NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

ROBERT GORHAM,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender

JANICE L. BERGMANN
Assistant Federal Public Defender
***Counsel for Petitioner**
One E. Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

QUESTION PRESENTED FOR REVIEW

Whether, for purposes of 28 U.S.C. § 2254(d)(1), a state court adjudication of the prejudice prong of an ineffective assistance of counsel claim is "contrary to" *Strickland v. Washington*, 466 U.S. 668 (1984), when it requires a defendant to show he actually would have accepted the state's plea offer, rather than only a "reasonable probability" that he would have done so, and therefore a federal habeas court reviews that claim *de novo*, as the Sixth Circuit has held; or whether that state-court adjudication is reviewed only for reasonableness, as the Eleventh Circuit held below.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

Federal Proceedings:

United States District Court for the Southern District of Florida:

Robert Earl Gorham v. Mark S. Inch,
No. 2:17-cv-14241-KAM (Oct. 4, 2021)

United States Court of Appeals for the Eleventh Circuit:

Robert Earl Gorham v. Fla. Dep't of Corr.,
No. 21-13645 (Feb. 21, 2023)

State Proceedings:

Florida Nineteenth Judicial Circuit

State v. Robert Earl Gorham,
No. 04-618-CF
(May 4, 2008) (order denying motion to correct an illegal sentence)
(Aug. 12, 2008) (order dismissing motion to correct an illegal sentence)
(Sept. 4, 2008) (order granting resentencing)

Florida Fourth District Court of Appeal:

Robert E. Gorham v. State,
No. 4D06-2013 (June 9, 2006)

Robert Gorham v. State,
No. 4D06-4271 (May 2, 2007)

Robert Gorham v. State,
No. 4D06-906 (Dec. 5, 2007)

Robert E. Gorham v. State,
No. 4D08-1698 (Aug. 6, 2008)

Robert Gorham v. State,
No. 4D07-5038 (Sep. 10, 2008)

Robert Gorham v. State,
No. 4D08-3477 (Oct. 22, 2008)

Robert E. Gorham v. State,
No. 4D12-1360 (Nov. 7, 2013)

Robert Gorham v. State,
No. 4D14-823 (July 2, 2014)

Robert Gorham v. State,
No. 4D15-2662 (Mar. 9, 2017)

Florida Supreme Court:

Robert Gorham v. State,
No. SC07-2422 (May 9, 2008)

Robert Gorham v. State,
No. SC08-2319 (Mar. 19, 2009)

Robert Earl Gorham v. Kenneth S. Tucker,
No. SC11-1596 (Aug. 31, 2011)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

No:

ROBERT GORHAM,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Robert Gorham respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-13645 in that court.

OPINIONS BELOW

The Eleventh Circuit's decision is unpublished but reported at 2023 WL 2135342 and is reproduced at Appendix A-1. The district court's order denying petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus is unpublished and is

reproduced in Appendix A-2. The magistrate judge's report is unpublished but reported at 2019 WL 7971877, and is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 28 U.S.C. § 1291 and 2253. On February 21, 2023, the court of appeals affirmed the district court's grant of Petitioner's habeas corpus petition. This petition is timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. Constitution, Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(d)

> **(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

> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1)

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In the early morning hours of September 18, 2004, Mr. Gorham was arrested in Okeechobee County, Florida. Earlier that evening, Mr. Gorham, his wife of eight years, and a female acquaintance of the couple had dinner at a restaurant and then gone drinking at a club. The charges arose out of an altercation that took place after they left the club, when Mr. Gorham was driving the acquaintance's Jeep and both women were passengers. He was eventually charged with two misdemeanor counts of battery, one count of aggravated assault, and one count of attempted aggravated assault.

2. Starting days after his arrest, Mr. Gorham told defense counsel multiple times pretrial that he was amenable to pleading guilty. And, a month after Mr. Gorham's arrest, the prosecutor emailed a plea offer to defense counsel. Pursuant to the offer, Mr. Gorham would plead guilty to the two battery charges and aggravated assault charge, in exchange for a five-year term of imprisonment and the

State's issuance of a *nolle prosequi* as to the attempted aggravated battery charge. *Id*.

3. The next day, defense counsel met with Mr. Gorham at the county jail for her first and only attorney-client meeting with him. At a later evidentiary hearing held by the state trial court, defense counsel could not recall whether she extended the State's five-year offer to her client, and the notes in her file did not reflect that she had in fact extended the offer. Although her "normal practice" would have been to discuss the plea offer she had received the day before, she remembered that at "that first meeting, [Mr. Gorham] fired me right there, so the meeting didn't go well, [and] so I don't know if we ever got to it." However, the trial court did not actually discharge defense counsel and appoint new counsel until nearly two months later. During that two months, Mr. Gorham sent two more letters to defense counsel indicating his willingness to plead guilty and outlining possible plea offers. Neither letter mentioned the State's offer.

4. Several months after the trial court appointed new counsel to represent Mr. Gorham, the State extended Mr. Gorham a ten-year plea offer, with the proviso that if Mr. Gorham rejected it, the State would file an amended information charging him with two counts of burglary of a conveyance with an assault or battery – a first-degree life felony – as opposed to the two misdemeanor battery counts in the original information. After an inquiry by the trial judge, Gorham confirmed his rejection of the ten-year plea offer, and his desire to go to trial. No mention of any prior plea

offer was made during the course this hearing. And the State made good in its threat, filing an amended information charging Mr. Gorham with the life felony counts.

5. After the trial court discharged Mr. Gorham's second defense counsel, he proceeded to trial with new counsel on November 29, 2005, and on the same date, the jury found him guilty verdict on all counts.

6. About a month prior to sentencing, Mr. Gorham filed a *pro se* motion in which he informed the trial court that he had learned of the existence of the State's five-year plea offer for the first time after he had received a copy of his case file from his original defense counsel and found the prosecutor's email in the file. In the motion, Mr. Gorham stated that he "would have (and still would) accepted the plea offer on the State's conditions without hesitation if it had been conveyed" to him, and that "at no time has anyone conveyed the [five-year] plea offer" to me. He asked the trial court to set aside the jury's verdict and give him the opportunity to accept the five- year plea offer.

7. Sentencing was held on February 13, 2006. Immediately after calling Mr. Gorham's case, the trial judge informed the parties that he was proceeding with an impromptu evidentiary hearing on Mr. Gorham's *pro se* motion because he "want[ed] a clear record on, uh, what's set forth." Mr. Gorham's original and second defense counsel were present at the court's request.

a. The trial court called Mr. Gorham's original defense attorney as "my first witness," and examined her under oath regarding the circumstances pertaining to the plea offer. She testified she received an email from the prosecutor extending a five-year plea offer. She placed a copy of the email in her file, and, on the following day, she visited Mr. Gorham in the county jail. But she did not document in her file whether or not she actually extended the offer to Mr. Gorham. She could not specifically recall whether the offer came up for discussion with Mr. Gorham, and stated, "I can honestly tell you, Judge, that I do not remember."

b. Although original counsel's "normal practice" would have been to discuss the plea offer she had received the day before, circumstances surrounding that meeting – her first with Mr. Gorham – made her unsure as to whether the plea offer was actually discussed. Specifically, she remembered that at "that first meeting, he fired me right there, so the meeting didn't go well, [and] so I don't know if we ever got to it." In response to questioning by the trial court, original counsel testified that Mr. Gorham "was willing to plead to misdemeanor batteries." She acknowledged that soon after the jail visit where Mr. Gorham "fired" her, she received a letter from Mr. Gorham asking her to explore the possibility of a plea offer. She further acknowledged that in the letter, Mr. Gorham agreed to plead guilty to misdemeanors, which is what the State's five-year plea offer entailed. But after Mr. Gorham fired her, she did not provide any information about the five-year plea offer, or a copy of the email from the prosecutor extending the offer, to subsequent counsel.

c. Under questioning by the trial judge, second defense counsel testified that she didn't remember a five year plea offer from the State. There was, however, the ten-year plea offer she received from the state prosecutor.

d. Mr. Gorham testified he never received notice of the five-year plea offer. He testified that had he received notice of the five-year plea offer at the time it was made, he would have accepted it "[w]ithout a doubt. Absolutely." He stated further that he would have "jumped on" the offer. Mr. Gorham recalled telling numerous people that he was guilty of the batteries and would plead to them. But he believed that he was not guilty of the burglary and other upgraded charges in the amended information. He admitted that, based on the information available to him at the time, he personally rejected the ten-year plea offer later conveyed to him by second defense counsel.

e. The trial judge questioned Mr. Gorham during the hearing. The trial judge mentioned that he had reviewed the record of Mr. Gorham's pre-trial proceedings, which were held before a different judge, and noted Mr. Gorham's persistent history of filing speedy trial demands, demonstrated upset with his attorneys, and rejection of the ten-year plea offer. The trial judge explained that his "plain, commonsense reading" of that record was that Mr. Gorham "wanted a trial and that was it," and that it would not have "made a bit of difference" if Gorham knew about the five-year plea at the outset of the case." The trial court then demanded of Mr. Gorham, "So tell me why I'mwrong."

f. Mr. Gorham explained at length why his desire for a speedy trial was fully consistent with his willingness to accept a five-year plea offer:

> I understand. If the court will review the record, there's four letters that I sent to [original counsel] giving her a proposed plea agreement, okay. This plea was on the table thirty days after my arrest. The reason I didn't want fast and speedy trial waived – and I think if you 'll listen to the record you'll hear me say over and over again I hate your county jail. I hate sitting in your county jail. I can't stand the county jail. I would much rather be in prison. Now, what happened is the case gets drug out, drug out, drug out, drug out, the last plea offer that come s to me is a ten-year deal, that's the deal. And, and I'm sitting there in the county jail begging, yes, fast and speedy, please give me a fast and speedy, get me out of your county jail. That's the deal. If they would have brought me that five-year offer, especially, . . . if [original counsel] had read over the probable cause affidavits . . . and she said Mister Gorham, I highly recommend you accept this five-year plea offer or [the prosecutor] will be able to file two life felonies against you and send you[r] ass away for the rest of your life. How difficult do you think it would have been for me to accept that five-year deal.
>
> * * *
>
> If I had been given the proper assistance of counsel and the facts of the case applied to the relevant law, I would have accepted that deal like that. . . . No hesitation.

g. After Mr. Gorham admitted that he believed he was "only guilty of two batteries," the trial judge noted that the State's five-year plea offer required him also to plead guilty to an aggravated assault charge and concluded, "that's why you wouldn't have taken the deal." Mr. Gorham disagreed, stating:

> That isn't true, no, and what I'm saying . . . to you is you and I both know that sometimes, hey, whether you're guilty of it or not, it's not risk, worth risking the jeopardy. It's worth taking the deal. I would have plead and just leaned over and whispered in his ear, I would have plead to eight or nine felonies had I known that (a) Mr. Albright wasn't going

> to seek habitualization and (b) that I was only going to get five years in contrast to possibly getting life sentences for being up-charged.

h. The trial court next questioned Mr. Gorham why he rejected the State's ten-year offer when he was facing two life sentences at trial. Mr. Gorham explained that he wanted to go to trial on the burglary charges because he was convinced his case on those charges was "triable," but explained further why, in contrast, he would have accepted the five-year offer had it been conveyed to him, stating, "If I knew that five-year deal was there, I would have taken it and this would have long been done. I would have been in DOC in sixty days, in sixty days. I've been sitting in that God-damned county jail for eighteen months."

i. The trial court denied the motion, stating, "the record . . . does not clearly indicate that the offer was necessarily extended, but regardless of whether it was extended or not, . . . the record I think is very clear that Mister Gorham would have rejected that offer as he did the ten-year offer." In support of its decision, the trial court noted Mr. Gorham's repeated demands for a speedy trial "from the first days in the county jail," his firing of attorneys who he believed weren't moving fast enough to bring his case to trial, and Mr. Gorham's statement after the verdict that he believed he was "only guilty of the . . . batteries," which "perhaps left [him] with some confidence that that's what the result would be at trial."

j. In light of its "confiden[ce]" that Mr. Gorham would not have accepted the five-year offer, the trial court declined to decide whether Mr. Gorham was notified of the offer. It stated,

> I feel very confident in making the finding, based upon all the facts and circumstances, that . . . I don't even have to . . . answer the first question on whether you received the plea offer because I don't think it would have made a bit of difference because I don't think it would have made a bit of difference if you had received that plea offer. I think we would be in the exact same position right now. So . . . I'm not finding that it wasn't made because I, I'm not so certain on that.

8. After rejecting Mr. Gorham's *pro se* motion, the trial court imposed a life sentence on both burglary counts, and concurrent five-year terms of imprisonment on the other counts.

9. The Florida Fourth District Court of Appeal rejected Mr. Gorham's claim that original trial counsel's failure to relate the State's five year plea offer to him was ineffective assistance of counsel. It concluded that "the record of the hearing held by the trial court on this issue supports the trial court's finding that Gorham would not have taken the offer if conveyed." *Gorham v. State*, 968 So.2d 717, 718 (Fla. 4th Dist. Ct. App. 2007), *rev. den.*, 983 So.2d 1154 (Fla. 2008). It held, however, that the two burglary convictions violated double jeopardy, and on remand, the trial court ultimately imposed a life sentence for the remaining burglary count.

10. On June 26, 2017, Mr. Gorham timely filed in the Southern District of Florida a *pro se* 28 U.S.C. § 2254 petition for writ of habeas corpus that included the clam that original counsel's failure to convey the five-year plea offer was ineffective

assistance of counsel. The petition was referred to a magistrate judge, who recommended that it be denied. App. A-3. As to the ineffective assistance claim, the Magistrate Judge concluded that the state courts' determination that Mr. Gorham would not have accepted a five-year plea offer was a finding of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(e)(1), and therefore, "rejection of the [ineffective assistance of counsel] claim by the Florida Fourth District Court of Appeals on direct appeal was not contrary to or an unreasonable application of federal constitutional principles." *Id*. at 23.

11. On February 18, 2020, the district court overruled the magistrate judge's report with respect to Mr. Gorham's ineffective assistance claim, but adopted it with respect to the remaining claims. DE 55: 2. As to the ineffective assistance claim, the district court analyzed whether the state court's adjudication was "contrary to," or an "unreasonable application of," clearly established Federal law under 28 U.S.C. § 2254(d)(1), concluded that it was both, and ordered an evidentiary hearing. DE 55: 13, 17-18, 24-25.

a. First, the district court held that the trial court's rejection of Mr. Gorham's ineffective assistance claim was "contrary to" *Strickland v. Washington*, 466 U.S. 668 (1984). DE 55: 18-20. The district court correctly noted that *Strickland* requires that a defendant establish a "reasonable probability" of prejudice, "meaning a 'probability sufficient to undermine confidence in the outcome' – a standard less demanding than the ordinary civil preponderance of the evidence

burden." *Id.* It found, however, that the trial court "did not articulate or reference any evidentiary yardstick remotely close to the *Strickland* 'reasonable probability' standard. *Id.* Rather, the trial court used an erroneous "prove me wrong" standard. *Id.* at 19.

> [T]he trial judge concluded that Gorham "wanted a trial no matter what," and it would not have made "a bit of difference" to the outcome in the case if he had been apprised of the five-year plea offer: the trial judge drew this conclusion as an inference from Gorham's aggressive litigation conduct (itemized by the trial judge to include fifteen demands for speedy trial; rejection of a 10-year plea offer; and refusal to acknowledge guilt on the upgraded burglary charges). After reciting these perceived inconsistencies in Gorham's stance, the trial judge directed Gorham to "tell me why I'm wrong." This directive shows the state court effectively shouldered Gorham with an improperly heavy burden of proof (essentially asking Gorham to prove he actually would have taken the plea) and one directly contrary to the Supreme Court's holding in *Strickland.*

Id. at 18-19.

b. The district judge held that the trial court's rejection of Mr. Gorham's ineffective assistance claim was also an "unreasonable application" of *Strickland*. *Id*. at 21-25. It concluded that "the litigation conduct [by Mr. Gorham] chronicled by the trial judge did not support a reasonable inference that Gorham was hell-bent on going to trial 'no matter what' and would have rejected the five-year plea offer, even if known[, a]nd no fair-minded jurist could have drawn such a conclusion based on Gorman's conduct outlined by the trial judge in support of his ruling." *Id.* at 22.

i. Specifically, the district court determined it was unreasonable for the trial court to infer from Mr. Gorham's history of speedy trial demands "that the assertion of one's constitutional right to a speedy trial is inconsistent with an amenability to plea," because "[m]any factors might induce a defendant to demand a speedy trial having nothing to do with acknowledgment of guilt and openness to a plea of guilty." *Id.* at 23. "[F]or example," the district court postulated, a defendant detained pretrial "obviously has a stronger incentive to seek speedy trial," and the assertion of the speedy trial right "is a recognized bargaining tool often employed to elicit the state's best plea offer at the outset of a case." *Id.*

ii. Second, the district court found that "Gorham's subsequent rejection of a ten-year plea offer does not reasonably support an inference that he would have resisted an offer of the state to recommend a prison term of half that time," and because the record was not developed in the state court regarding the circumstances attending the ten-year offer, "it is impossible to draw any inference from it regarding Gorham's receptivity to a plea offer of any length." *Id.*

iii. Third, explained the district court, "one cannot logically conclude that because of Gorham's post-conviction failure to acknowledge guilt on the burglary charges which carried a life sentence, he would not have been amenable to pleading guilty to the battery and aggravated assault charges on which the original information (and five-year plea offer) rested." *Id.*

iv. In sum, concluded the district court, "[i]t cannot fairly be said that Gorham's exercise of his constitutional right to a speedy trial demonstrated an intractable resistance to plead guilty, or that his dispute over culpability on the burglary life-felony negated his ability or willingness to plead guilty on the lesser assault and battery charges included in the original information." *Id*. at 24. "Nor on this record can any inference reasonably be drawn on Gorham's amenability to the five-year plea offer from his subsequent rejection of an offer to serve twice that amount of time." *Id*. As a result, the district court concluded, when combined with the trial court's reliance on a higher burden of proof than *Strickland* required, the trial judge's reliance on these factors to conclude that Mr. Gorham had not shown that he would have accepted the five-year plea offer was an unreasonable application of *Strickland* such that § 2254(d)(1) did not bar relief. *Id*.

v. In light of its conclusion that § 2254(d)(1) did not bar federal habeas relief and therefore *de novo* review of Mr. Gorham's claim was warranted, the district court ordered an evidentiary hearing. The evidentiary hearing was set for April 2020, but the COVID-19 pandemic intervened, and the hearing was stayed until the district court reopened for jury trials.

13. Sixteen months after it had granted an evidentiary hearing, the district court cancelled the hearing, entered an Order overruling its previous order granting a hearing, and entered a final judgment adopting the magistrate judge's report and denying the petition. App. A-2. In this Order, the district judge did not mention

the "contrary to" clause of § 2254(d), but instead focused only on whether the state court's finding was "unreasonable." *Id.* at 12. It concluded, as had the magistrate judge, that the state trial court's determination that Mr. Gorham would not have accepted the plea offer was a determination of fact entitled to the presumption of correctness by clear and convincing evidence under § 2254(e). *Id.* And because the district court concluded that Mr. Gorham could not rebut this finding, it determined it could not find that the state applied *Strickland* unreasonably. *Id.* at 12-13. The district court therefore denied the petition. *Id.* at 14.

14. The Eleventh Circuit affirmed. App. A-1. The court of appeals first determined that the district court did not err when it declined to consider whether counsel's performance was deficient because "a court need not determine both prongs of the *Strickland* analysis if a prisoner makes a deficient showing as to one." *Id.* at 6. As to *Strickland* prejudice, it rejected Mr. Gorham's "argument that the Florida court held Gorham to a higher standard than required, as the Florida court's finding that he would not have accepted the plea necessarily finds that Gorham did not allege and prove a 'reasonable probability' that he would have accepted the plea offer." *Id.* at 7. The court of appeals therefore applied the deference standard in 28 U.S.C. § 2254(d), and concluded the state court's determination that Mr. Gorham was not prejudiced by counsel's failure to convey the plea offer was not unreasonable. *Id.*

REASONS FOR GRANTING THE WRIT

I. There is a split in the circuits as to whether a state court decision requiring the defendant to show that, but for counsel's advice, he actually would have accepted a plea offer, is "contrary to . . . clearly established Federal law" for purposes of 28 U.S.C. § 2254(d).

Under the "contrary to" clause in § 2254(d)(1), a federal habeas court may grant relief only if (1), the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) the state court confronted facts that are materially indistinguishable from a relevant Supreme Court precedent and arrived at the opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The Eleventh Circuit rejected Mr. Gorham's argument that the state courts' rejection of his ineffective assistance of counsel claim was contrary to the relevant Supreme Court precedent – *Strickland* and its progeny. In so doing, it reached a conclusion that conflicts with this Court's decisions governing when a state court decision is "contrary to . . . clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1).

To satisfy *Strickland*'s prejudice prong, a defendant generally must show a "reasonable probability" of prejudice, meaning a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). Therefore, where a defendant rejects a plea offer, defendant must show, *inter alia*, that "there is a

reasonable probability" that he would have accepted the plea. *Id*. at 164.

The "reasonable probability" burden is lower than a preponderance of the evidence. *Strickland*, 466 U.S. at 693. As a result, a state court decision is "contrary to clearly . . . established Federal law" for purposes of § 2254(d) when it uses a preponderance-of-the-evidence test (or even more onerous standard) to determine prejudice, rather than the "reasonable probability" test promulgated by *Strickland:*

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405–06 (O'Connor, J., for the Court) (citing *Strickland,* 466 U.S. at 694). *See Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (concluding that state court decision requiring the defendant to show that but for counsel's advice, he actually would have accepted a plea offer, was "contrary to" established Supreme Court precedent); *Rose v. Lee*, 252 F.3d 676, 689 (4th Cir. 2001) (concluding state court adjudication of ineffective assistance claim was "contrary to" *Strickland* where state court applied preponderance of evidence standard on prejudice prong); *United States v. Day*, 969 F.2d 39, 45 n.8 (3d Cir. 1992) ("*Strickland v. Washington* does not require certainty or even a preponderance of the evidence that the outcome would

have been different with effective assistance of counsel; it require only 'reasonable probability' that that is the case.").

For example, in *Magana*, the Sixth Circuit considered whether the state court's adjudication of the petitioner's ineffective assistance of counsel claim alleging that he rejected a plea offer as a result of counsel's erroneous advice was "contrary to" *Strickland* and its progeny for purposes of § 2254(d)(1). *Magana*, 263 F.3d at 548. There, "the trial court determined that the defendant *would not have accepted* the offer," and the state appellate court affirmed, concluding "that the trial court's finding that defendant *would not have accepted* the plea offer is supported by the record." *Id.* at 548-49 (emphasis added). Therefore, the Sixth Circuit concluded, "[b]oth the state trial court and Michigan Court of Appeals concluded that, even if trial counsel's performance was constitutionally deficient, Magana could not prove prejudice because he did not establish that, but for his trial counsel's erroneous advice, he would have accepted the plea." *Id*. at 549. The Sixth Circuit explained that the state courts' standard for prejudice "placed too great a burden of proof on the defendant to show prejudice: under that state court's definition, a defendant must demonstrate, not just a 'reasonable probability,' but *an absolute certainty* that the outcome of the proceedings would have been different." *Id*. at 550. "Holding Magana to this most exacting standard was," the Sixth Circuit concluded, "contrary to clearly established Supreme Court precedent" and therefore the state court decisions were entitled to no deference under § 2254(d)(1). *Id.* Rather, it reviewed

Magana's claim *de novo*. *Id*. at 551.

In the case below, on facts nearly identical to those in *Magana*, the Eleventh Circuit held exactly the opposite – that the state court decisions were not "contrary to" *Strickland* and therefore § 2254(d)(1) applied. This split in the circuits on such an important question requires the Court's attention.

Specifically, as was true of the state courts in *Morgana*, the Florida courts here found that Mr. Gorham would not have accepted the State's plea offer. The Florida appellate court affirmed the trial court's rejection of Mr. Gorham's ineffective assistance of counsel claim because, in its estimation, "the record of the hearing held by the trial court on this issue supports the trial court's finding that Gorham *would not have taken* the five-year plea offer had it been conveyed." *Gorham v. State*, 968 So.2d 717, 718 (Fla. 4th Dist. Ct. App. 2007) (emphasis added), *rev. den.*, 983 So.2d 1154 (Fla. 2008). Nowhere in its decision did the state appellate court cite *Strickland* or mention the "reasonable probability" standard for establishing prejudice. *See id*. Rather, it cited only a pre-*Lafler* state-court decision holding that a defendant cannot state a *prima facie* case of ineffective assistance based on counsel's failure to convey a plea offer unless the defendant demonstrates, *inter alia*, that he "would have accepted it." *Id*. (citing *Cottle v. State*, 733 So.2d 963, 966 (Fla. 1999) (per curiam)).

The citation by the state court of appeals to *Cottle* is telling. There, the Florida Supreme Court considered the showing of prejudice required in order to state

a *prima facie* case for ineffective assistance of counsel based on counsel's failure to properly notify a defendant of a plea offer. *Cottle*, 733 So.2d at 966. *Cottle* required a showing that "defendant *would have accepted* the plea offer but for the inadequate notice." *Id.* at 967 (emphasis added); *see id*. at 969 (affirming lower court's decision requiring defendant to show "that had he been correctly advised [by counsel] he *would have accepted* the plea offer" (emphasis added)).

After this Court decided *Lafler* and *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399 (2012), the Florida Supreme Court retreated from *Cottle*. *Alcorn v. State*, 121 So.3d 419, 432 (Fla. 2013). It acknowledged that, in light of *Lafler* and *Frye*, "[i]n the plea context, a defendant establishes *Strickland* prejudice when he shows, among other things, *a reasonable probability*, defined as a probability sufficient to undermine confidence in the outcome, *that he would have accepted* the offer had counsel performed effectively (i.e., had given the correct advice). *Id*. (citing *Frye,* 132 S. Ct. at, 1410 (2012); *Lafler,* 132 S. Ct. at 1385)) (emphasis added here). The Florida Supreme Court's belated embrace of the "reasonable probability" standard for *Strickland* prejudice, however, was of no help to Mr. Gorham. *Alcorn* was decided more than five years after the state appellate court rejected Mr. Gorham's ineffective assistance of counsel claim with a citation to the incorrect standard in *Cottle.*

Therefore, as was true in *Morgana*, both the state trial court and state appellate court concluded that, even if trial counsel's performance was constitutionally deficient, Mr. Gorham "could not prove prejudice because he did not

establish that, but for his trial counsel's erroneous advice, he would have accepted the plea." *Morgana*, 263 F.3d at 549. Yet whereas the Sixth Circuit concluded that this standard for prejudice "placed too great a burden of proof on the defendant to show prejudice" because it required a defendant to demonstrate, "not just a 'reasonable probability,' but *an absolute certainty* that the outcome of the proceedings would have been different," *id.* at 550 (emphasis added), the Eleventh Circuit was untroubled by the Florida courts' use of the exact same standard. *See* App. A-1 at 7. Unlike the Sixth Circuit in *Morgana*, the Eleventh Circuit below held that "the Florida court's finding that he would not have accepted the plea necessarily finds that Gorham did not allege and prove a 'reasonable probability' that he would have accepted the plea offer." *Id.*

And whereas the Sixth Circuit determined that "[h]olding Magana to this most exacting standard was . . . contrary to clearly established Supreme Court precedent" and therefore reviewed the prejudice prong of Magana's ineffectiveness claim *de novo*, the Eleventh Circuit below applied § 2254(d)(1) and reviewed the state court's prejudice determination only for reasonableness. *See* App. A-1 at 7.

Accordingly, there is a true split in the circuits on the question presented.

II. The question presented is important.

This split in the circuits is sufficiently important to warrant this Court's consideration. This Court has not considered when a state court's standard for prejudice is "contrary to" *Strickland* since it did so in *Woodford v. Visciotti*, 537 U.S.

19 (2002) (per curiam), more than 20 years ago. And this Court has never considered the situation presented here, where the state court itself has acknowledged that the prejudice standard it employed was not consistent with *Strickland*.

In *Visciotti*, this Court held that the California Supreme Court's determination that a prisoner was not prejudiced by counsel's deficient performance was *not* "contrary to" *Strickland* for purposes of 28 U.S.C. § 2254(d)(1). There, the state court's decision referred to *Strickland* and the reasonable probability standard in its rejection of Visciotti's ineffective assistance of counsel claim, but also on four occasions employed the term "probable" without the modifier "reasonably." *Id*. at 23. After the Ninth Circuit concluded that the state court's description of the prejudice standard was "contrary to" *Strickland*, this Court reversed. *Id*. The Court determined that the state court's "occasional shorthand reference of that standard by use of the term 'probable' without the modifier may perhaps be imprecise, but . . . it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision." *Id*. at 23-24.

Here, unlike the state court in *Visciotti*, *Strickland*'s "reasonable probability" prejudice criterion is glaringly absent from the state appellate court's opinion. *See Gorham*, 968 So.2d at 719. Indeed, the state court did not mention *Strickland* or the words "reasonable probability" at all. *See id*. Rather, it cited to the Florida Supreme Court's decision in *Cottle*, and stated that Mr. Gorham could not demonstrate prejudice resulting from counsel's failure to convey the plea offer unless

he showed that "defendant would have accepted it." *Id*. It was not until five years *after* the state appellate court rejected Mr. Gorham's ineffective assistance of counsel claim that the Florida Supreme Court retreated from *Cottle* and correctly and fully embraced the reasonable probability standard articulated in *Strickland*. *See Alcorn*, 121 So.3d at 432.

Accordingly, *Visciotti* did not resolve the question presented here. And just as the question presented in *Visciotti* was sufficiently important to warrant this Court's grant of the petition for writ of certiorari there, so too is the question presented here.

III. This case presents a good vehicle for the Court to consider the circuit split.

The straightforward facts of this case allow this Court a clean look at the question presented. Neither the state courts nor the Eleventh Circuit addressed *Strickland*'s deficient performance prong. Their rulings relied entirely upon the prejudice prong. The state courts rejected Mr. Gorham's ineffective assistance claim without mentioning *Strickland* or the "reasonable probability" standard. And five years after the state courts rejected Mr. Gorham's claim, the Florida Supreme Court acknowledged that prior to that time, it had been erroneously requiring defendants had to make a showing higher than the reasonable probability standard articulated in *Strickland* in order to state a *prima facie* case of prejudice.

Moreover, Mr. Gorham's arguments regarding whether the state court's decision was "contrary to" *Strickland* and its progeny were fully presented in his habeas proceedings below. Yet the Eleventh Circuit nonetheless concluded that the state court's prejudice ruling was not "contrary to" *Strickland*, but instead had to be assessed for reasonableness under 28 U.S.C. § 2254(d). The circuit split is squarely presented.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Janice L. Bergmann*
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
May 22, 2023