No. 22-5024

IN THE

SUPREME COURT OF THE UNITED STATES

JEROD RODRIGUEZ,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

B. ARGUMENT

As explained in the Petitioner's certiorari petition, the first question presented in this case is as follows:

> Whether the prejudice prong set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is established if a petitioner/defendant can demonstrate that a mistrial would have been granted by the trial court had defense counsel properly moved for a mistrial (i.e., the result of the proceeding would have been different, because the trial would have ended in a mistrial rather than a guilty verdict).

In his 28 U.S.C. § 2254 petition (and in his state postconviction motion), the Petitioner alleged that defense counsel rendered ineffective assistance of counsel during the trial by failing to object – and move for a mistrial – following the violation of his constitutional right of confrontation. Specifically, the Petitioner explained that during the trial, the State played for the jury a recording of a telephone conversation between the alleged victim (Larry Hopkins) and the Petitioner during which Mr. Hopkins stated that the Petitioner's girlfriend (Kristy Ferguson) had stated that she believed the Petitioner committed the crimes in question:

> THE PETITIONER: Has – has Kristy talked to you about this?
>
> MR. HOPKINS: Yeah, she told me that she thought you took [the watch].

Brief in Opp., p. 4. As explained in the Petitioner's certiorari petition, the Petitioner was denied his right to cross-examine and confront Ms. Ferguson because she did *not* testify at trial. Had defense counsel properly moved for a mistrial, there is a reasonable probability that a mistrial would have been granted.

In the brief in opposition, the Respondent asserts that "based on the totality of

the other evidence introduced against Petitioner at trial, Petitioner failed to satisfy the second prong of *Strickland* by showing he was prejudiced by the admission of the statements." Brief in Opp., p. 25. The Respondent also quotes from the prejudice argument that was presented by the State during the state court postconviction proceedings:

> The second prong of *Strickland* has not been met because there has been no showing that the sentence "Yeah, she told me that she thought you took it," if improper, *changed the outcome of the trial.* In fact, the defendant's paragraph long explanation of Ms. Ferguson's support for him surely outweighed any impact the complained of statement had. Also, without other specific incidents to address, there can be no showing that any deficiency *affected the outcome of the trial when compared to the totality of the evidence.*

Brief in Opp., p. 27 (emphasis added).[1] However, contrary to the Respondent's argument, in the context of an ineffective assistance of counsel claim concerning the failure to request a mistrial, the prejudice prong of the *Strickland* standard focuses on whether there is a reasonable probability that a mistrial would have been granted – not on whether there is a reasonable probability that the jury would have returned a different verdict. As explained by Honorable Paul L. Friedman in *United States v. Ramsey*, 323 F. Supp. 2d 27, 38-44 (D.D.C. 2004):

> To succeed on the prejudice prong of *Strickland*, Mr. Ramsey must show that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466

[1] The Respondent also cites to "evidence establishing that Petitioner arranged for the return of Larry Hopkins watch to him right after Petitioner's arrest." Brief in Opp., p. 34.

U.S. at 694. This question turns on the application of the Supreme Court's dictum that a defendant is prejudiced when there is a reasonable probability that "the result of the proceeding would have been different" but for counsel's unprofessional errors. *Id.* at 694.

Mr. Ramsey's current counsel argues that *the reasonable probability of a mistrial* – regardless of the outcome of any retrial – is enough to satisfy the prejudice prong of *Strickland* because "the result" or outcome of Mr. Ramsey's trial would have been different: there would have been a mistrial rather than a conviction. If there had been a mistrial, counsel offers, anything could have happened before a second trial. Mr. Fierro could have died, for example. Most significantly, a competent defense attorney having reviewed the transcript of the first trial, surely would have discussed the pros and cons of a plea with Mr. Ramsey and likely would have strongly urged him to plead guilty. A plea would have reduced the sentencing range under the United States Sentencing Guidelines from 210 to 262 months to 168 to 210 months.

The government responds that a different result or outcome must be an acquittal rather than a conviction and that the grant of a mistrial would not be enough to satisfy the prejudice prong of *Strickland*. After all, *Strickland* states that the question under the second prong is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. at 695. In the case of a mistrial, the government argues, "the factfinder" necessarily would have been the new jury at a second trial. Thus, in the government's view, the mistrial and the potential plea are not the touchstones for analysis under *Strickland*.

As already stated, the Court would have granted the motion for a mistrial if Mr. Palmer or the defendant had made such a motion. Thus, the result of the first trial would have been different. One can assume, however, that upon retrial there was not a reasonable probability of an acquittal if Mr. Fierro and the DEA agents testified at the second trial essentially as they had at the first and the video and audiotapes were admitted in evidence as surely they would have been. *This case thus directly presents the question whether Strickland's use of "the proceeding" means that a defendant must demonstrate that the decision by a different factfinder at a different trial would likely have been an acquittal, or whether, at least in some situations, the denial of a significant procedural right by virtue of defense counsel's incompetence (in this case a mistrial) is sufficient to satisfy the prejudice prong of Strickland.*

There is a strong and understandable force behind the idea that post-conviction relief should be reserved for those defendants who may not have committed the crimes for which they have been convicted, and

it seems intuitively peculiar to refer to a defendant as "prejudiced" when the almost certain end result of a retrial – conviction – would be identical to the result he received while represented by deficient counsel. *See Kimmelman v. Morrison*, 477 U.S. [365,] 394-397 [(1986)] (Powell, J., concurring in judgment); *cf. Stone v. Powell*, 428 U.S. 465 (1976) (holding that Fourth Amendment violations that should have led to the exclusion of reliable evidence do not constitute grounds for habeas relief). Further, if the Sixth Amendment guarantee is in place to assure fair trials – and the Supreme Court has said that it is, *see Mickens v. Taylor*, 535 U.S. [162,] 166 [(2002)] (quoting *United States v. Cronic*, 466 U.S. [648,] 658 [(1984)]) – it is reasonable at least to assess whether the defendant was the victim of some unfairness in his trial. *See Williams v. Taylor*, 529 U.S. 362, 391-393 (2000); *Lockhart v. Fretwell*, 506 U.S. [364,] 369-372 [(1993)]. Arguably, Mr. Ramsey was not the victim of unfairness in the result; he was found guilty and likely (if the same evidence were presented) would be found guilty again. If the evidence against the defendant was so overwhelming, it is difficult to maintain that he was deprived of a trial "whose result is reliable." *Strickland v. Washington*, 466 U.S. at 687; *see also Kimmelman v. Morrison*, 477 U.S. at 374 (stating prejudice test as whether "the verdict [was] rendered suspect"). Indeed, a contrary decision might be taken as giving the defendant a "windfall to which [he is] not entitle[d]." *Lockhart v. Fretwell*, 506 U.S. at 366.

The case law suggests, however, that Mr. Ramsey's obvious guilt may not bar his entitlement to relief under [28 U.S.C.] Section 2255. If Mr. Palmer's errors "deprive[d] [Mr. Ramsey] of a substantive or procedural right to which the law entitle[d] him," it matters not whether his conviction ultimately is "fair." *Williams v. Taylor*, 529 U.S. at 393; *see also id.* at 397-398. In *Williams v. Taylor*, the defendant was deprived of the right to provide the jury with mitigating evidence that "his trial counsel either failed to discover or failed to offer." *Id.* Here, the question is whether Mr. Palmer's failure to request a mistrial deprived Mr. Ramsey of any similar right.

Mr. Palmer's most serious error was in permitting the jury to pronounce Mr. Ramsey's guilt when he had an opportunity to avoid that result by seeking a mistrial. In that respect, his deficient performance in failing to move for a mistrial is analogous to a defense lawyer's deficient performance in counseling against or in rejecting an obviously beneficial plea offer to a guilty defendant, or in failing to appeal a conviction. In both of those situations, the effective advocate seeks to take the client's liberty out of the hands of the jury. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (stating test as "whether counsel's constitutionally ineffective

performance affected the outcome of the plea process"); *Smith v. United States*, 348 F.3d 545, 551 (6th Cir. 2003) (applying *Hill v. Lockhart* test to conclude that failure of defense counsel to "provide professional guidance . . . regarding his sentence exposure prior to a plea may constitute deficient assistance") (internal quotation omitted); *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989) (stating test as whether the result of the appeal would have been different). *See also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (finding prejudice where, but for counsel's errors, the client would have appealed). Relief under Section 2255 thus does not turn on the defendant's actual innocence in these situations. *See Kimmelman v. Morrison*, 477 U.S. at 381 ("[W]e decline to hold either that the guarantee of effective assistance of counsel belongs only to the innocent or that it attaches only to matters affecting the determination of actual guilt.").

Specifically, in the terminology of *Lockhart v. Fretwell*, the second trial that would have been obtained by Mr. Palmer's having requested, and the Court having granted, a mistrial was a "procedural right to which the law entitle[d]" Mr. Ramsey, in the same way that a retrial after appellate reversal or a plea not taken because of ineffective advice provided by counsel are procedural rights. *See Lockhart v. Fretwell*, 506 U.S. at 372. Mr. Palmer's deficient conduct deprived Mr. Ramsey of the opportunity for a second trial he otherwise would have had, untainted by the evidence Mr. Palmer should have sought to exclude even before the trial began and untainted by an opening statement to the jury of an entrapment defense he could not present. *See Roe v. Flores-Ortega*, 528 U.S. at 483 ("[C]ounsel's deficient performance has deprived [the defendant] of more than a fair judicial proceeding; that deficiency deprived [him] of the appellate proceeding altogether."). *The Court concludes that the reasonable probability – actually the certainty (see supra at 37-38) – that a mistrial in this case would have been granted is sufficient to demonstrate prejudice.*

The Court finds the analogy to the appeal cases persuasive. The failure of trial counsel to file a timely notice of appeal when requested to do constitutes ineffective assistance of counsel even when the lost appeal may not have had a reasonable probability of success. *See Roe v. Flores-Ortega*, 528 U.S. at 477-478; *Martin v. United States*, 81 F.3d 1083, 1084 (11th Cir. 1996); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Eli*, 227 F. Supp. 2d 90, 99 (D.D.C. 2002). Furthermore, an attorney who does appeal and ably argues several grounds for reversal on appeal nevertheless is deficient in omitting an argument that would have resulted in reversal irrespective of the likely result of a retrial after

reversal. *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995). *See also Mayo v. Henderson*, 13 F.3d 528, 536 (2d Cir. 1994) (prejudice prong satisfied if an argument not advanced by counsel on appeal would have resulted in a new trial); *Page v. United States*, 884 F.2d at 302 (characterizing prejudice inquiry as whether "the result of the [appeal] would have been different") (bracketed material in original). Thus, an attorney who provides deficient advice that causes the client unreasonably not to appeal a conviction or to lose his timely right to appeal has rendered ineffective assistance. A mistrial that is granted because of irremediable prejudice against the defendant is indistinguishable functionally from an appellate reversal of a conviction.

The class of cases evaluating ineffective assistance claims in which counsel is alleged to have improperly advised or failed to advise clients concerning plea offers bolster the Court's conclusion. If counsel is deficient in advising a client of the consequences of going to trial as opposed to accepting a plea offer and the client decides to go to trial, the client has an ineffective assistance claim if he can demonstrate that he would have pleaded guilty if he had been represented by competent counsel. *See Hill v. Lockhart*, 474 U.S. at 56 (prejudice prong met if defendant demonstrates a reasonable probability that, but for counsel's errors, he would have pleaded guilty instead of going to trial). *See also United States v. Graham*, 91 F.3d 213, 218-220 (D.C. Cir. 1996); *United States v. Taylor*, 139 F.3d 924, 929-930 (D.C. Cir. 1998); *United States v. Horne*, 987 F.2d 833, 835 (D.C. Cir. 1993). *Accord Smith v. United States*, 348 F.3d at 551-552 (6th Cir. 2003); *United States v. Blaylock*, 20 F.3d 1458, 1466-1467 (9th Cir. 1994); *United States v. Day*, 969 F.2d 39, 44-45 (3d Cir. 1992); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991). Conversely, where the ill-advised client pleads guilty when it was not in his best interests to do so, he establishes prejudice by showing that but for counsel's deficient performance a reasonable probability exists that the defendant would not have pleaded guilty and would have insisted on a trial. It is not necessary that he would have been acquitted after that trial. *See Hill v. Lockhart*, 474 U.S. at 59; *United States v. Hanson*, 339 F.3d 983, 990-992 (D.C. Cir. 2003); *United States v. Horne*, 987 F.2d at 835. Both of these variations are relevant to Mr. Ramsey's case.

The *Hill* formulation – assessing whether the "plea process" would have been resolved differently – establishes that at least for pleas the question is not ultimate guilt but process. Under *Hill*, "a plea based upon advice of counsel that 'falls below the level of reasonable competence such that the defendant does not receive effective assistance' is neither voluntary nor intelligent," and thus is based on the constitutionally deficient assistance of counsel. *United States v. McCoy*, 215 F.3d 102, 107

(D.C. Cir. 2000) (quoting *United States v. Loughery*, 908 F.2d 1014, 1019 (D.C. Cir. 1990)). *Hill* thus provides support for Mr. Ramsey's position that the only prejudice that need be shown is the lost opportunity to receive a second trial.

Admittedly, pleas are different from mistrials in at least two respects. First, a decision to plead guilty waives myriad procedural protections, most notably the rights against compelled self-incrimination and trial by jury. By contrast, a decision not to move for a mistrial affects none of those rights. It simply is a decision as to whether one's chances of a fair trial with the first jury have been so impaired that it would be appropriate to ask for another. Second, and quite possibly for the reason underlying the first difference, a decision to plead guilty rests with the defendant alone, while the decision to request a mistrial rests primarily with counsel. Nevertheless, the D.C. Circuit has held that an ineffective assistance claim may succeed if the defendant can show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *United States v. Taylor*, 139 F.3d at 929-930 (quoting *Hill v. Lockhart*, 474 U.S. at 59). *See also United States v. Calderon*, 163 F.3d 644, 646 (D.C. Cir. 1999). In this context, all that must be shown is a " 'reasonable probability' . . . 'sufficient to undermine confidence' in the defendant's decision to plead guilty." *United States v. McCoy*, 215 F.3d at 107 (quoting *Strickland*, 466 U.S. at 694).

Even more analogous are the plea cases that allow defendants to make out ineffective-assistance claims when they were advised not to accept a plea offer and go to trial instead. In this case, Mr. Ramsey went to trial on a case his counsel later claimed was "unwinnable," one now characterized as "difficult," and one the Court believes would not give him a reasonable probability of acquittal on retrial. Under the circumstances, any reasonably competent counsel would have stressed to Mr. Ramsey the advantages of moving for a mistrial in order to start the process anew and then pleading guilty. *See Toro v. Fairman*, 940 F.2d at 1068.

Mr. Palmer has testified that the prosecution was not offering much of a deal when he discussed a plea in advance of trial. But the first trial had proved so disastrous for the defendant – in part because of the missteps of his counsel – that there was no downside in seeking a mistrial to reopen plea discussions. Even if there was no bargain to strike with the prosecution, Mr. Ramsey still would have been better off to plead to the indictment, and thereby take advantage of the two-level (or possibly three-level) reduction in offense level under the Guidelines for acceptance of responsibility. *See* note 5 *supra.* Mr. Palmer's failure to move for a mistrial and then to advise his client to plead guilty constituted ineffective assistance of counsel. Mr. Ramsey's testimony at the Section

> 2255 hearing coupled with the decrease in the sentence he could have expected from the two-level reduction establishes a reasonable probability that he would have pleaded guilty. He therefore is entitled to relief.
>
> For the foregoing reasons, the Court finds that Mr. Ramsey's conviction was obtained through a denial of his Sixth Amendment right to the effective assistance of counsel. Mr. Palmer's performance was deficient, particularly, but not exclusively, in his failing to move for a mistrial, failing to research the law with respect to the defense he intended to offer to the charge, failing to review the Cobb file, and failing to advise Mr. Ramsey of the substantial advantages of aborting the trial and pleading guilty in view of the strength of the government's case. Not moving for a mistrial to afford counsel the opportunity to discuss the advantage of a plea after hearing all of the evidence and realizing that an entrapment defense could not be mounted was incompetent. Mr. Ramsey has shown prejudice by demonstrating a reasonable probability that a mistrial would have been requested if he had been represented by competent counsel and by demonstrating a reasonable probability that the Court would have granted a mistrial if one were requested.
>
> Mr. Ramsey's motion for relief under 28 U.S.C. § 2255 is granted. His conviction and sentence are vacated and a new trial is ORDERED.

(Emphasis added) (footnotes omitted). Consistent with *Ramsey*, in the instant case, the Petitioner is able to establish *Strickland* prejudice by demonstrating that there is a reasonable probability that a mistrial would have been granted – if properly requested – after the jury heard that Ms. Ferguson allegedly stated that she thought that the Petitioner engaged in the criminal conduct that was charged in this case.

In the brief in opposition, the Respondent asserts that there is a "dearth of case law" establishing that a motion for mistrial would have been granted had defense counsel requested one. *See* Brief in Opp., p. 32. Contrary to the Respondent's assertion, Florida law is clear that a trial court should grant a mistrial if a jury is erroneously exposed to a criminal defendant's alleged confession. *See Thomas v. State*, 851 So. 2d 876, 878 (Fla. 1st DCA 2003) ("We agree with appellant that the effect of the jury hearing testimony from two separate witnesses that appellant had made

statements to two different persons either confessing or giving details of the crimes was highly prejudicial given the basis of his defense and the testimony of the defense witnesses. We appreciate the difficult position the trial judge was in, and approve his effort to salvage a lengthy trial by giving a curative instruction after the second motion for mistrial. The instruction, however, seemed to emphasize that appellant had given a taped confession which the trial judge had heard, but that the jury was not to consider the confession due to a legal technicality. Under the circumstances, a mistrial should have been granted."). *See also United States v. Cook*, 530 F.2d 145 (7th Cir. 1976) (holding that the district court erroneously refused to grant a mistrial after a government witness had testified to a confession made by one codefendant which inculpated the other codefendant). As asserted in the Petitioner's certiorari petition, to the extent that there is any factual dispute regarding whether a mistrial would have been granted in this case, the district court (or the magistrate judge) should have held an evidentiary hearing on the issue.

Accordingly, for the reasons set forth above and contained in the Petitioner's certiorari petition, the Court should grant the Petitioner's certiorari petition to address the first question presented in this case. The issue of whether a mistrial satisfies the *Strickland* prejudice prong has the potential to impact numerous criminal cases nationwide.

Regarding the second question presented in the certiorari petition,[2] the

[2] The second question presented in this case is whether the court of appeals improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Petitioner continues to assert that he has satisfied the "reasonable jurists could debate" certificate of appealability standard because he has (1) made "a substantial showing of the denial of a constitutional right" (i.e., his right to effective assistance of counsel and his right of confrontation) and (2) the district court's resolution of this claim is "debatable amongst jurists of reason." This is especially true given that (1) the Petitioner has not been afforded *any evidentiary hearing* on his postconviction claim and (2) the magistrate judge's conclusion that a mistrial does not satisfy the *Strickland* prejudice prong is contrary to Judge Friedman's conclusion in *Ramsey*. Hence, the issue in this case is "adequate to deserve encouragement to proceed further." *Miller-El*, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to further clarify the certificate of appealability standard. Thus, for the reasons set forth above and contained in the Petitioner's certiorari petition, the Petitioner asks the Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

The Petitioner therefore prays the Court to grant certiorari in this case.

Respectfully Submitted,

MICHAEL UFFERMAN
COUNSEL FOR THE PETITIONER