No. _____

In the

Supreme Court of the United States

Jason Claude Edwards, Petitioner

v.

Ron Godwin, Warden, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Under this Court's Sixth Amendment jurisprudence, counsel is required to communicate to the accused all favorable plea offers and to counsel the accused on the advantages and disadvantages of the offer. In adjudicating ineffective assistance of counsel claims based on failure to communicate a favorable plea offer, the petitioner must show prejudice by, among other things, that the outcome of the plea proceedings would have been different with *competent advice*. *Lafler c. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984).

The operative state court decision found that trial counsel's failure to communicate a 6-year offer to petitioner was harmless, without considering the effect of presumed competent counsel advice on the likelihood of petitioner accepting the offer rather than face a retrial and life sentence on conviction. That deficiency was likely outcome-determinative. Accepting the offer would have meant release from custody in a few years. Retrial presented a significant risk of conviction and the consequence of

conviction was a life sentence And petitioner could have entered an *Alford* plea, which would not have required him to renounce his earlier testimony he was innocent. Petitioner's mother, his closest confidante, would have supported the deal.

The state court also required petitioner to prove prejudice under a standard akin to "more likely than not" standard and categorically excluded petitioner's declaration that he would have accepted the offer from prejudice analysis. On this record, failure to reasonably apply the prejudice standard under *Strickland*, is the difference between affirming the district court grant of relief and sending petitioner back to prison for life.

The district court found the state court's fact-finding process to be unreasonable under AEDPA and, under de novo standard, granted habeas relief. On state's appeal, a divided Ninth Circuit panel reversed the grant of habeas; the dissenting judge would affirm the grant.

This petition presents the following questions for review:

1. Whether the Ninth Circuit majority unreasonably applied clearly established Supreme Court law by approving as reasonable a state court

prejudice analysis that did not consider the effect of presumed competent counsel advice on likelihood of petitioner accepting the offer?

2. Whether the Ninth Circuit majority unreasonably applied clearly established Supreme Court law by approving as reasonable a state court prejudice analysis, which (1) categorically excluded from consideration petitioner's declaration that he would have accepted the offer, and (2) required petitioner to prove prejudice to an at least "more likely than not" standard?

PARTIES TO THE PROCEEDINGS

Petitioner is Jason Claude Edwards.

Respondent is Ron Godwin, Warden.

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Opinions Below

An unpublished 2-1 opinion of the United States Court of Appeal for the Ninth Circuit was filed April 13, 2023. (CertAppendix-001). Appellant filed a timely rehearing petition, which the Ninth Circuit denied August 3, 2023. (CertAppendix-052).

Jurisdiction

The Ninth Circuit denied a timely petition for rehearing August 3, 2023. (CertAppendix-052). Jurisdiction of this Court is thus timely invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution states. states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

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§ 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

(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
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> (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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the 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 Facts and Procedural History

Petitioner stood trial in a California state court on the charges of sexually molesting his daughters and the jury was unable to reach a unanimous verdict; the split was 11-2 and 7-5 in favor of acquittal. (CertAppendix-016-17).

The prosecution decided to retry the case; petitioner faced a 60-to-life sentence if convicted. At retrial, the prosecution was planning to call an expert witness whose testimony was likely to be admitted and would have boosted credibility of the child complaining witnesses. (Cert-Appendix-018).

Shortly before retrial, the prosecutor offered a plea deal to the petitioner, under which the petitioner would plead guilty to one count of a less aggravated charge and received a six-year sentence. (CertAppendix-017-18).

Given how much time the petitioner already spent of custody, accepting the deal would have meant a release from custody soon.

Without communicating the offer to the petitioner first, trial counsel replied, ""Not happening. I'll convey the offer to my client as required, but 99.99999 % s not happening." Trial counsel then never informed petitioner of this offer, petitioner went to trial, was convicted, and received a life-in-prison term. Petitioner did not find out about the offer until after he was convicted. (CertAppendix-018-19).

Petitioner filed an ineffective assistance claim based on failure to communicate a favorable plea offer and the state courts found that the offer had not been communicated to him by counsel. (CertAppendix-047). But the state courts rejected the claim on prejudice grounds, without considering the effect of presumed competent counsel advice on the likelihood of petitioner accepting the offer. (CertAppendix-047-50).

And the prejudice test the state court applied was under *In re Alvernaz* 2 Cal.4th 924 (1992), which categorically precluded consideration of petitioner's testimony that he would have accepted the deal from the prejudice analysis. (CertAppendix-049-40). The unreasonableness of that finding by the California Court of Appeal – the operative state court decision - is what brought the petitioner to federal court.

There, the magistrate judge, and the district court judge found that the state court no-prejudice finding was unreasonable under AEDPA because state courts analyzed the likelihood of petitioner accepting the offer without measuring the effect of presumed competent counsel advice on the likelihood of petitioner accepting the offer if it had

been communicated to him. And on the de novo standard, the district court found that petitioner has shown prejudice and was entitled to habeas relief. (CertAppendix-014-25-31).

The State appealed the grant of habeas and a divided Ninth Circuit panel reversed. The panel majority reasoned that impact of presumed counsel advice is irrelevant and proceeded to analyze the likelihood of petitioner accepting or rejecting the offer as if petitioner would have been making that decision entirely on his own. The panel majority also found that the prejudice test the state court applied was not more stringent than this Court required in *Strickland* and its progeny. (CertAppendix-001-6).

The dissent would affirm the district court's grant of habeas. The dissent found the state court's no prejudice finding to be an unreasonable application of *Strickland* because the state court required Edwards to show prejudice under a more stringent test than Strickland requires. (CertAppendix-007-11).

And on de novo review, the dissent would affirm the grant of habeas relief, for many reasons discussed in the district court opinion,

especially the tenfold disparity between the six-year offer (and likely quick release from jail) and the 60-to-life exposure on conviction. (CertAppendix-012). The dissent also emphasized (1) Edwards' undisputed testimony that he did not start plea discussions because he reasonably thought the prosecutor would be the one to start those discussions, (2) petitioner's mother support for the deal, (3) trial counsel's new trial testimony that she would have persuaded petitioner to accept the offer. (CertAppendix-013).

REASONS FOR GRANTING CERTIORARI

I.

The Ninth Circuit Majority Failed to Reasonably Apply Clearly Established Law Requiring Consideration of Impact of Presumed Competent Counsel Advice on the Likelihood of Petitioner Accepting a Favorable Plea Offer

A. Importance of the Issue Presented for Review

This Court should grant review because the Ninth Circuit's majority failed to reasonably apply clearly established law, as decided by this Court. Supreme Court Rule 10(a) (discussing grant of cert as an exercise of this

Court's supervisory powers). This Court has invoked its supervisory power to grant certiorari in 28 U.S.C. § 2254 appeals. See, e.g., *Waddington v. Sarasaud*, 555 U.S. 179, 182 (2009) (granting cert because this Court disagreed with the Ninth Circuit's finding that the state court's application of clearly established federal law was unreasonable); *Premo v. Moore*, 562 U.S. 115 (2011) (granting cert to correct the Ninth Circuit error in granting habeas relief on an ineffective assistance claim under AEDPA); *Broomfield v. Cain*, 576 U.S. 305 (2015) (granting cert to hold that the state's denial of petitioner's habeas claim was an unreasonable determination of facts under AEDPA).

The magnitude of the Ninth Circuit's majority's error and the dire consequences to the petitioner call for this Court's exercise of its supervisory power. In making a no-prejudice finding, the state courts ignored impact of presumed competent counsel advice on the likelihood of petitioner accepting the 6-year offer if he were told about it, not going to trial to face a life sentence. (CertAppendix-026-30).

And this issue is outcome-determinative. There is a 10-fold disparity between the offer and the exposure on conviction. Despite a favorable jury

split in the first trial, retrial still posed a significant risk of conviction (especially since the prosecution was planning to add a key expert witness) . Petitioner's mother – his closest confidante – would have supported accepting the offer. And because California law permits Edwards to enter an *Alford* plea without requiring an admission of guilt, accepting the deal would not have required petitioner to renounce his earlier claims of innocence. Because competent counsel would have been constitutionally compelled to discuss these points with petitioner, there is more than reasonable likelihood of petitioner accepting the offer. (CertAppendix-026-30).

This is also an issue of nationwide importance because a vast majority of the nation's criminal cases are resolved through guilty pleas. About nine-in-ten federal defendants plead guilty,[4] and in California, some 97% of defendants in felony cases resolved their case through a plea bargainsnegotiated between the prosecution and defense.[5] As the Supreme Court put it, "[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

And assistance of competent counsel at the plea stage is vitally important because whether to plead is one of the few decisions our system of justice gives to the accused and consultation with competent counsel ensures voluntariness and intelligence of such a decision:

> The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." [citation omitted]. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, *a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.*

Lafler, 566 U.S. at 165 (emphasis added); see also *Frye*, 566 U.S. at 141 ("This Court made clear that the negotiation of a plea bargain is a critical phase of litigation for the purpose of the Sixth Amendment right to effective assistance of counsel").

Finally, the consequence of failing to reasonably apply this Court's precedent in this area are dire for the accused, as petitioner's case shows. Petitioner was accused on sexual assault crimes and faced a life sentence. The prosecution made a 6-year offer, which, given the time petitioner had spent in pretrial custody, would have led to his release very soon. But trial counsel not only failed to inform petitioner of the offer, but flippantly

rejected it out of hand. Petitioner did not learn about it until after he was convicted. After conviction, petitioner received a life sentence.

The district court granted habeas relief and ordered the State to re-offer the 6-year deal to petitioner. But if the Ninth Circuit's error is not corrected, petitioner faces going back to prison to serve a life sentence. If there was ever a case to justify the exercise of this Court's supervisory power under Supreme Court Rule 10, this is it.

B. The Ninth Circuit Panel Majority Contradicts This Court's Precedent by Failing to Find That the State Court Was Unreasonable in not Considering Impact of Presumed Competent Counsel Advice on Petitioner Accepting a Favorable Plea Offer

1. Clearly Established Supreme Court Law that in Determining Prejudice for Ineffective Assistance Claim Based on Failure to Communicate a Favorable Plea Offer, the Court Must Consider the Impact of Presumed Competent Counsel Advice on the Likelihood of Petitioner Accepting the Offer

To show prejudice from counsel's failure to communicate the 6-year offer, Edwards had to show that if counsel told him about it and provided competent advice, Edwards reasonably likely would have taken that offer. *Strickland*, 466 U.S. at 687–88; *Lafler v. Cooper*, 566 U.S. 156, 164; (2012); *Frye*, 566 U.S. 134.

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Lafler and *Frye* are the latest examples of the Supreme Court applying the *Strickland* prejudice analysis to ineffective assistance claims arising in plea negotiation context. In these companion cases, the Supreme Court reaffirmed that the right to effective assistance of counsel applies to plea negotiation, a critical stage of the proceeding:

> The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." [citation omitted]. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.

*Lafle*r, 566 U.S. at 165 (emphasis added); see also *Frye*, 566 U.S. at 141 ("This Court made clear that the negotiation of a plea bargain is a critical phase of litigation for the purpose of the Sixth Amendment right to effective assistance of counsel"). This underscores the importance of competent counsel advice on the likelihood of Edwards accepting a plea offer, which the state appellate court disregarded.

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Frye also held that counsel's duty is not only to communicate a plea offer, but also that codified standards of professional conduct for counsel are relevant in determining the scope of counsel's duties in this situation. *Frye*, 566 U.S. at 145–46; see also pre-*Fry* federal habeas decision in *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002) (defense counsel advising the client about a plea offer has to give the client the tools he needs to make an intelligent decision); accord *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (Where the issue is whether to advise the client to plead, the attorney has the duty to advise the client of the available options and possible consequences and failure to do so constitutes ineffective assistance of counsel).

Then, in explaining how the *Strickland* prejudice analysis applies in the context of ineffective assistance in plea negotiations, *Lafler* held that advice defendant would be expected to receive from competent counsel is relevant to the prejudice showing:

> To establish *Strickland* prejudice a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

> been different." Id., at 694, 104 S. Ct. 2052. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See Frye, post, at 1410, 132 S.Ct. 1399 (noting that Strickland 's inquiry, as applied to advice with respect to plea bargains, turns on "whether 'the result of the proceeding would have been different' " (quoting Strickland, supra, at 694, 104 S.Ct. 2052)); see also Hill, 474 U.S., at 59, 106 S.Ct. 366 ("The ... 'prejudice ...' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). In Hill, when evaluating the petitioner's claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Ibid.

Lafler v. Cooper, 566 U.S. 156, 163 (2012) (emphasis added).

The unreasonableness of the Ninth Circuit's interpretation of clearly established Supreme Court law is underscored by several recent Ninth Circuit habeas opinions reaffirming that this Court requires consideration of presumed competent counsel advice in assessing prejudice from ineffective assistance of counsel in plea negotiations. *Bradford v Johnson*, No. 24-16279, 2022 WL 313841, at * 2 (9th Cir., Feb. 2, 2022) ("To satisfy Strickland's prejudice prong, Bradford "must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163.

This means that he must show, among other things, a reasonable probability that he would have accepted the plea offer had his counsel provided competent advice. See id. at 164, 171); *Schmaus v. Jacquez*, 733 F. App'x 339, 342 (9th Cir. 2018) ("in the context of pleas, to establish prejudice under Strickland, the defendant "must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163, 132 S.Ct. 1376.)

Commented [GV1]:

2. The Ninth Circuit Majority's Analysis is Contrary to or Unreasonably Applies Clearly Established Supreme Court Law by Deeming Reasonable a State Court No-Prejudice Finding That Did Not Consider Presumptive Effect of Competent Counsel Advice on the Likelihood of Petitioner Accepting a Favorable Plea Offer

The Ninth Circuit's majority's opinion conflicts with and unreasonably applies clearly established Supreme Court law about (1) counsel's duty to advice on pros and cons of the offer (2) the state court's obligation to consider the effect of such presumed competent counsel advice on the likelihood of petitioner accepting the offer.

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i. Ninth Circuit majority was unreasonably wrong in finding the state court considered presumed advice of competent counsel

First, while the majority found that competent counsel advice was considered by the state court, the state court never addressed that impact in the opinion. (CertAppendix-004). For example, when the state court addressed how petitioner might view his chances at retrial given a favorable split in the first trial, no reasonable attorney could give this type of uninformed and one-sided discussion of the risks of rejecting the offer. (CertAppendix-041-42). As the district court found, retrial still presented a significant risk of conviction, a point competent counsel was *constitutionally compelled* to discuss with petitioner. (CertAppendix—026-27). A split jury is not a ringing endorsement of petitioner's innocence and a jury at retrial would be new and would know nothing about how the first trial ended. (CertAppendix-026). A new jury could well view the evidence and witnesses differently and it is hard to predict what a new jury would be like or how it would view the case. (*Id*). There could be new evidence and here, the prosecution was expected to present a new expert witness who would likely

boost the child witness credibility. (*Id*). And given these risks, and the tremendous disparity between the offer and the life-term exposure, reasonable counsel would have advocated for petitioner to seriously consider accepting this offer. (*Id*).

Similarly, while the state court noted potential consequences of the plea (like sex offender registration and possible civil commitment), and competent counsel would have been required to discuss those risks with petitioner, competent counsel would have been also compelled to explain why petitioner may and should take the deal despite them. For example, because of the procedural protections under California law and petitioner's lack of a prior record of sexual interest in minors, civil commitment was unlikely. While these consequences (or potential consequences) are unpleasant, they are a lesser of two evils as compared to spending life in prison as a convicted sex offender. Plus, if petitioner were convicted, he would have still faced those same negative consequences after any eventual parole grant by California. (CertAppendix-028).

These factors show that the state court did not evaluate presumed competent counsel advice's impact on petitioner's likely view of risks and rewards of accepting / rejecting the plea. That is particularly true given the tenfold difference between the terms of the plea agreement and life-term exposure that would have been mandatory on conviction. Presumed advice of competent counsel would have stressed substantial risks of retrial and the tremendous disparity between the life-term exposure on conviction and quick release from prison if petitioner took the offer. Inexplicably, the only way in which the state court considered the effect of trial counsel's advice on petitioner's amenability to taking the plea is to cite counsel's *improper response* to the offer as evidence that petitioner would not agree to take a plea. (CertAppendix-041-42). That is contrary to clearly established Supreme Court law requiring consideration of impact of *competent* counsel advice. (*Lafler*, 566 U.S. at 163).

That impact is paramount here, given the tenfold difference in exposure, substantial risks of a retrial, and availability of an *Alford* plea. No reasonable attorney would flippantly reject such a favorable offer without

communicating it to the client and counseling him about the benefits (a short fixed-term sentence, no need to abandon a claim of innocence to accept it) and reminding about the substantial risk of conviction and a 60-to-life exposure if convicted.

Similarly, the state court's analysis overlooks the effect of presumed *competent* counsel advice on petitioner's willingness to take a plea given his testimony that he was innocent. Competent counsel would have been required to explain that while many accused testify at first that they are innocent, they still end up accepting a plea deal. They do so to avoid rolling the dice when, as here, the state makes a generous plea offer and there is a significant risk of a very long sentence on conviction. *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003) (collecting cases holding that disparity between the plea offer and the original sentence exposure is strong evidence of reasonable probability that a property advised defendant would have accepted a favorable offer despite earlier protestations of innocence).

Counsel also would have been constitutionally required to explain that petitioner could take an *Alford* plea that would not require him to admit guilt

and is *designed* to enable favorable offer acceptance to avoid a risk of conviction. 425; U.S. 70; *Rauen*, 201 Cal.App.4th 424.

And while some clients can act irrationally despite competent advice, the district court correctly found that nothing in the record placed petitioner in that category. (CertAppendix-028-30). Petitioner never rejected any plea offers or refused to engage in plea bargaining. Petitioner's trial counsel described petitioner as a reasonable client who would follow counsel's advice. (CertAppendix-030).

And as the district court concluded, there is nothing unreasonable about petitioner's testimony that he thought it would be up to the prosecutor to engage in plea bargaining, especially in client of trial counsel's testimony that she never discussed plea bargaining with petitioner. (CertAppendix-029).

For those reasons, the panel majority is unreasonable (just like the state court was) in analogizing this case to *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997). In *Jones*, improper plea advice was held harmless because Jones's attorney correctly told Jones that the State's case was weak and Jones's belief

in his innocence was so strong his primary issue in the habeas appeal was counsel's failure to present evidence that someone else committed the murder. *Turner*, 281 F.3d at 880.

Another key difference with *Jones* is that the defendant there knew shortly after counsel's unauthorized rejection of the offer that the offer was made, yet did not seek any relief on this ground until after losing the direct appeal on other issues. 114 F.3d at 1006. That fact only strengthens inference that Jones was motivated only by the persistent belief in his innocence and was not interested in pleading.

In contrast here, trial counsel never advised Edwards of the offer. And competent counsel would have presumably stressed the difference between the 6-year offer (and likely quick release from jail) and the tenfold exposure of 60-to-life sentence on conviction. Again, this is materially different from Jones where accepting the offer would have reduced a 25-year exposure to needing to serve a 10-year sentence.

Plus, unlike *Jones*, petitioner did not find out about the favorable offer until after he was convicted and he immediately sought habeas relief for

counsel's failure to communicate it. These factors strengthen petitioner's' claim that he reasonably likely would have taken the deal. This is especially true when we consider presumed advice from counsel about the ten-fold disparity between the offer and exposure on conviction, availability of an *Alford* plea, and substantial risks of conviction on retrial despite the favorable jury split in the first trial.

ii. The Ninth Circuit majority was unreasonably wrong in concluding that presumed competent counsel advice was irrelevant to the likelihood of petitioner accepting the 6-year offer

The panel majority opinion also conflicts with clearly established Supreme Court law by deeming irrelevant the advice of counsel to petitioner's amenability to taking the plea. (CertAppendix-004). The majority notes the wide range of professional assistance. (*Id*). But this Court requires that competent counsel describe advantages and disadvantages of accepting and rejecting the offer. *Frye*, 566 U.S. at 145-46; *Padilla*, 559 U.S. at 370. There would have been no discretion for counsel not to discuss those things with petitioner.

And given the significant risks retrial posed, the tenfold difference between the plea offer and the life exposure on conviction, and the availability of an *Alford* plea, it would have been patently unreasonable under *Strickland* for counsel to do anything other than urge the client to seriously consider taking this offer. The state court's contrary analysis (and its endorsement by the Ninth Circuit majority) violates Supreme Court command requiring focus on what competent counsel would have reasonably likely done here rather than conducting post-hoc rationalization of trial counsel's improper conduct. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003).

Focusing on what competent counsel would have likely told petitioner, this is precisely the type of case in which presumed competent advice of counsel reasonably likely would have impacted petitioner's willingness to accept the offer. Petitioner was on trial for his life. Whether to take a plea is a decision the law entrusts petitioner, not his lawyer. But petitioner has a Sixth Amendment right to competent counsel advice in making that decision. Issues, like risks and rewards of accepting and rejecting the offer, possible

consequence of each action, availability of an *Alford* plea, and the low likelihood of a potential civil commitment would have been paramount to making an informed decision.

Even if petitioner's knowledge of the favorable jury split might have created an unreasonable expectation of how his retrial may proceed, competent counsel would have been required to give information to disabuse petitioner of this misconception. Counsel would have been required to explain to petitioner the significant risks a retrial posed and reminded petitioner that the offer would allow him to go home very soon while a conviction after retrial would lend him in prison for life as a sex offender.

Similarly, while a lay person might think that acceptance of the offer conflicts with an earlier claim of innocence, competent counsel would have been required to explain that an *Alford* plea avoids the need to admit guilt and allows the accused to benefit from a favorable offer. *Smith*, 348 F.3d at 352.

So the majority's discarding of presumed advice of counsel as inconsequential is contrary to clearly established law from this Court about

the constitutional role of counsel in plea negotiations and the record here. CertAppendix-004). The district court was right that the state court did not consider any of these issues in its prejudice analysis. (CertAppendix-026-30).

In sum, given how unreasonably the panel majority applied clearly established authority from this Court, the importance of the right to counsel in plea negotiations, and the dire consequences to petitioner resulting from leaving the majority's error uncorrected, this Court should grant the petition.

II.

This Court Should Grant Review Because the Ninth Circuit's Decision Conflicts with Clearly Established Decisions of This Court by Upholding as Reasonable the State Court's use of More Stringent Standard of Prejudice Than *Strickland* Requires

A. Importance of Question Presented

This Court should grant review on this issue because the Ninth Circuit majority resolved in clear contradiction to this Court's precedent in *Strickland* and its progeny about the required level of prejudice. The error in applying *Strickland* prejudice here is patent and outcome-determinative.

And the consequences for petitioner are life-threatening. Petitioner was deprived of a chance to accept a 6-year plea offer, which would have let to his release in a few years. Instead, he was convicted and received a life sentence. The district court granted his federal habeas petition requiring the State to reoffer the 6-year deal or release petitioner. If the Ninth Circuit's majority's deeply flawed opinion is upheld, the petitioner faces going back to prison to serve a life sentence. On the facts here, it would be a miscarriage of justice.

Plus, this is an important issue for many of the same reasons as Question Presented No. 1. Most cases in the federal and state criminal justice systems are resolved through plea bargaining process. And because our system of justice gives the accused the power to decide whether to plead guilty, assistance of competent counsel in the plea process is vital to ensure voluntariness, intelligence, and reliability of guilty pleas.

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B. The Ninth Circuit's Majority Unreasonably Misapplied *Strickland* and Its Progeny by Requiring Petitioner to Prove Prejudice Under a Standard More Stringent than *Strickland* Requires

Turning to the merits, this Court's review in its supervisory capacity is required because for two related reasons, the state court decision that the panel majority endorsed as reasonable, subjected petitioner's prejudice claim to a standard more stringent than this Court requires.

First, as the dissent in the Ninth Circuit explained, the state court unreasonably applied *Strickland* by forcing petitioner to show that *he would have accepted the deal* if he knew about it. That is a showing more stringent than the "reasonable probability" standard in *Strickland.* (CertAppendix-010, citing *Harrington v. Richter*, 562 U.S.86, 111 (2011).) And while the difference in these standards may be generally slight, this is a rare case in which that difference is outcome-determinative. (CertAppendix-10-11).

Indeed, given the tenfold disparity between *the 6-year offer* (which would have led to petitioner's release from jail in a few years) and the *60-to-life* exposure on conviction, substantial risks of conviction on retrial

discussed in the district court's opinion, the availability of an *Alford* plea that does not require admission of guilt- all points competent counsel would have been constitutionally required to discuss with petitioner– petitioner has shown reasonable probability that he would have accepted the offer. The only logical inference from the language in the analysis section of the opinion and the resulting no prejudice finding on this record is that the state court applied a more stringent prejudice test than *Strickland* requires. CertAppendix-10-11; *Nunes v. Mueller*, 350 F.3d 1045, 1054–55 (9th Cir. 2003) (requiring habeas petitioner to show more than reasonable probability that he would have accepted the offer is unreasonable application of *Strickland*).

Second, by considering prejudice under *in re Alvernaz*, the state court required petitioner to make a more stringent showing of prejudice than *Strickland* requires. Under *Strickland*, petitioner only had to show a reasonable probability that but for counsel's deficient performance, petitioner would have accepted the offer. And this standard does not require a petitioner to prove prejudice even to a "more likely than not" standard. *Strickland*, 466 U.S. at 693-94; *Hill v. Lockhart*, 474 U.S. 52, 57 (1965).

And to satisfy this standard, this Court never placed categoric limitations on what evidence a petitioner could present to make that showing. *Lafler*, 566 U.S. at 174, citing *Cooper v. Lafler*, 376 F. App'x 563, 571–72 (6th Cir. 2010) (rejecting a proposed rule like *Alvernaz*)

Yet under *Alvernaz*, a petitioner's testimony that if he had received effective assistance of counsel, he would have taken the deal, is considered inherently unreliable and insufficient to establish prejudice. *In re Alvernaz*, 2 Cal. 4th 924, 938–39 (1992). And the state court rejected trial counsel's testimony that she would urge petitioner to take a deal if she communicated it to him – an objective corroborating evidence supporting petitioner's claim, especially since counsel was admitting a professional error – as incredible.

These additional requirements create a standard analogous to preponderance of the evidence, more onerous than *Strickland* requires. (CertAppendix-010; *Strickland*, 466 U.S. at 693–94).[1] Given how unreasonably the Ninth Circuit majority applied *Strickland* prejudice

[1] The Ninth Circuit has long questioned whether *Alvernaz* is an objectively reasonable application of *Strickland*. (CertAppendix-009); *Perez v. Rosario*, 459 F.3d 943, 947 (9th Cir. 2006), n. 2.

standard, the compelling facts showing reasonable likelihood of petitioner accepting the deal if he had been informed of the offer and received competent advice about its pros and cons, the Court should grant review.

Respectfully submitted,

DATE: October 29, 2023

By: *s/ Gene D. Vorobyov*

Supreme Court Bar No. 292878
Counsel of Record for Petitioner
JASON CLAUDE EDWARDS