

No. **23-5248**

Supreme Court, U.S.
FILED

JUL 18 2023

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Nikolas Gacho — PETITIONER
(Your Name)

vs.

Tyrone Baker — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Northern District of Illinois, E.D.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nikolas Gacho
(Your Name)

P.O. Box 1700
(Address)

Galesburg, IL, 61402
(City, State, Zip Code)

(Phone Number)

ORIGINAL

Questions presented

1) Should the 7Th Circuit Court of Appeals have issued a certificate of appealability to petitioner Nikolas Gacho where his ineffective assistance of counsel claim demonstrates a substantial showing of a violation of his 6th amendment right to effective assistance of counsel ?

2) Did petitioner receive ineffective assistance of counsel ?

3) Was the State court's decision unreasonable under 28 U.S.C. 2254(d)(1) and/or(d)(2) ?

4) Should the District court have ordered an evidentiary hearing, where the facts alleged if proven entitle petitioner to relief ?

5) Is it clearly established by the United States Supreme Court precedent, that an attorney, whether requested to do so or not, must provide their advice and professional opinion on whether a plea appears to be favorable or they believe it is in their client's best interest to accept the plea ?

6) Is it clearly established by United States Supreme court precedent, that an attorney can operate under a conflict of interest during plea negotiations. If so, is it a conflict of interest for an attorney to refuse to request a continuance, which by doing so advances their personal interest over their fiduciary duty ?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at No. 21 c 5612; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☒ reported at Gaiche v. Brannon-Dortch, 2022 U.S. Dist. Lexis 195706; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 27, 2023.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case:

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the justice thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

On December 4, 2013, Petitioner, Nikolas Gacho -- 17 years old at the time of the instant offense -- was convicted in the Circuit Court for Cook County, Illinois, of Attempted First degree Murder. On February 10, 2014, the Court sentenced Gacho to 35 years imprisonment, which included a mandatory 25-year Firearm Sentencing Enhancement. Notice of Appeal was timely filed on March 7, 2014. Illinois' Appellate Court affirmed the conviction and sentence on August 23, 2016, unpublished at People v. Gacho, 2016 IL App(1st) 140896-U. A timely Petition for Leave To Appeal to the Illinois Supreme Court was filed on September 23, 2016. The Illinois Supreme Court denied review on January 18, 2018, at People v. Gacho, NO. 121344, 94 N.E.3d 630 (Table)(Ill.Jan. 18, 2018). No petition for Writ of Certiorari was filed on direct review.

On October 17, 2018, Petitioner filed a timely pro-se Petition For Post-Conviction Relief (Appendix G), in the Circuit Court of Cook County, Illinois, arguing inter alia, that counsel provided ineffective assistance during the plea bargaining process.

In this petition, Gacho presented factual evidence that, over the nearly 31 months of pretrial proceedings Gacho's attorneys advised Gacho of an incorrect sentencing range of 6-30 years, (Gacho's actual sentencing range was 31-years-life, due to a 25 year -life firearm sentencing enhancement for personally discharging a firearm that caused great bodily harm) and repeatedly assured him and his family that, by him being only 17 years old at the time of the

offense there was no way, even if we lost at trial a judge was going to give Gacho anything near 30 years. Everything that was planned and considered in preparation for trial was done so based on the incorrect sentencing information which was provided by counsel counsel, and counsel's affirmative and misleading assurances.

On the day of trial, Gacho's attorneys informed him the state making a 20 year plea offer, and at the same time, informed Nikolas, the State enhanced his charges today. They are now seeking a 25 year-life enhancement, making his sentencing range 31 years-life (which was a lie, the language preserving the State's right to seek the 25 year-life enhancement was in the charging of information, counts 3-6, which counsel waived a formal reading of See Appendix J&K). Prior to the day of trial Gacho had not been informed by the Court, nor his attorneys, he was subject to this 25 year-life enhancement, and a sentencing range of 31 years-life. See Exhibit G at 21&31.

When presented with the State's 20 year offer Gacho asked his attorneys to try and get the offer down to 15 years. They returned and informed him the state remained at their 20 year offer. Gacho again asked his attorneys to try and get the offer down to 15 years or as close to it as possible, they returned and informe Gacho they had spoken to the the judge and the judge felt 20 years was a fair offer. Gacho then asked his attorneys for advice, and they informed him -- they could not help him in making his decision. Based on them refusing to provide Gacho with any advice as to what he should do, Gacho informed his attorneys -- he would like a continuance to consider the offer -- in light of the significant shift in the sentencing range -- and because everything that was planned and considered going into trial had been done so with Gacho thinking

his sentencing range was 6-30 years. He also would like to speak to his family about accepting the offer. Gacho's attorney, Phillip Bartoleменти, upon hearing Gacho's request for a continuance informed Gacho: "There was no way he could ask for a continuance on the day we're to start trial, that is not an option." See appendix D at 3. Bartolementi went on to say: "He could not and would not ask for a continuance because it would undermine his credibility in front of the court." Id.

Based on Gacho's attorneys refusing to provide him any useful information or advice when he was considering whether to accept or reject the plea offer, and refusing to ask for a continuance so Gacho could re-assess his options in light of the significant shift in the sentencing range, and speak to his family about accepting the offer, Gacho declined to accept the 20 year offer and proceeded to trial. (Appendix G at 2-7;21;31)

On January 11, 2019, The Circuit Court of Cook County summarily dismissed Gacho's pro-se petition for post-conviction relief as frivolous and patently without merit.

The Circuit Court's summary of the claim presented by Gacho states: "Gacho claims his lawyers were ineffective for (1) failing to inform him about the firearm enhancement until the day of trial, (2) providing him no reasonable professional advice as to what decision to make, and (3) refusing to ask for a continuance. He says those factors deprived him of making a knowing and informed decision. But for those errors, he would've accepted the 20 year plea offer." Appendix E at 7.

The Circuit Court in reaching their conclusion states: "Here defense counsel did inform Gacho the State made a plea offer and did. ultimately, inform him of thr accurate sentencing range if convicted at trial. ()While counsel may have stated an incorrect sentencing range at earlier stages, Gacho did have all the relevent information that is constitutionally required to decide whether to accept orreject reject the plea offer when he made his choice. His arguement supposes counsel should have instructed him which decision to make or persuaded him to accept the plea. The Constitution does not require that. Only Gacho could make the decision. Counsel could not make it for him. Therefore, there is no basis in law that Gacho's lawyer's performance was unreasonable." Id at 8-9.

"In addition, Gacho's own account belies the notion that he would have accepted the 20-year offer. In his telling, Gacho asked his lawyers to counter wiht 15 years after being informed that the sentencing range was 31 years to life. Yet he still rejected the20-year offer when the state held firm and he was told the judge thought it fair. Thus, he had a meaningful opportunity to consider the offer with correct information. Under those circumstances, his actual decision to go to trial contradicts his conclusory claim that he would've accepted the plea. Ultimately, Gacho was not arguably prejudiced."Id at9.

The Circuit Court's conclusion is unreasonable, where, the court states, "The Constitution does not require that" an attorney must provide advice about whether to acceptor reject a plea offer. Where the Court cites Lafler v. Cooper for this very proposition. See Id.at 8

"The right to effective assistance does extend to the plea

bargaining process. Hill v. Lockhart, 474 U.S. 52,57(1985); People v Hall, 217 ILL. 2d 324(2005). That includes the right to be informed of the offer of a plea bargain (Missouri v. Frye,566 U.S.134(2012)) **and the right to competent advice about whether to accept or reject a plea offer**(Lafler v. Cooper,566 U.S.156(2012)). Id. at 8.

Additionally, the Court's conclusion does not address whether counsel performed deficiently for refusing to request a continuance, which advanced his personal interest over fulfilling his fiduciary duty and breached his duty of loyalty.

On December 22,2020, The Illinois Appellate Court affirmed the Circuit Court's first stage summary dismissal of Gacho's post-conviction petition.

The Appellate Court summarized Gacho's claim as follows, "He claimed that his trial counsel provided him ineffective assistance by failing to inform him of the correct sentencing range until the day of trial,providing him with no assistance about whether to accept the plea offer, and then refusing to ask for a continuance to allow him to consider the offer and make an informed decision after full consultation withhis defense counsel. He claimed that he would've accepted the state's 20-year offer, but for ineffective assistance ofhis counsel." Appendix C at5-6.

The Appellate Court went on to affirm the summary dismissal and deny relief. In doing so, the Illinois Appellate Court reached three conclusions on why Gacho's attorney's conduct did not fall below an objective standard of reasonableness to the prejudice of the defendant. First, in finding that counsel was not ineffective for providing incorrect sentencing info and misleading assurances, and failing to

inform Gacho that he was subject to a mandatory 25 year-life firearm enhancement prior to the day of trial,(Appendix C at11-par22) the Court found that none of the cases cited by petitioner "assists petitioner in demonstrating an arguable claim of ineffective assistance of counsel in this case." Id. at 14-par26. The court reached its second conclusion while still addressing the above challenged conduct, when they agreed "with the trial court's assessment that, with respect to the information about the potential sentence he faced, petitioner's attorneys provided him with 'all the relevant information that is constitutionally required to decide whether to accept or reject the plea when he made his choice'." Id.at 15-par27. The Appellate Court's third conclusion on deficient performance is identical to its first, where the court found again "that none of the cases cited by petitioner support the conclusion that an attorney's refusal to request a continuance on the day of trial, solely to allow a client to have additional time to consider a plea offer, is arguably conduct that falls below an objective standard of reasonableness to the prejudice of the defendant." Id. at 17-par30 and "none of the cases suggest that an attorney is required to request a continuance of the trial for a purpose unrelated to the trial itself."Id.

Next, the Appellate court also reached three conclusions on why Gacho did not suffer prejudice. First, the Court found that the "court here conducted the kind of pretrial inquiry recommended in Williams." *** and noted "that it is 'well established that admonishments by the Circuit Court can cure Prejudice to a defendant resulting from counsel's incorrect advice.'People v. Valdez, 2016IL 119860, par31."Id. at15-par26. Second, the Court found that "during the trial court's pretrial inquiry into petitioner's understanding of the plea

offer and his desire to reject it, petitioner did not suggest to the trial court or otherwise equivocate about his desire to reject the State's 20-year offer." Id. at 18-par 31. Third, the court agreed with the trial court that petitioner has not shown that his decision to reject the guilty plea was caused by his attorney's misinforming him of the sentencing range he faced prior to the day of trial then refusing to request a continuance to allow him more time to consider the State's offer." Id. at 17-par 31.

Absent from the Appellate Court's conclusions is a finding on whether it was deficient performance by counsel for not providing any advice on whether to accept or reject the plea, considering the totality of the circumstances of the case sub judice. Also, although the court did partially consider the element of refusing to request a continuance, it did not consider, nor make a finding on, whether, if counsel refused to request a continuance to advance his personal interest over fulfilling his fiduciary duty amounts to deficient performance. This disregarded element is a significant element of Gacho's claim, which, by failing to consider, fails to consider the totality of the circumstances, as well as, fails to assume the truth of the allegations.

On January 12, 2021, Gacho filed a petition for rehearing asking the Appellate Court to grant rehearing because the court's distinction between deficient representation during plea negotiations and deficient representation related to trials has been expressly rejected by the U.S. Supreme Court; for the purpose of summary review under Illinois' Post-Conviction Act, a 20 year old's silence should

not bar his claim of ineffective assistance of counsel, where the attorney's improper representation induced Gacho's silence; and the court failed to assume the truth of the allegations in Gacho's Post-Conviction Petition. On January 20, 2021, The Illinois Appellate Court denied the petition for rehearing.

On february 24, 2021, Gacho filed a Petition for Leave to Appeal in the Illinois Supreme Court, which was denied on May 26, 2021. Appendix D.

On September 27, 2021, Gacho filed his pro-se Federal Habeas petition pertinent to this appeal. Appendix H.

On October 20, 2021, Gacho filed A Writ of Certiorari in The United States Supreme court, which was denied on January 10, 2022. Appendix F.

On October 27, 2022, The Northern District of Illinois, Eastern Division denied Gacho's petition for Federal Habeas relief. Appendix b.

Gacho filed a timely notice of appeal on November 22, 2022, requesting a certificate of appealability from the 7th Circuit court of Appeals, which was denied on April 27, 2023. Appendix A.

This petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE PETITION

This court should issue Gacho a certificate of appealability and order further proceedings, where, Gacho's claim demonstrates a substantial showing of a constitutional violation, and the District Court's resolution remains debatable.

ARGUMENT

I. Gacho was denied his right to effective assistance of counsel during pre-trial and plea negotiation proceedings.

In the instant case counsel commits errors during pre-trial proceedings and plea negotiations. The errors during pre-trial proceedings exacerbate the errors made during plea negotiations. This court should "Examine each example of incompetence individually" and "consider their cumulative effect in light of the totality of the circumstances" where "their cumulative effect may be substantial enough to meet the Strickland test." Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984) (citations omitted). To establish that trial counsel was constitutionally ineffective, Gacho must show both that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). Both elements are met here.

A.1 Counsel's ineffectiveness begins during pre-trial proceedings with counsel providing incorrect sentencing information and affirmative misleading assurances based on incorrect sentencing information.

From the beginning of representation and throughout the nearly 31-months of pre-trial proceedings Gacho's attorneys informed him he was facing a sentencing range of only 6-30 years, and repeatedly assured him and his family, that, by him being only 17 years old at the time of this offense, there was no way even if we lost at trial a judge was going to give him anything near 30 years. This erroneous information stood uncorrected until the day of trial, where prior to the day of trial neither the trial court nor counsel informed Gacho he was subject to a mandatory 25 year-life enhancement. See Appendix G at 2,3,4,21,31. By this time everything that had been planned and considered had been done so based on counsel's incorrect sentencing information and misleading assurances. Id. at 3,4,6,21,31.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms" Strickland, 466 U.S. at 688, as laid-out in ABA standards and Precedent, Rompilla v. Beard, 545 U.S. 374, 387 (2005). Measured by the professional norms prevailing during Bartolamenti's and Makowski's representation of Gacho, their performance was objectively unreasonable.

ABA standards made clear that trial counsel must investigate the facts relevant to defendant's punishment and while doing so counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case. See, e.g., ABA standards for criminal justice: pleas of guilty, standard 14-3.2 & comment, p. 123 (1999) (stating that counsel must engage in "appropriate investigation and study" prior to advising a defendant during plea negotiations, which includes

the "responsibility to investigate ... facts that go to the defendant's potential sentence."); ABA standards for criminal justice: prosecution & defense function, standard 4-5.1(a) & comment, p.198 (1999) (stating that counsel must "inform[] himself of herself on the facts and the law", which includes the duty to "advise[] fully [the defendant] as to the probable outcome or alternative choices"); ABA standards for criminal justice: prosecution & defense function, standard 4-4.1(a) (1993) (stating that counsel must "explore all avenues leading to ... the penalty"); ABA standards for criminal justice: def. function, standard 4-5.1(f) (4th edition) (stating when advising the client "defense counsel should not intentionally understate or overstate the risk, hazards, or prospects of the case"); See also Nat'l legal aid & Def. Ass'n, performance guidelines § 6.2(a) (2006) (explaining that, in preparing for plea negotiations, "counsel should be fully aware of, and make sure the client is fully aware of: (1) the maximum term of imprisonment ... that may be ordered, and any mandatory punishment or sentencing guideline system").

Case law similarly made clear that, counsel must learn the facts of a case, make an estimate of the likely sentence, and communicate the result of that analysis. See, e.g., Rompilla, 545 U.S. at 387 ("it is the duty of the lawyer ... to explore all avenues leading to facts relevant ... [to] the penalty in the event of conviction") (internal quotations marks omitted). But "If an attorney chooses to provide such information, his/her conduct may be considered objectively unreasonable if the attorney fails to conduct a good faith inquiry and that information is materially false". Moore v. Bryant, 348 F.3d 238, 242 (7th cir. 2003). [A] defendant can prove that his attorney's performance

formance was deficient if he shows that his attorney did not make a good-faith effort to discover the facts relevant to his sentencing, to analyze those facts in terms of the applicable legal principals and to discuss that analysis with him", United States v. Love, 2012 U.S. Dist. Lexis 99332,*15. See, e.g. Julian v. Bartley, 495 f.3d 487, 495(7th cir.2007)(Granting §2254 petition because " what [counsel] told [the defendant] about a thirty-year maximum for his sentence as clearly wrong and therefore objectively unreasonable."): Moore, 348 f.3d at 242(Granting habeas relief and explaining that in the plea context, the deficient performance prong is met where the inaccurate advice resulted from the attorney's failure to undertake a good-faith analysis of all of the relevant facts")(internal quotation marks omitted); Washington v. Smith, 219 f.3d 620, 629(7th cir.2000) (Granting habeas relief because counsel's failure to properly investigate sentencing exposure constituted deficient performance)

Gacho's attorneys did not live up to these well-established professional norms, where counsel's actions in providing incorrect sentencing information and misleading assurances based on their incorrect information is demonstrative of a failure to do a basic routine investigation of the sentencing range.

Although Gacho was ultimately informed of the correct sentencing range, it wasn't until the day of trial. By this time everything that was planned and considered was done so based on erroneous advice. The significance of the incorrect information is the impact it had on significant decisions during pre-trial proceedings. Gacho's attorneys advised him to pursue a defense of self-defense in light of overwhelming evidence based on their mistaken belief that even if we lose

at trial there was no way a judge would impose a sentence anywhere near 30 years. Their mistaken belief was due to a failure to properly investigate the sentencing range. Gacho relied on their erroneous advice and misleading assurances when agreeing to the defense of self-defense, which led Gacho to believe the judge would impose a sentence less than the State's first offer of 26 years, even if we lost a trial. See Strickland, 466 U.S. at 690-91, "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." There are no reasonable professional judgments that can support counsel's failure to investigate the sentencing penalties. In failing to do so they were unaware that Gacho faced 31-life at the time they advised the defense of self-defense, which would require Gacho to take the stand and admit to every element of the offense. No reasonable attorney who was aware that Gacho, a juvenile offender, facing life in prison, would've advised a defense of self-defense in light of the evidence Gacho faced. Additionally, "Had [Gacho] been informed of the correct sentencing range of 31 years to life from the beginning of representation I would've never even considered going to trial." Appendix G at 31.

Where this advice was clearly erroneous and due to a failure to properly investigate, it should be found objectively unreasonable and factored into the analysis of counsel's errors during plea negotiations on the day of trial.

A.2 Counsel's ineffectiveness during plea negotiations on the day of trial.

The worst of counsel's errors occurred during plea negotiations conducted on the day of trial, where counsel refused to provide effective assistance during a critical stage of proceedings, and then chose their own personal interests over fulfilling their fiduciary duty.

In Padilla,... The court made clear that the negotiation of a plea bargain is a critical phase of litigation for purposes of the sixth amendment right to effective assistance of counsel." Missouri v. Frye, 132 S.ct.1399,1406(2012)(citations and internal quotations omitted). "Plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Id.at 1407. "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler v. Cooper, 132 S.ct. 1376,1387(2012). In addition to the responsibilities counsel has during the plea bargain process, counsel has a "duty of loyalty" with which comes "the obligation to avoid conflicts of interest." Strickland, 466 U.S. at 692.

At the time Gacho was considering whether to accept or reject the 20 year plea offer, counsel failed to provide effective assistance of counsel by refusing to provide advice or consultation to aid Gacho in making a informed decision at a critical stage.

After Gacho made two close counter offers, the first of 15 years, and a second last effort to get the offer any bit lower, Gacho then

asked his attorneys for advice. They informed him "they could not help [him] in making his decision." Appendix G at 3.

In fact, counsel worked against Gacho during plea negotiations, where after counsel refused to provide any advice or consultation, "[Gacho] informed his attorneys he would like a continuance to consider offer and speak to his family about accepting the plea offer." Id. Gacho informed his attorneys the continuance was needed due to the "significant shift in the sentencing range and...[because] everything that was planned and considered up until that point had been done so with [him] thinking his sentencing was 6-30 years." Id. Counsel then provided a deliberate false statement of law by stating, "there was no way he could ask for a continuance on the day we're to start trial—that is not an option." Id. "[Counsel] went on to say he could not ask and would not ask for a continuance because it would undermine his credibility in front of the court." Id.

This minimal effort from counsel cannot be the full extent of the responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Frye, 132 S.Ct. at 1404.

Again ABA standards make clear that, defense counsel should communicate every plea offer to their client and advise the client with candor concerning all aspects of the case. Advice should be provided sufficiently in advance to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions. During the course of disposition discussions, defense counsel should not knowingly make false statements of fact or law, and should aid the client in deciding on the best course of action

and how best to pursue and implement that course of action. Also, defense counsel should not permit their professional judgement or obligations regarding the representation of a client to be adversely affected by their personal interests. See, e.g., ABA standard 4-5.1(c) (4th edition) ("defense counsel should promptly communicate to the client every plea offer... and provide advice as outlined in this standard"); 4-5.1(b) ("...before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case..."); 4-5.1(e) ("defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing accused into decisions."); Standard 4-6.2(f) ("defense counsel should not knowingly make false statements of fact or law in the course of disposition discussions."); Standard 4-5.1(i) ("after advising the client, defense counsel should aid the client in deciding on the best course of action and how best to pursue and implement that course of action."); Standard 4-1.7(b) ("defense counsel should not permit their professional judgements or obligations regarding the representation of a client to be adversely affected by...their personal...interests.")

Case law similarly made clear that the responsibilities counsel has during the plea bargaining process included providing advice to Gacho when he was considering whether to accept or reject the plea offer.

Although "a lawyer must take care not to coerce a client into accepting or rejecting a plea offer." Purdy v. United States, 208 F.3d 41, 45 (2nd Cir. 2000). "Defense counsel must give the benefit of

counsel's professional advice on this crucial decision of whether to plead guilty." Purdy, 208 f.3d at 44-45. "In no event could [counsel] have been relieved of his constitutional duty to give his professional advice on this crucial decision." Boria v. Keane, 99 f.3d 492, 498 (2nd cir. 1996). Where "among the most 'basic duties' of a defense attorney are the duties to consult with the defendant on important decisions." Carrion v. Smith, 644 f.supp.2d 453, 465 (S.D.N.Y. 2009 (citing Strickland, 466 U.S. at 688)). "In a pre-Strickland case, the Supreme Court described the duty to provide advice on a plea offer as one of the basic functions of defense counsel: 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then offer his informed opinion as to what plea should be entered'." Id. at 466 (citing VonMoltke v. Gilles, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.ed. 309 (1948)). Because, plea negotiations are "a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." Lafler, 132 S.Ct. at 1385. "Criminal defendants require effective counsel during plea negotiations anything less might deny a defendant effective representation at the only stage when legal advice would help him." Frye, 132 S.Ct. at 1407-08. "Failure to advise a client as to a plea offer is unreasonable performance." Rayson v. U.S., 647 f.3d. 491, 496 (2nd cir. 2011).

"Considering all the circumstances" Carrion, at 644, Gacho's attorneys deprived him of effective assistance at a critical stage of proceedings, "a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." Lafler, 132 S.Ct. at 1385. Where counsel's refusal to provide any advice or consultation

in light of such a significant development is clearly deficient performance. "Counsel must advise a client regarding a plea." Raysor, 647 f.3d at 496. Counsel's refusal to provide advice at this time is exacerbated by the fact that it was due to a failure to properly investigate the sentencing penalties which led counsel to provide incorrect sentencing information and misleading assurances up to the day of trial. See Julian v. Bartley, 495 f.3d 487, 495 (7th cir. 2007) (Granting §2254 petition because "what [counsel] told [the defendant] about a thirty-year maximum for his sentence as clearly wrong and therefore objectively unreasonable."); see also Moore, 348 f.3d at 242 (Granting habeas relief and explaining that in the plea context, the deficient performance prong is met where the inaccurate advice resulted from the attorney's failure to undertake a good-faith analysis of the relevant facts").

Counsel's refusal to provide any advice or consultation after this significant development, allowed Gacho to reflect the plea and enter trial without ever discussing the enhancement in any detail other than it carried 25-years to life. Counsel never discussed with Gacho the elements needed to be proven for it to be imposed. Additionally, they never discussed how this enhancement would impact our defense or, whether, in light of this development they still advise the defense of self-defense. See U.S. v. Love, 2012 U.S. Dist. Lexis 99332*15-16. Without this information Gacho was not and could not have been fully informed to make an "intelligent choice", Hill v. Lockhart, 474 U.S. 52, 56-57 (1985).

No reasonable attorney would not have advised Gacho to accept the 20 year plea, where Gacho never claimed to his attorneys he was innocent, and during plea negotiations Gacho made a very close counter offer of 15 years or as close to it as possible. See Purdy, 208 f.3d at 46-47; See also, Turner v. State of Tenn., 858 f.2d 1201, 1206-07 (1988).

"Under the particular circumstances presented here" Gacho's attorneys not only should have provided some kind of advice or consultation at the time of the plea offer, they "should have made an explicit recommendation to take the plea offer, at the very least" Carrion, 644 f.supp. 2d at 469, they should have requested Gacho's continuance.

As a result of counsel refusing to provide any advice or consultation, Gacho requested his attorneys to request a continuance so he could "consider the offer and speak to his family about accepting the offer". Appendix G at 3. Gacho's attorney, Phillip Bartoleменти, upon hearing Gacho's request for a continuance stated, "There was no way he could ask for a continuance on the day we're to start trial, that is not an option." Id. Bartolementi went on to say "He could not and would not ask for a continuance because it would undermine his credibility in front of the court." Id.

A continuance was an option. See 725 ILCS 5/114-4 "Motion for a continuance", (d) "The court may upon the written motion of either party or upon the court's own motion order a continuance for grounds not stated in subsection (b) and (c) of this section if he finds that the interest of justice so require."

There is a reasonable probability that an objective decision maker would have granted a continuance in the "interest of justice", if presented with the facts that counsel had provided incorrect sentencing information and affirmative assurances that were based on this incorrect information, and counsel provided this information due to a failure to properly investigate the sentencing penalties, and the misrepresentation was significant, 6-30 years compared to 31-life. As a result, additional time is needed, so Gacho, whose life and liberty is at stake, could re-assess his options and seek the advice of his family on such a significant decision. Under these circumstances, there is a reasonable probability an objective decision maker would have granted the request. See U.S. v. Morris, 827 F.2d 1348, 1353 (9th Cir. 1987) (upon request by defendant's attorney judge granted continuance for defendant to consider the plea, because, "that's something you want to think about before you say yes or no too quickly. So I want to be sure you and your attorney have an opportunity to discuss this fully.")

Bartoleменти refused to request a continuance because he did not want to admit to his mistakes and undermine his credibility in front of the court. Which, in doing so, he advanced his personal interest over fulfilling his fiduciary duty.

Considering the totality of the circumstances, counsel's failure to explicitly advise Gacho to accept the plea was unreasonable, counsel's refusal to provide any advice at all was unreasonable, at the very least counsel performed deficiently for not even attempting to request Gacho's request for a continuance. But counsel's refusal to provide advice to Gacho, after providing affirmative misleading

assurances throughout the entire duration of pretrial proceedings, and then refuse to request Gacho's request for a continuance by providing a deliberate false statement of law to advance his personal interest is clearly deficient performance.

B. Counsel's deficient performance prejudiced Gacho.

To satisfy Strickland's prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. This inquiry takes on a more tailored meaning in the case of a foregone plea agreement. In these circumstances, a petitioner must show there is a reasonable probability that (1) petitioner would have accepted the plea agreement; (2) the prosecution would not have withdrawn the plea; and (3) the court would have accepted the terms of the deal. Lafler, 566 U.S. at 164.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not necessary to "show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. The chance of prejudice need only be better than negligible. Cannan v. McBride, 395 F.3d 376, 386 (7th Cir. 2005)

1. There is a reasonable probability Gacho would have accepted the State's twenty year plea offer.

Gacho supports his claim he would have accepted the state's 20 year offer with the following: First Gacho surrendered himself to the authorities on May 23, 2011, to the Chicago police department's area 2 violent crimes unit, with Bartoleменти at his side. See Exhibit G at

20. This is demonstrative of Gacho's willingness to accept responsibility for his actions.

Second, at the time Gacho was presented the 20 year offer his first counter offer was 15 years, just 5 years less than the 20, when that failed, he again asked they attempt to get it any bit lower, which closed the gap even more. Gacho's close counter offers are demonstrative of his willingness to accept the plea. See Turner, 858 f.2d at 1206 (finding as sufficient corroborating evidence that petitioner would have agreed to the plea from his having made a close counter offer, and concluding that adequate advice might well have tipped the scales.) The present circumstances are similar to Turner's holding, where, after Gacho's last effort to get the offer any bit lower he asks his attorneys for advice -- which they refused to provide. After they refused to provide any advice to Gacho, Gacho informed them he would like a continuance to consider the offer and speak to his family about accepting it. Both of these counter offers were made without any advice or input by counsel, and without Gacho being allowed to speak to his family. See Boria v. Keane, 99 f.3d 492, 497 (2nd cir. 1996) ("there would have been more than a 'reasonable probability' that the father would have organized the family to persuade petitioner not to pursue the suicidal course he seemed bent upon following".) Unlike Boria the facts presented demonstrate Gacho was not bent on going to trial, where, Gacho's counter offers demonstrate he was not insistent on his innocence. See Purdy, 208 f.3d at 45-46.

Last, this is not a case where Gacho was unwilling to admit to his conduct. See Carrion, 644 f.supp. 2d, at 461 n.67; 472 (finding there was a reasonable probability petitioner would have accepted the plea, despite there being evidence in the record suggesting he was unwilling to admit to his conduct.) Where Gacho got on the stand and admitted to every element of the offense. See AA-148; AA-150; AA-153-154. See also People v. Corry, 687 n.e. 2d 877-89 (1997). In light of overwhelming evidence. See AA-165.

These facts coupled with Gacho's counter offers, followed by his request for a continuance to consider the offer and speak to his family about accepting it -- demonstrate there is a reasonable probability Gacho would have accepted the plea were it not for counsel's errors, which forced Gacho to make an immediate and involuntary decision without any advice from his counsel or his family. See Exhibit G at 31, "appellant has asserted under oath that he would have accepted the plea if properly advised by counsel." Raysor v. U.S., 647 f.3d.491, 496 (2nd cir.2011).

2. There is a reasonable probability that the state would have stood by the offer.

Under Lafler, the next element of prejudice is to show that the prosecution would not have withdrawn the offer in light of intervening circumstances.

There was no reason for the state to withdraw the plea, where the offer was made on the day of trial, surely by this time the state had reviewed all of the facts of the case.

3. There is a reasonable probability that the court would have accepted the plea.

In making this determination, courts "assume [] that in most jurisdictions prosecutors and judges are familiar with the Boundaries of acceptable plea bargains and sentences," Frye, 566 U.S. at 148, and courts generally "defer to the parties' negotiated agreement in the vast majority of cases," give the parties' superior knowledge and the substantial judicial resources saved through plea bargaining. Green v. Attorney Gen., State of Fla., 193 f.supp. 3d 1287 (M.D.2016). The Illinois Supreme court has encouraged plea bargaining based on its "firmly rooted views that the plea bargaining process, and the negotiated plea agreements that result from that process, are vital to and highly desirable for the criminal justice system." People v. Henderson, 809 N.E.2d 1224, 1231 (ILL.2004).

Furthermore, in Illinois, while judges retain discretion to reject a proposed plea agreement, that discretion is limited. People v. Allen, 815 N.E. 2d 426, 430 (Ill.App.Ct.2004) ("Just because a court may reject a proposed plea agreement, it does not follow that a court may reject one for any reason at all.") See also, People v. Hudson, 2017 Il App(3d) 160225 (Finding trial court abused its discretion in rejecting plea).

There is at least a reasonable probability that an objective decisionmaker applying these principles would have accepted the plea agreement. Under the agreement, Gacho would have received a substantial sentence of 20 years, which would require at least 17 years to be served, which would have allowed for Gacho's earliest at age 36. At the time of sentencing Gacho was just 20 years old and just 2 months past his 17th birthday when he committed this

offense. Also the Judge participated in the plea discussions and co-signed the 20 year offer as a "fair offer". See Exhibit G at 3.

In light of these facts and the Illinois Supreme court's preferences for plea bargains, there is at least a reasonable probability that a court would have accepted the plea agreement.

II. The District Court's finding that Gacho's attorneys were not ineffective for refusing to provide any advice to Gacho on whether to accept or reject the 20 year plea is debatable.

The District Court states, "defense counsel cannot coerce a criminal defendant to accept a plea offer because doing so would render the plea involuntary". Appendix B at 6(*14-15).

However, other federal courts have found that, "in no event could [counsel] have been relieved of his constitutional duty to give his professional advice on this crucial decision." Boria, 99 f.3d at 498. Although "a lawyer must take care not to coerce a client into accepting or rejecting a plea offer." Purdy, 208 f.3d at 45. "defense counsel must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty." Id. at 44-45.

In Gacho's reply brief in the district court he cited very similar cases who granted the writ under §2254 under similar, or even less favorable facts. See Boria v. Keane, 99 f.3d 492 (2nd cir. 1996); Carrion v. Smith, 644 f.supp.2d 453 (S.D.N.Y. 2009); Turner v. State of Tenn., 858 f.2d 1201 (6th cir. 1988). See Appendix I 12-15.

Additionally, U.S. Supreme Court precedent supports counsel must provide advice on whether to accept or reject a plea offer.

Where plea negotiations are "a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." Lafler, 132 S.Ct. at 1385. "Criminal defendants require effective counsel during plea negotiations anything less might deny a defendant effective representation at the only stage when legal advice would help him." Frye, 132 S.Ct. at 1407-08. "Among the most 'basic duties' of a defense attorney are the duties to consult with the defendant on important decisions." Carrion, 644 f.supp 2d at 465n.106(S.D.N.Y. 2009(citing Strickland, 466 U.S. at 688)).

Considering the above principals and authorities the District Court's conclusion remains debatable, and this court should issue a certificate of appealability and resolve the matter, where Gacho has shown: (1) That reasonable jurists would find the District Court's "assessment of the constitutional claims debatable or wrong," and/or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nikolas Gacho

Date: July 17, 2023