CASE NO. 21-7611

In The
Supreme Court of the United States

JOHN CHARLES EICHINGER,

***Petitioner*,**

v.

GEORGE LITTLE,
ACTING SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

Petition's Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari

THIS IS A CAPITAL CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal cases

Federal statutes

REPLY ARGUMENT

I. PETITIONER REMAINS ENTITLED TO A CERTIFICATE OF APPEALABILITY BECAUSE HIS WAIVER OF TWO CONTESTED TRIALS WAS INDUCED BY COUNSEL'S FACTUALLY AND LEGALLY INACCURATE ADVICE ABOUT THE PROSECUTION'S PLEA OFFER.

Respondents do not dispute that trial counsel misread the prosecution's plea offer. The offer pledged only that the prosecution would refrain from objecting to the *admissibility* of evidence that Petitioner John Eichinger did not contest his guilt. "[T]he Commonwealth has offered to permit the jury to hear that he did not contest his guilt in the four murders," the offer stated. App. 184. "Normally, all that is admissible is the fact of conviction, not the lack of contesting." *Id.* Contrary to counsel's advice, the offer did *not* say that the prosecution would refrain from disputing Eichinger's remorse or acceptance of responsibility. App. 184–85; NT 6/17/11 at 63–64; NT 6/15/11 at 79–80.

Also contrary to counsel's advice, the law did not require the prosecution's agreement in order for the defense to argue remorse "or any other relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Counsel failed to grasp hornbook Eighth Amendment law:

> Q: Before Mr. Eichinger stipulated to the evidence in both cases, did you tell him that, if he took the Still case to trial separately, that the defense would be precluded from arguing remorse in the capital cases?
>
> A: Yes. He was aware of the fact that . . . it was an all-or-nothing type of deal that was being presented.

NT 7/21/2011 at 9.

Because counsel's inaccurate advice induced Eichinger's waiver of two severed trials, it is irrelevant whether counsel otherwise filed "many motions on

Eichinger's behalf" (Opp. at 8), whether counsel preserved suppression claims for appeal (*id.* at 13), or whether counsel "reasonably" focused on remorse during the penalty phase (*id.* at 13-14). Respondents' arguments reduce to the notion that "a fair trial wipes clean any deficient performance by defense counsel during plea bargaining." *Lafler v. Cooper*, 566 U.S. 156, 169 (2012). That notion is untenable, because "a defendant has the right to effective assistance of counsel in considering whether to accept" a plea offer. *Id.* at 168. "[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012).

Respondents next point to the post-conviction court's general comments on Eichinger's credibility as a witness. Opp. at 15–16. Leaving aside that those comments do not address the undisputed fact that trial counsel's advice induced Eichinger's trial waiver – *see* NT 7/21/2011 at 10 (per attorney Bauer); NT 6/15/2011 at 57–63 (per attorney McElroy) – the Sixth Amendment claim at issue does not depend on what respondents describe as Eichinger's "self-serving testimony at the PCRA hearings that he would have insisted on a contested trial" if not for counsel's advice. Opp. at 15. Indeed, two contested trials were already underway when the parties' agreement abruptly terminated them. The parties had already empaneled a jury for the non-capital trial, and they were in the midst of voir dire for the capital trial. NT 10/17/05 at 95, 238–39, 280. This is not a case, then, in which the claim rests on "post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017). There is a "reasonable probability" that the severed trials would have continued

along if not for counsel's intervening misadvice. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Eichinger's ineffective-assistance claim requires nothing more. *Id.*

Equally unhelpful is respondent's reliance on the district court's ruling. Opp. at 17–18. Respondents think it important that the district court recited the holdings of *Lafler* and *Frye*. But neither that court nor any other has applied those holdings to Eichinger's actual claim, i.e., that counsel misread the prosecution's plea offer (a premise respondents do not contest), that counsel communicated that misreading to the client, and that counsel induced the client's waiver of a contested guilt phase trial. That claim easily makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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