factor in the decisionmaking process, stating that '[k]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.'" *Id.* (quoting *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992)).

In another case involving affirmative misadvice, the Fifth Circuit explained that "[o]ne of the most important duties of an attorney representing a criminal defendant is advising the defendant about whether he should plead guilty." *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005). And an "attorney fulfills

this obligation by informing the defendant about the relevant circumstances and the likely consequences of a plea. Apprising a defendant about his exposure under the sentencing guidelines is necessarily part of this process." *Id.* Indeed, the Fifth Circuit observed, "[a] defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial." *Id.*

Finally, the Eleventh Circuit recently stated that it "agree[d]" that "counsels' performance was deficient" under the first *Strickland* prong based on the "failure to . . . communicate [the defendant's] potential total sentence and the application of the sentencing guidelines" during plea negotiations. *Carmichael v. United States*, 966 F.3d 1250, 1258 (11th Cir. 2020).

C. The Seventh Circuit's conclusion is also wrong.

The Seventh Circuit not only created a split of authority, it is also wrong. Criminal defendants have a right to effective assistance of counsel when considering whether to accept a plea offer. *See Lafler*, 566 U.S. at 168; *Frye*, 566 U.S. at 147. A critical factor in deciding whether to plead guilty is the sentencing exposure the defendant faces at trial. *See, e.g.*, *Smith*, 348 F.3d at 554; *Bui*, 795 F.3d at 367; *Herrera*, 412 F.3d at 580. And a defendant cannot make an informed decision whether to accept a plea offer without knowing his sentencing exposure should he reject the plea offer and proceed to trial. *See, e.g.*, *Herrera*, 412 F.3d at 580.

Here, for example, Petitioner's sentencing exposure was extremely complicated: He faced dozens of counts based on different permutations of offenses and possible enhancements, some of which would

merge into others and some of which would require consecutive sentences. As a layman with a low IQ, he could not figure out on his own which counts would merge and which counts would trigger mandatory consecutive sentences, much less what those sentences might be. Thus, he could not assess whether Judge Claps's offer was a good deal compared to what he faced at trial. And this is true regardless of what is known or unknown about the second case then pending against him and regardless of whether Petitioner was advised of his sentencing exposure in that case: Petitioner could not have made an informed decision whether to accept or reject the combined plea offer without knowing his sentencing exposure at trial in *both* cases (not just one).

II. The circuit courts are also split on the showing required to establish diligence under § 2254(e)(2).

Turning to the second question presented, this Court has stated that "[d]iligence . . . require[s] in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Michael Williams*, 529 U.S. at 437. Circuit courts interpreting this language, however, have disagreed over whether seeking an evidentiary hearing in state court is sufficient to establish diligence, or whether a habeas petitioner needs to have done more.

A. Three circuit courts have held that requesting a hearing is not sufficient.

Three circuit courts, including the Seventh Circuit in this case, have held that requesting an evidentiary

hearing in state court is not sufficient to establish diligence.

Here, for example, the Seventh Circuit held that Petitioner "failed to show the diligence necessary to obtain an evidentiary hearing," Pet.App. 18a, despite his request for "an evidentiary hearing in state court," Pet.App. 17a. "[B]ecause he did seek an evidentiary hearing in state court," the court acknowledged, "[w]hether [Petitioner] exercised diligence in developing the factual basis for his claim is a close and difficult question." *Id.* But his request was not enough, the court concluded, because of the "factual void about S.D.'s case." Pet.App. 19a.

The Fifth Circuit has similarly explained that "mere requests for an evidentiary hearing will not demonstrate reasonable diligence." *Burton v. Terrell*, 576 F.3d 268, 273 (5th Cir. 2009). In *Burton*, for example, the Fifth Circuit held that, even if the petitioner had requested an evidentiary hearing in state court, he "was not diligent in developing the factual record . . . because he neither claimed nor demonstrated that his trial counsel's all-important affidavit 'could not be obtained absent an order for discovery or a hearing.'" *Id.* (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000)).[4]

The Tenth Circuit is in accord with the Fifth and Seventh, having noted "that 'merely requesting a

[4] This reasoning would not apply here, as the Illinois Appellate Court "recognized that the only evidence [Petitioner] could present of private discussions with his attorney would be his own testimony and his counsel's, and that at the pleading stage, he could be excused for failing to present an affidavit of his counsel." Pet.App. 18a.

hearing in state court may not be enough to satisfy the requirement that [a petitioner] diligently seek to develop a factual basis for his claim.'" *Hammon v. Ward*, 466 F.3d 919, 927 (10th Cir. 2006) (quoting *Parker v. Scott*, 394 F.3d 1302, 1325 (10th Cir. 2005)). In *Hammon*, however, the Tenth Circuit held that the petitioner "not only aggressively sought an evidentiary hearing, he also put on some evidence in support of his allegation," namely "the state trial record," which supported the allegation. *Id.*

B. Two circuit courts have held that requesting a hearing is sufficient.

In contrast, two circuits have held that a request for an evidentiary hearing in state-post conviction proceedings is sufficient to establish diligence under § 2254(e)(2).

The Eleventh Circuit has explained: "In general, our precedent says that when a petitioner requested an evidentiary hearing at every appropriate stage in state court and was denied a hearing on the claim entirely, the petitioner has satisfied the diligence requirement for purposes of avoiding Section 2254(e)(2)." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1289 (11th Cir. 2012). Notably, the *Pope* court first considered whether § 2254(e)(2)'s diligence requirement barred an evidentiary hearing, and, after concluding that petitioner had been diligent, it *then* asked whether "the petitioner ha[d] 'proffer[ed] evidence that, if true, would entitle him to relief.'" *Id.* at 1291 (quoting *Hill v. Moore*, 175 F.3d 915, 922 (11th Cir. 1999)). On this merits question, the court concluded that "[t]he record . . . leaves us with [the petitioner's] untested . . . allegations, and little, if anything else to consider." *Id.* at 1287–88. And the court "agree[d] with

[the petitioner] that these allegations . . . are powerful, and *if* he is able to prove they are true, he would be entitled to habeas relief." *Id.* at 1294. Thus, only *after* determining that the petitioner's diligence rendered § 2254(e)(2)'s limitations inapplicable did the court consider the merits of the claim, which the court could not decide on the too-sparse record.

For its part, the Third Circuit has also "concluded that the petitioner's request for an evidentiary hearing in the state post-conviction court . . . showed sufficient diligence to render Section 2254(e)(2) inapplicable." *Thomas v. Horn*, 570 F.3d 105, 125 (3d Cir. 2009) (citing *Thomas v. Varner*, 428 F.3d 491 (3d Cir. 2005)); *see also Morris v. Beard*, 633 F.3d 185, 195 (3d Cir. 2011). What is more, the *Horn* court, pointing to the "sparse" record, determined that "any resolution of [the petitioner's] *Strickland* claims [was] premature without the benefit of an evidentiary hearing." *Horn*, 570 F.3d at 124–25. The court then noted that the petitioner had requested an evidentiary hearing in state post-conviction proceedings. *Id.* at 125–26. "*Therefore*," the court concluded, "Section 2254(e)(2) does not apply." *Id.* (citing *Varner*, 428 F.3d at 498; *Michael Williams*, 529 U.S. at 437). Finding no statutory bar to the evidentiary hearing, the court further explained that the petitioner was entitled to a hearing because, "without a fully developed record, we cannot foreclose the possibility that [he] will be able to show prejudice." *Id.*

C. The Seventh Circuit falls on the wrong side of the split.

The Seventh Circuit's opinion below not only deepens the circuit split on this issue, it is also flawed for two reasons.

1. *First*, whether an evidentiary hearing is barred under § 2254(e)(2) is an entirely distinct and separate question from the merits of the claim itself. All that the threshold § 2254(e)(2) question asks is whether a hearing is barred because the petitioner was not "diligent." *Michael Williams*, 529 U.S. at 432, 437. The Seventh Circuit's approach, however, improperly advances the subsequent merits question—whether Petitioner alleged facts that, if true, would entitle him to relief—into the threshold question whether he was diligent in seeking an evidentiary hearing in state court.

Indeed, a showing of diligence does not necessarily entitle a petitioner to an evidentiary hearing—it only renders § 2254(e)(2)'s statutory limitations on evidentiary hearings inapplicable, leaving it to the court to determine whether to order a hearing (based on whether his allegations, if true, would entitle him to relief). By muddling these inquiries, the Seventh Circuit distorts the diligence requirement and puts the cart before the horse. *See* Pet.App. 18a ("[W]e conclude that [Petitioner] failed to show the diligence necessary to obtain an evidentiary hearing for the same reason his claim fails on the merits[.]").

Because Petitioner requested an evidentiary hearing in state court, he satisfied § 2254(e)(2)'s diligence requirement. Only after answering this threshold question should the Seventh Circuit have considered whether Petitioner was entitled to a hearing—a second-order question that the court also should have answered in the affirmative because Petitioner's allegations, if true, merit habeas relief, *see supra* Part I.

2. *Second*, the Seventh Circuit's approach ignores the structure of Illinois's multi-stage post-conviction process—a process that requires only the "gist of a constitutional claim" at the first stage, *Davis*, 388 F.3d at 1060 (quoting *Gardner*, 810 N.E.2d at 184), which is as far as Petitioner got before his petition was dismissed.

In fact, Petitioner did *more* than the Ninth Circuit found sufficient when assessing the diligence requirement in the context of a similar multi-stage state habeas process. In *Horton v. Mayle*, 408 F.3d 570, 582 n.6 (9th Cir. 2005), the Ninth Circuit considered whether a petitioner "exercised sufficient diligence" where the petitioner did not reach the stage at which a hearing would be requested (and thus never requested one). As the court explained, "[u]nder California law, an appellate court, when presented with a state habeas petition, determines whether an evidentiary hearing is warranted only after the parties file formal pleadings, if they are ordered to do so." *Id*. Where a state habeas petition is denied without any formal pleadings, the Ninth Circuit concluded, a petitioner who did not request an evidentiary hearing nonetheless may establish diligence where he "never reached the stage of the proceedings at which an evidentiary hearing should be requested." *Id*.

Here, in contrast, Petitioner *did* request an evidentiary hearing, but never reached the third stage when an evidentiary hearing would have been conducted because the state court dismissed his petition at the first stage. As the Seventh Circuit recognized, "[i]n his state postconviction petition, [Petitioner] requested a hearing, described the basis for his claim, and in-

cluded an affidavit swearing to the truth of his allegations." Pet.App. 17a–18a. "[A]t the pleading stage," the court went on, "he could be excused for failing to present an affidavit by his counsel." *Id*. at 18a. That his petition was summarily (and erroneously) dismissed at the first stage does not render his diligence unsatisfactory. Rather, Petitioner acted with "diligence at the relevant stages of the state court proceedings." *Horton*, 408 F.3d at 582 n.6.

III. The questions presented are important.

Given the number of defendants who confront plea offers and who file § 2254 habeas petitions each year, the questions presented have significant implications for the criminal justice system.

The first question presented provides an opportunity for the Court to clarify the advice defense counsel must give their clients when contemplating a plea offer. The question is of particular importance given the intricacies of sentencing regimes—as demonstrated by the complexity of Petitioner's sentencing exposure here.

The second question presented provides an opportunity for the Court to clarify the showing required to establish diligence under § 2254(e)(2), which is important given the number of habeas petitioners and the complexity of federal habeas relief. This question is complicated because post-conviction procedures vary greatly across states, and the circuit courts would benefit from guidance on the diligence necessary to avoid § 2254(e)(2)'s limitations on evidentiary hearings.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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