No. ___ – _____

In the Supreme Court of the United States

JEFFREY KINZLE,

Petitioner,

v.

ERIC JACKSON,

Respondent.

On Petition for a 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

Whether, under § 2254(d), a federal court may "look through" to review the decision of an inferior court when the high court offers additional reasoning explaining the court's decision on the relevant claim.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Kinzle respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported but is available at 2022 WL 576017.

JURISDICTION

The judgment of the court of appeals was entered February 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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….

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Wilson v. Sellers*, this Court made clear that the "look-through" procedure first announced in *Ylist v. Nunnemaker*, 501 U.S. 797 (1991), continued to apply in habeas cases where the last decision by a state court "does not come accompanied with [ ] reasons." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). When "the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion," in contrast, "[t]his is a straightforward inquiry." *Id.* The reviewing court "simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id*; *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1198 (2018) (Gorsuch, J., dissenting) (citation omitted) ("As the text and our precedent make clear, a federal habeas court must focus its review on the final state court decision on the merits, not any preceding decision by an inferior state court.").

In the wake of *Wilson*, however, the Ninth Circuit continues to adhere to a doctrine that allows it to look through *reasoned* decisions when the higher court "adopts" the reasoning of the lower court. *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005); *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007). In some cases, this may be harmless—there may be no other reasoning. But in Mr. Kinzle's case, this doctrine allowed the Ninth Circuit panel to ignore specific reasoning from the Deputy Supreme Court Commissioner that was "contrary to" *Lafler v. Cooper* and *Strickland v. Washington* in favor of arguably better reasoning from the Washington Court of Appeals.

Mr. Kinzle's federal habeas petition concerned his attorney's failure to investigate his uncontrolled mental illness and the erratic and insufficient medication he was receiving in custody as compared to his preexisting medication protocol. As Mr. Kinzle's bipolar disorder raged, his trial attorney's failure to follow up on pleas to look into his mental health records led him to reject a favorable plea offer. Once his medications were renewed and his mental illness was stabilized, he declared that had his attorney assisted him to regain proper and consistent medications so his mental illness was controlled during the plea process, he would have accepted the offer.

The Ninth Circuit failed entirely to address the concluding reason given by the Deputy Commissioner, and the basis for the certificate of appealability awarded by a two-judge motions panel for that Court: that Mr. Kinzle could not prove the prejudice prong of his ineffective assistance claim because Mr. Kinzle "fail[ed] to show that under the circumstances of this case the choice to make the State prove the charges at trial was *one that a person in a stable mental condition could not have reasonably made*." 1-ER-19 (emphasis added)." This standard was contrary to the clearly established *Lafler*/*Strickland* inquiry because it substituted an objective inquiry for the subjective question whether the petitioner would have accepted the plea under the counterfactual and raised the prejudice bar far beyond "a reasonable probability" of that result. *See Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Instead, the Ninth Circuit panel noted that the Deputy Commissioner had initially recited the correct standard ("a reasonable probability the outcome would have been different"). Pet. App. A at 3a; *see* 1-ER-19. The panel went on to emphasize the point on which the Deputy Commissioner purportedly "incorporated" the opinion of the Court of Appeals: that the chain of causation from seeking treatment for Mr. Kinzle's documented mental illness to him recovering a mental state in which he would have pleaded guilty was "too speculative." Pet. App. A at 3a. But it failed to note that this statement was immediately followed by the above-referenced conclusion, directly conflicting with *Lafler* and *Strickland*, which indicated the Deputy Commissioner had been testing the connection between the trial attorney's deficiency and Mr. Kinzle's failure to plead guilty according to a much more stringent test than the one supplied by Supreme Court precedent. 1-ER-19.

Under *Wilson*, the Ninth Circuit should have this reviewed this conclusion and tested it against the § 2254(d) thresholds. 138 S. Ct. at 1192. Because it overlooked this reasoning in favor of the conclusions of the inferior court, defying a recent decision of this Court, certiorari should be granted.

STATEMENT OF THE CASE

Mr. Kinzle presented a claim of ineffective assistance of counsel during the plea process to the Washington Court of Appeals and the Washington Supreme Court, which adjudicated his claim on the merits. His claim was based upon counsel's failure to investigate his mental state during this process.

The facts presented in that proceeding demonstrate that Mr. Kinzle suffered from serious mental illness, which was not properly or regularly medicated by the Snohomish County Jail, and which directly led to rejection of two favorable plea offers by the state. Mr. Kinzle also established, through expert testimony, his own declaration, and other evidence, that if he had been properly medicated, he would have accepted the offers.

A. During the Plea Process, Mr. Kinzle Received Inadequate and Irregular Medication in Custody While His Attorney Ignored His Request to Obtain His Mental Health Records.

Mr. Kinzle was charged in Snohomish County, Washington, with indecent liberties, failure to register as a sex offender, and molestation. 2-ER-110; 2-ER-112; 2-ER-114. The Snohomish County Public Defender, through assistant public defender Cassie Trueblood, was appointed to represent Mr. Kinzle in all three cases. 2-ER-172–77.

After his arrest, Mr. Kinzle informed jail staff that he had prescriptions for Lithium, Efexor, Trazodone, Dexedrine, and Lorazepam. 2-ER-132. But throughout the period between his arrest and two plea offers, he received inadequate and irregular medication for conditions that required continuous medication and monitoring. 2-ER-27; 2-ER-149–167; *see, e.g.*, 2-ER-134 (written request for jail "Medication Assistance" dated April 21, 2011: "Problem: I have been waiting since the day I was arrested [] to get at least some of my medications the ones that are most important are my lithium my bipolar is acting up real bad I am cycling verry [sic] quickly and am not sleeping verry [sic] well or regularly…."). An expert declaration in the state proceeding established that Mr. Kinzle's bipolar disorder

required continuous treatment with lithium, whose dosage must be "carefully titrated, *i.e.*, measured, so that the dose is not toxic and is clinically effective. Titration requires systematic blood workups to determine the patient's lithium level." Decl. of Dr. Breen, 2-ER-124. Mr. Kinzle's blood lithium levels were not even measured until November 16, 2011, after he had already rejected the two plea offers. 2-ER-166. As a result of this inadequate medication and monitoring, the expert found that during the time that Mr. Kinzle first came in contact with his defense counsel, Cassie Trueblood, he was experiencing signs of mania and likely depression. 2-ER-121.

Although Ms. Trueblood had in her file a pretrial interview with Mr. Kinzle indicating he suffered from bipolar disorder, and Mr. Kinzle specifically requested that she obtain his "mental helth [sic] records from Anchorage Jail anchorage AK – 2010 – palmer correctional center – palmer AK – Mat-Sue – pretrial – palmer AK, - Mat-Sue – behavioral helth [sic] – Wasilla AK – bolth 2004-2005 records and 2010-2009," 2-ER-190, she never made an attempt to obtain these records or further investigate his mental health.

On April 7, 2011, the State made a plea offer to Mr. Kinzle which encompassed all three of his cases; Ms. Trueblood received the offer on April 26, 2011. 2-ER-304. If Mr. Kinzle pled guilty to both the indecent liberties and child molestation charges, he could expect a standard guideline range suggesting a minimum of between 108 and 144 months of imprisonment to life, and the prosecutor would recommend the low-end standard-range sentence of a minimum of 108 months to

life for both convictions. The prosecutor would also dismiss the failure-to-register-as-a-sex-offender charge. 2-ER-304. Ms. Trueblood conveyed this offer to Mr. Kinzle. 2-ER-71.

When the prosecutor's deadline to accept the offer passed on May 20, 2011, the State amended the information on June 10, 2011, adding a second count of child molestation. 2-ER-3–14.

In late June of 2011, Mr. Kinzle made a counter offer through Ms. Trueblood to plead to a single sex offense. 2-ER-316–32. The prosecutor responded with some hesitation about "get[ting] the emotional roller coaster going," but ultimately, on June 28, 2011, agreed to drop the indecent liberties charge and have him plead to child molestation and a non-sex related assault—which would have resulted in a range of 108 to 144 months. 2-ER-334. Mr. Kinzle rejected this offer. 2-ER-337.

On July 6, 2011, Ms. Trueblood wrote the prosecutor informing him that Mr. Kinzle had reconsidered his opinion on the June 28, 2011 offer he had rejected. 2-ER-339. She added "he indicates he would accept it and plea ASAP. Any chance that's still open?" *Id.*

Immediately following this query, Mr. Kinzle's medication was abruptly discontinued: he did not receive any medication from July 7–31, 2011. 2-ER-151. On July 8, 2011, the prosecutor, after checking with the victims, responded

"[r]e Kinzle, I am inclined to do it…Will he really pull the trigger? I don't want to waste their time and emotions if he is not committed." 2-ER-342. Ms. Trueblood reassured him, and they scheduled a change of plea hearing for July 21, 2011. *Id.*

On July 21, 2011, after two weeks of receiving no psychiatric medication whatsoever, Mr. Kinzle appeared before the Honorable Eric Z. Lucas. 1-ER-33–38. The prosecutor informed the court that if Mr. Kinzle did not accept the offer, he would never see this offer again. 1-ER-35. Ms. Trueblood responded that the case should be set over for the following day so Mr. Kinzle could move to replace her because there had been a severe breakdown in communications. 1-ER-35–36. Judge Lucas inquired with Mr. Kinzle directly. 1-ER-36–38. Mr. Kinzle rejected the plea offer; acknowledged that his request to have Ms. Trueblood replaced would disrupt the interview process of two witnesses; and announced his intention to have Ms. Trueblood replaced. *Id.*

Mr. Kinzle proceeded to trial (with Ms. Trueblood as counsel) and was convicted. By rejecting the plea offers, Mr. Kinzle exposed himself to both a higher sentence range and consecutive sentencing on the three separate cases. Had he accepted the original offer, under Washington State's mandatory sentencing guideline scheme his minimum term for all three cases could be no greater than 144 months and, given the prosecutor's recommendation, could be as low as 108 months. After going to trial, Mr. Kinzle received a total minimum term of 273 months. 2-ER-75, 2-ER-93.

Once he was stabilized, Mr. Kinzle stated in his declaration that had he been mentally stable and been able to trust Ms. Trueblood's advice, he would have accepted the offer and not gone to trial on any of his cases. 2-ER-68–70.

B. In Postconviction Proceedings, the Washington Court of Appeals Rejects Mr. Kinzle's Personal Restraint Petition, and the Washington Supreme Court Denies Review, Agreeing with the Court of Appeals But Adding Additional Reasoning.

Mr. Kinzle brought his IAC claim in a personal restraint petition in the Washington Court of Appeals. While he alleged that Ms. Trueblood's failure to investigate his inadequate and irregular medication at the jail led directly to his manic decision to decline the two plea favorable offers, the Washington Court of Appeals ruled that this link was "speculative and tenuous," and that he therefore had not shown a reasonable probability that he would have pled guilty absent Ms. Trueblood's deficient performance. 1-ER-31–32.

The Washington Supreme Court then issued a "reasoned" opinion denying review of the petition. Although it agreed with the Court of Appeals that the link was "tenuous," the Deputy Supreme Court Commissioner also offered his own reasoning, indicating that he had measured this causal claim under a much higher standard than that required by *Strickland* and *Lafler*: "He fails to show that under the circumstances of this case the choice to make the State prove the charges at trial was *one that a person in a stable mental condition could not have reasonably made*." 1-ER-19. This standard was not only higher than a "reasonable probability" of pleading guilty, but also turned the subjective question of whether this petitioner

would have accepted the plea into whether any objective "reasonable person" could have made the same decision the petitioner did.

C. The Federal Courts, Following Ninth Circuit Precedent, Look Through the *Reasoned* Washington Supreme Court Opinion to the Decision of the Inferior Court.

In assessing Mr. Kinzle's IAC claim, the federal district court analyzed not the Washington Supreme Court opinion, but the decision of the lower court: "[T]he Court is assured by the Commissioner's report that *the Court of Appeals' decision* resolved Petitioner's claim on the merits and applied the appropriate constitutional standard." Pet. App. B at 10a.

The Ninth Circuit ignored this Court's holding in *Wilson*, then invoked Ninth Circuit precedent allowing the federal court to look through the last reasoned decision if that decision "adopted or substantially incorporated the reasoning from a previous decision." Pet. App. A at 3a (quoting *Barker*, 423 F.3d at 1093). Reviewing the decisions in tandem, the Court held that the Court of Appeals and Deputy Supreme Court Commissioner had reasonably reasoned that the "logical chain necessary" to demonstrate prejudice was too "speculative." Pet. App. A at 3a–4a. It did not quote or discuss the wildly incorrect prejudice *standard* that the Deputy Commissioner had used to measure this argument—the issue on which the certificate of appealability and the briefing had been based.

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REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Doctrine Extending the Look-Through Doctrine to *Explained* Decisions of the Washington Supreme Court Contravenes *Wilson v. Sellers* and Conflicts With the Rule in Two Other Circuit Courts.

This Court has emphasized multiple times that the look-through doctrine is a limited exception to the general rule that federal courts review the last decision of a state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Wilson v. Sellers*, 138 S. Ct. 1188 (2018)*; Brumfield v. Cain*, 576 U.S. 305, 313 (2015). It applies only to "an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment)." *Ylst,* 501 U.S. at 802. In contrast, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion […] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again." *Wilson*, 138 S. Ct. at 1192; *see also Wilson*, 138 S. Ct. at 1198 (Gorsuch, J., dissenting) ("As the text and our precedent make clear, a federal habeas court must focus its review on the final state court decision on the merits, not any preceding decision by an inferior state court.").

The Ninth Circuit's pre-*Wilson* court-made exception to this doctrine when an opinion "adopted or substantially incorporated the reasoning from a previous decision," violates this rule. *Barker*, 423 F.3d at 1093 (9th Cir. 2005) (citing *Lambert v. Blodgett*, 393 F.3d 943, 970 n.17 (9th Cir. 2004); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003)); *see also Edwards*, 475 F.3d at 1126. If a higher court offers its own

reasons in addition to its approval of the lower court opinion, the latter decision is "reasoned" and the federal court must assess those reasons, not those of the inferior court.

The Ninth Circuit exception conflicts with the Third Circuit, in which the lower court decision is only consulted when it "has not been supplemented in a meaningful way by the higher state court." *Bond v. Beard*, 539 F.3d 256, 289 (3rd Cir. 2008). It also conflicts with the Sixth Circuit, which holds,

> [W]e must [ ] defer to the last reasoned state-court opinion, rather than try to string together a series of state opinions piecemeal for each claim. As the Supreme Court made clear in *Ylst*, the core purpose of this rule is to improve "administrability" and "accuracy" amongst the lower federal courts . . . These objectives are contravened when a court attempts to combine various state-court decisions together for purposes of reviewing a single claim.

Barton v. Warden, Southern Ohio Correctional Facility, 786 F.3d 450, 463 (6th Cir. 2015). In either of these Circuits, Mr. Kinzle's claim would be assessed solely on review of the Deputy Commissioner's reasoned decision, including the concluding sentence, which was contrary to the prejudice standard in *Strickland* and *Lafler*.

II. The Decision Below Was Wrong.

The panel decision ignored the concluding sentence in the last reasoned opinion showing that the Deputy Commissioner had applied a prejudice standard contrary to *Strickland* and *Lafler*, while deferring to an amalgamation of the best-reasoned portions of the inferior court and higher court decisions. Pet. App. A at 3a. This was error, because under *Wilson*, a federal court's task is to identify a single, final decision that explains the court's reasoning: "[W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned

opinion[,] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192 (emphasis added). Here, the last state court to decide Mr. Kinzle's ineffective assistance claim was the Washington Supreme Court, through its Deputy Commissioner, and that court supplied its decision on the merits in a reasoned opinion.

The decision of the Washington Supreme Court Deputy Commissioner was "contrary to" or "an unreasonable application of" *Lafler* and *Strickland* because it substituted an objective prejudice standard for *Lafler*'s subjective one, and thereby distorted the Strickland query into the existence of a "reasonable probability of a different result." It also found evidence of Mr. Kinzle's subjective probability of accepting the plea offer "speculative," even though *Lafler* endorsed the Sixth Circuit's finding of prejudice based on the same kind of evidence. Finally, it imposed a higher prejudice standard than that found in either *Lafler* or *Strickland*.

Because the Deputy Commissioner did not address whether counsel was deficient under *Strickland*, the deficiency prong is subject to de novo review. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). As to prejudice, the Deputy Commissioner at first correctly framed the rule under *Strickland*: "Mr. Kinzle does not show, as he must, that there is a reasonable probability the outcome would have been different in the absence of the deficient performance." 1-ER-19.[1] But when it

[1] Notably, however, the authority the Deputy Commissioner cited for this standard was a Washington case, *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 842 (2012),

came to explaining how this rule applied to the specific plea argument controlled by *Lafler*, the Deputy Commissioner neither cited this Court's opinion in *Lafler* nor stated the correct rule from *Lafler*. *Lafler* makes clear that Mr. Kinzle's burden was to demonstrate that but for his attorney's deficiency in failing to investigate his mental state, there was "a reasonable probability that . . . the defendant would have accepted the plea . . . 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*, 566 U.S. at 164. But the Deputy Commissioner stated this burden very differently:

> [H]ow Mr. Kinzle may have judged a plea offer under a different mental state is wholly speculative, despite Mr. Kinzle's assertion. He fails to show that under the circumstances of this case the choice to make the State prove the charges at trial was one that *a person in a stable mental condition could not have reasonably made*.

Id. (emphasis added). Rather than being asked to show a reasonable probability that he, the defendant, would have accepted the plea, the Deputy Commissioner required him to show that an objectively reasonable person in his position would necessarily have accepted the plea. The declaration was not the only piece of evidence provided. Mr. Kinzle accepted responsibility for his actions at sentencing after his medication had been increased. 2-ER-293; *see Lafler* at 171 ("[A] court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions.").

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that was later held to be an unreasonable application of Strickland's prejudice analysis by the Ninth Circuit. *See Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015).

The *Lafler* standard specifically asks for subjective evidence of what the defendant himself would have done. *See Lafler*, 566 U.S. at 167 ("He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice."). Indeed, the *Lafler* Court agreed that "respondent ha[d] shown" prejudice in the record before the Sixth Circuit, which consisted of the petitioner's own testimony on the question of what he would have done under the counterfactual. See *id.* at 174 (citing *Cooper v. Lafler*, 376 F. App'x. 563, 571–72 (6th Cir. 2010)).

By changing the subjective prejudice test from *Lafler* to an objective test, the Deputy Commissioner's decision was "contrary to" *Lafler* because it "applie[d] a rule that contradicts the governing law set forth in our case[ ]," *Williams v. Taylor*, 529 U.S. 362, 405 (2000). This alteration of the required test for prejudice is quite similar to the "contrary to" example discussed in *Williams* itself. *Id.* at 405–06 (substituting a preponderance-of-the-evidence standard for *Strickland*'s "reasonable probability of a different result" standard would be "contrary to" *Strickland*). The § 2254(d) standard is met for this reason alone.

Second, the Deputy Commissioner's decision rejected Mr. Kinzle's own "assertion" of what he would have done if properly medicated as "merely speculative," despite the fact that this Court had endorsed a similar counterfactual showing before the lower courts in *Lafler*. Specifically, at the precise pin cite where the this Court had endorsed the prejudice showing of the *Lafler* petitioner, the Sixth

Circuit had rejected the state's argument that the petitioner's own statement was insufficient to demonstrate he would have accepted the guilty plea:

> He testified that, had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the state's offer. Nevertheless, although this evidence is uncontradicted, the state suggests that petitioner cannot show prejudice with his "own self-serving statement." Appellant's Br. at 27. There is no legal basis for us to impose a requirement that habeas petitioners provide additional evidence, and we have declined to create this rule in the past. To do so would contradict the Supreme Court's holdings that petitioner need only establish a "reasonable probability" that the result would have been different. See Hill [v. Lockhart], 474 U.S. [52,] 59, 106 S. Ct. 366.

Cooper, 376 F. App'x at 571–72 (non-Supreme Court citations omitted). Mr. Kinzle's showing that he would have accepted the plea bargain offered absent his attorney's failure to consider, investigate, and evaluate his mental state, was precisely the same kind of evidence; and dismissing it as "merely speculative" was therefore contrary to or an "unreasonable application" of the *Strickland/Lafler* standard.

Finally, the Washington Deputy Commissioner invented a likelihood requirement out of whole cloth: that Mr. Kinzle prove that a reasonable person in his position would never have rejected the plea offer. 1-ER-19 ("He fails to show that under the circumstances of this case the choice to make the State prove the charges at trial was one that a person in a stable mental condition could not have reasonably made."). The *Lafler* standard, like the general *Strickland* standard it is derived from, requires something less than a preponderance. *See Strickland*, 466 U.S. at 694. The question *Lafler* poses is the existence of "a reasonable probability that . . . the defendant would have accepted the plea . . .", *Lafler*, 566 U.S. at 164, so requiring Mr. Kinzle to prove that any reasonable person in his position would have

taken the plea offer improperly raised the standard, in addition to displacing the analysis from his subjective mental state onto that of a reasonable person. Because the Commissioner applied the wrong legal standard, the prejudice prong is subject to de novo review.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 26th day of May, 2022.

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