NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AWEIS HAJI-MOHAMED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Circuit deliberately applied a more demanding standard for showing prejudice for ineffective assistance of counsel than the standard established by *Strickland v. Washington*, 466 U.S. 668 (1984), which is uniformly followed by the Circuit Courts. The Sixth Circuit did so because it decided that applying the normal standard would be a windfall for the petitioner, who would evidently win his claim under the normal standard. Was that error?

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PRAYER

Petitioner Aweis Haji-Mohamed respectfully petitions for a writ of certiorari issue to review to review the judgment of the U. S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion denying relief is unpublished but available at Pet. App. 1. Its initial opinion denying relief is available at Pet. App. 20. The district court's order is available at Pet. App. 39.

JURISDICTION

The court of appeals entered its initial judgment on September 22, 2023. It granted panel rehearing, and it issued it revised, final judgment February 26, 2024. It denied the motion for rehearing of that judgment on April 4, 2024. This petition is filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISION OF LAW

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the "Assistance of Counsel for his defence." U.S. Const. amend. VI.

INTRODUCTION

Aweis Haji-Mohamed pleaded guilty under a binding agreement for 35 years. Everyone, including the district court, told him that 35 years was his statutory mandatory minimum. They were all wrong. His mandatory minimum was actually 32 years. When, as here, the district court has violated Rule 11 by misstating the defendant's mandatory minimum at the plea hearing, the defendant can almost *always* win a motion to withdraw his plea by citing that Rule 11 violation.

After Mohamed's plea and prior to sentencing, the First Step Act reduced his mandatory minimum to 17 years, and he moved to withdraw his plea. His lawyer, litigating the motion reluctantly, never even recognized the Rule 11 violation described above. The motion failed due to counsel's failure to harness the Rule 11 violation. Mohamed was sentenced to 35 years.

On collateral review under 28 U.S.C. § 2255, Mohamed argued his lawyer was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to harness the Rule 11 violation when arguing to withdraw Mohamed's guilty plea. The Panel denied this claim on the putative ground that Mohamed had failed to show the requisite prejudice. Doing so, it applied an overly strict standard for prejudice because it applied the standard for proving a plea *involuntary*. The correct standard was more lenient, namely: a reasonable probability of winning the plea-withdrawal motion had counsel harnessed the Rule 11 violation. That standard was obviously satisfied here, and it was mandated by precedent both from this Court, *Strickland v. Washington*, 466 U.S. 668 (1984), and the Sixth Circuit itself. *See, e.g., United States v. Bankston*, 820 F.3d 215 (6th Cir. 2016); *United States v. Wynn*, 663 F.3d 847 (6th Cir. 2011).

The Panel's error was so stark that it agreed to rehear the case, and it amended its opinion. When doing so, however, it decided to apply the same overly strict prejudice standard that it had applied the first time. Its justification for applying that strict standard was this: the

Panel thought Mohamed would wrongfully get a windfall if the normal, relatively lenient *Strickland* standard were applied. That maneuver violated precedent, including *Kimmelman v. Morris*, 477 U.S. 365 (1986), which expressly rejected such a maneuver. The Panel's ruling amounts to intolerable judicial activism. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("[O]nly this Court may overrule one of its precedents").

To deny Mohamed relief, the Sixth Circuit has established a standard that deviates from the standard that is both dictated by this Court and is also uniformly applied by the other Circuits. The Court should grant certiorari to address the circuit split created by this decision, or it should summarily reverse. *Thurston Motor Lines*, 460 U.S. at 535 (summarily reversing decision that violated this Court's precedent).

STATEMENT

A. Mohamed's guilty plea was flawed by a Rule 11 violation that virtually entitled him to withdraw his plea.

From his arraignment forward, everyone told Mohamed that if he was convicted under 18 U.S.C. § 924(c) for the Cricket-store robbery and one of the two alleged robberies of drug dealers, his statutory mandatory minimum sentence would be 35 years. (Appellant Br. at 9-11, Reply Br. at 17.) That was a mistake. The mandatory minimum would have been 32 years. Pet. App. 1.

Mohamed entered a binding "C-Plea" bargain for 35 years, pleading guilty to the 924(c) count for the Cricket-store robbery and a 924(c) count for a drug-dealer robbery.[1] Pet. App. 2. At

[1] The proof of the alleged drug-dealer robberies was inherently weak. Neither robbery was even "reported" until long after the fact. (Presentence Report (PSR) at 11-12.) Neither involved substantial property. (*Id.*) One lacked absolutely any support by physical evidence; the other's only physical evidence was slight. (*Id.*) The charges rested heavily, if not exclusively, on the after-the-fact claim of a drug dealer who presumably received credit from the government for cooperation.

that plea hearing, the district court repeated everyone's mistake: it told Mohamed his mandatory minimum for his convictions was 35 years. Pet. App. 3. That was a violation of Rule 11, which requires a district court to correctly tell a defendant the minimum penalty for the charges he is pleading guilty to. Fed. R. Crim. P. 11(b)(1)(I).

Then the First Step Act (FSA) softened the law on 924(c) sentences. Pet. App. 4. Under the FSA, which applied to Mohamed, his mandatory minimum for his two 924(c) convictions was 17 years. *Id.* Mohamed told his lawyer, David Komisar, to file a motion to withdraw his plea, and Komisar resisted, litigating the motion only reluctantly. (Komisar Aff., R.14-1, PageID# 119.)

To win that motion, Komisar had to identify a "fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). *See Kercheval v. United States*, 274 U.S. 220, 224 (1927). That standard is meant to be relatively "liberal." Fed. R. Crim. P. 32, Notes of Advisory Committee on Rules, 1983 Amendment; *United States v. Gardner*, 5 F.4th 110, 114 (1st Cir. 2021); *United States v. Ramirez-Hernandez,* 449 F.3d 824, 826 (8th Cir. 2006). For example, case law says that standard is "almost always" satisfied when the district court, in violation of Rule 11, incorrectly stated the statutory penalty range for the crimes of conviction. *United States v. Ford*, 993 F.2d 249, 251 (D.C. Cir. 1993);[2] *see generally United States v. Hogg*, 723 F.3d 730,

[2] *See also United States v. Price*, 988 F.2d 712, 719 (7th Cir. 1993) ("Rule 11 requires that a defendant both understand and know the direct consequences of his plea. Sentencing in violation of Rule 11 of course would be an abuse of discretion and would constitute a 'fair and just reason' to withdraw a plea."); *United States v. Siegel*, 102 F.3d 477, 482 (11th Cir. 1996) (holding court's failure to advise defendant of statutory penalties was a "core" Rule 11 violation that entitled the defendant to withdraw his plea); *United States v. Martinez-Molina*, 64 F.3d 719, 733-34 (1st Cir. 1995) (same).

737 (6th Cir. 2013) (finding court's misstatement of statutory range rendered plea *involuntary* under binding plea bargain).

B. Mohamed's lawyer lost the plea-withdrawal motion because he failed to harness the Rule 11 violation.

But Komisar failed to realize the court had committed that core Rule 11 violation because he remained mistaken about the statutory range. (Komisar Dec., R.14-1, PageID# 118.) Komisar never bothered to ascertain the correct statutory range, not even when Mohamed was insisting on withdrawing his plea. (*Id.*) Komisar has candidly stated: "I did not care" what that range was. (*Id.*) Since Komisar did not realize the Rule 11 violation, he did not use that violation to (further)[3] support his argument there was a "fair and just reason" to let Mohamed withdraw his plea. The district court denied the motion.

In Mohamed's § 2255 motion and on appeal here, he pursued two claims that had, as their starting point, the Rule 11 violation: (1) ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) an involuntary guilty plea. The district court denied those claims without an evidentiary hearing.

C. The Sixth Circuit Panel rejected Mohamed's claim of ineffective assistance of counsel because it refused to use the normal standard for assessing prejudice.

The Panel *sua sponte* invoked procedural default to deny Mohamed's involuntary-plea claim. As for his *Strickland* claim, it held Mohamed "cannot demonstrate the requisite prejudice." Pet. App. 2.

[3] Komisar argued the FSA's reduction to penalties supported withdrawal, saying that reduction was "important in this case . . . because negotiations, plea negotiations, which this was about, are generated mainly by the mandatory minimum sentence." (Komisar, Hearing Tr., No. 3:15-cr-88, R.906, PageID# 6119.)

The Panel applied an overly strict prejudice standard. It applied that overly strict standard in its original opinion, relying on the standard for a claim Mohamed did not even raise. After Mohamed pointed out that stark error, the Panel amended its opinion, yet it insisted on applying the same, overly strict standard, albeit with a new rationale.

Mohamed argued that Komisar was ineffective for failing to use, *inter alia*, the Rule 11 violation to prove he had a "fair and just reason" to withdraw his plea. (Principal Br. at 39-42; Reply Br. at 3-4, 22-24.) Komisar's deficiency in this respect was obvious because his failure was due not to strategy but to ignorance of the law. *See* Pet. App. 9-10.[4]

Winning the plea-withdrawal motion would have restored Mohamed's right to trial. To prove prejudice for Komisar's failure to use the Rule 11 violation in support of that motion, Mohamed had to show there was a "reasonable probability" that, if Komisar had used it, the motion would have been granted, *viz.*, that the lenient fair-and-just-reason standard (described above *supra* page 4) would have been satisfied. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (prejudice for ineffective assistance is established by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The Circuit Courts uniformly apply this reasonable-probability standard when deciding if trial counsel's defective performance caused the loss of a motion dispositive to the outcome of a charge. *See, e.g., United States v. Mercedes-De La Cruz*, 787 F.3d 61, 69-70 (1st

[4] The Panel said, at a minimum, Komisar's error "raise[s] serious questions about whether counsel's failure is objectively deficient." *Id.* at 9. The Court then said maybe Komisar's "overall plea strategy" might have been effective since it got Mohamed the 35-year deal. *Id.* But that consideration cannot be controlling because Mohamed expressly wanted *out* of the 35-year deal—which was a decision entirely in his, not his lawyer's, power to make, *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018)—and his lawyer was obligated to work to achieve that goal. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Komisar had at his fingertips a very strong argument to achieve that goal, and he *deficiently* failed to use it due not to "strategy" but to "ignorance of the law." *Id.*

Cir. 2015) (suppression motion); *Hummel v. Rosemeyer*, 564 F.3d 290, 303 (3d Cir. 2009) (incompetency motion); *Young v. Dretke*, 356 F.3d 616, 619-620 (5th Cir. 2004) (motion to dismiss indictment); *United States v. Bankston*, 820 F.3d 215, 234 (6th Cir. 2016) (motion to dismiss count); *Tomlin v. Myers*, 30 F.3d 1235, 1240, 1243 (9th Cir. 1994) (motion to exclude eyewitness identification).

As discussed *supra* page four, a Rule 11 violation of the type made in Mohamed's case is "almost always" a valid reason for letting a defendant to withdraw a plea. *Ford*, 993 F.2d at 251; *see, e.g.*, *Hogg*, 723 F.3d at 737. Notably, the Panel never denied there is at least a reasonable probability Mohamed would have won his plea-withdrawal motion had counsel harnessed the Rule 11 violation. Indeed, because the motion was winnable even without harnessing the Rule 11 violation,[5] *it was, without a doubt, reasonably likely to win if counsel had harnessed that violation.*[6]

But it would be harder for Mohamed to show a reasonable probability that *he would have rejected the plea bargain* for 35 years had he known his minimum was actually 32 years. That is what he would have to show (1) to prove his plea involuntary, *United States v. Stubbs*, 279 F.3d 402, 412 (6th Cir. 2002), or (2) to prove defense counsel ineffective for misadvising him about the statutory range. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012).

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[5] *United States v. Sands*, No. 2:17-cr-261, 2019 U.S. Dist. LEXIS 28498, *2, 6 (S.D. Ohio Feb. 22, 2019) (holding the FSA reduction to 924(c) penalties *independently* sufficed to allow defendant to withdraw his plea).

[6] The remedy for this *Strickland* claim would differ from the remedy for proving a plea involuntary. It would be a remand for a new plea-withdrawal hearing. *See, e.g., Clinard v. Lee*, 722 F. App'x 552, 564-65 (6th Cir. 2018) (ordering new pretrial hearing as remedy); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (stating "the remedy for a Sixth Amendment violation should 'neutralize' the constitutional deprivation suffered by the defendant," and ordering return to plea bargaining).

In its original opinion, the Panel applied that harder standard. It held Mohamed must show "'that but for his counsel's erroneous advice, there is a reasonable probability that he would have [rejected] the plea.'" Pet. App. 24 (quoting *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003) and citing, *inter alia*, *Lafler*). It held he failed to meet that standard.[7]

In his panel rehearing petition, Mohamed pointed out he did not raise a *Lafler* claim, that the *Lafler* (or involuntary-plea) standard was overly strict for the claim he did raise, and so the Panel had essentially failed to address his actual claim. In response, the government asserted the "underlying inquiry" was whether Mohamed could "show a reasonable probability that the misstated mandatory minimum actually affected his decision to plead guilty," thereby claiming the *Lafler* standard applied. (Response to Rehearing Pet. at 13.) Yet it cited nothing to support that assertion—a conspicuous hole in a sophisticated brief. (*Id.*)

Despite that conspicuous hole, the Panel adopted the government's assertion, cobbling together a theory in putative support. Quoting *United States v. Wynn*, 663 F.3d 847, 852 (6th Cir. 2011), it started by stating the prejudice standard *correctly*. Pet. App. 6. Then it detoured. It pointed out that, if raised for the first time on appeal, a Rule 11 error is reviewed for plain error, which means the defendant would have to "'show a reasonable probability that, but for the error, he would not have entered the plea.'" Pet. App. 7 (quoting *Hogg*, *supra*). That is, he would have to satisfy the same *Lafler* or involuntary-plea standard. Further detouring, the Panel asked out of the blue: "So how do these review standards interact with our inquiry on collateral review—considering that claims for ineffective assistance of counsel should most frequently be brought through a § 2255 motion instead of a direct appeal?"

[7] Mohamed readily satisfies that involuntary-plea standard as well, as proven by comparing his case with the precedential *Hogg* case. (*See* Principal Br. at 25-26.) The Panel's opinions make this point hard to grasp because they discuss the record in such a disjointed manner.

The Panel answered its own question: "Ignoring this wrinkle would unjustifiably permit defendants to circumvent plain error analysis when we weight prejudice on collateral review." Pet. App. 8. That is, the Panel worried that the usual prejudice standard mandated by *Strickland* was a windfall for Mohamed. *Id.* And so it deviated from that standard:

> Thus, for purposes of showing prejudice under *Strickland*, in considering whether there is a reasonable probability that Haji-Mohamed would have prevailed on a motion to withdraw his plea based on a Rule 11 error, we may consider *whether there is a reasonable probability that the Rule 11 error caused his decision to plea guilty*.

Id. (emphasis added). *Voilà*: in the italicized language, the Panel resurrected the very same *Lafler* standard for prejudice that it had originally applied in error. The Panel reasoned that it had to deviate from *Strickland* and its progeny or else the relatively stricter prejudice standards for a late-raised substantive Rule 11 violation would be stripped of their practical effect (and Mohamed would evidently win).

Not only did that deviation violate the precedential holdings cited above, but the Panel's putative justification for that deviation has already been expressly rejected by this Court. In *Kimmelman*, the defendant's lawyer was ineffective for failing to litigate a Fourth Amendment suppression motion. Procedural rules barred review of the substantive Fourth Amendment claim on federal collateral review, effectively creating an insurmountable standard of review for that substantive claim. So instead of litigating the substantive claim, the defendant litigated a *Strickland* claim, arguing his lawyer was ineffective for failing to properly raise the Fourth Amendment claim. The State argued that, if the procedural bar to the substantive Fourth

Amendment claim were not applied to the *Strickland* claim, that bar "would be stripped of all practical effect." *Kimmelman*, 477 U.S. at 380.[8]

This Court held the State's concern was immaterial for two reasons, one doctrinal and the other pragmatic:

> (1) "While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims [*viz.*, the Fourth Amendment claim and the *Strickland* claim] are nonetheless distinct, both in nature and in the requisite elements of proof." *Id.* at 374; *see also id.* at 375 ("the two claims have separate identities and reflect different constitutional values").
>
> (2) Precisely because the accused has suffered from defective representation, "an accused will often not realize he has a meritorious ineffectiveness claim until he begins collateral review proceedings," and so it would be unfair to penalize him for not raising the underlying substantive issue sooner. *Id.* at 378.

In short, *Kimmelman* says a court, perceiving a windfall to a defendant, cannot deviate from *Strickland* in order to preserve a procedural hurdle that would have applied to an underlying substantive claim if the defendant were only litigating the substantive claim, not a *Strickland* claim. Despite *Kimmelman*, that is what the Panel did, fabricating its own rule of decision at loggerheads with *Strickland*.

[8] *See also id.* at 373 ("Petitioner's urge that the Sixth Amendment veil be lifted from respondent's habeas petition to reveal what petitioners argue it really is—an attempt to litigate his defaulted Fourth Amendment claim.").

REASON FOR GRANTING THE PETITION

The decision below conflicts with this Court's precedent, which is uniformly followed by the Circuit Courts.

Forty years ago, this Court established the prejudice standard for a claim of ineffective assistance of counsel: prejudice for ineffective assistance is established by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In *Kimmelman v. Morris*, 477 U.S. 365 (1986), this Court faced a situation where that standard would arguably appear a windfall for a post-conviction petitioner because the petitioner could win a *Strickland* claim that his lawyer was ineffective for failing to litigate a Fourth Amendment issue, but he could *not* win the substantive Fourth Amendment itself due to legal hurdles. This Court rejected the State's concern about a windfall, holding that concern immaterial, as discussed *supra* page 10. *Kimmelman*, 477 U.S. at 380; *see also Williams v. Taylor*, 529 U.S. 362, 393, 397 (2000) (refusing to modify *Strickland*'s prejudice standard).

Accordingly, the Circuit Courts have uniformly continued to apply the normal prejudice standard under *Strickland* when adjudicating a claim that trial counsel ineffectively handled a motion dispositive to the outcome of a charge. *United States v. Mercedes-De La Cruz*, 787 F.3d 61, 69-70 (1st Cir. 2015) (suppression motion); *Hummel v. Rosemeyer*, 564 F.3d 290, 303 (3d Cir. 2009) (incompetency motion); *Young v. Dretke*, 356 F.3d 616, 619-620 (5th Cir. 2004) (motion to dismiss indictment); *United States v. Bankston*, 820 F.3d 215, 234 (6th Cir. 2016) (motion to dismiss count); *Tomlin v. Myers*, 30 F.3d 1235, 1240, 1243 (9th Cir. 1994) (motion to exclude eyewitness identification).

Thus, precedent uniformly required the Sixth Circuit to ask this question regarding prejudice: If Mohamed's lawyer had harnessed the Rule 11 violation when arguing to let

Mohamed withdraw his guilty plea, is there a reasonable probability the motion would have been granted? The answer to that question was obviously "yes." And so Mohamed is obviously entitled to win his *Strickland* claim and win a new plea-withdrawal hearing. But to avoid that result, which the Panel considered an unjustified windfall, the Panel chose to apply a stricter standard for prejudice. Not only did that choice violate forty-year-old precedent (*Strickland*), but it also violated *Kimmelman*, which had expressly rejected that very same kind of deviation from *Strickland*.

In sum, the Sixth Circuit's decision to deviate from *Strickland* and *Kimmelman* plainly violates precedent and splits from the uniform practice of the Circuit Courts. The Court should grant certiorari, or it should summarily reverse and grant relief. *Thurston Motor Lines*, 460 U.S. at 535 (summarily reversing decision that violated this Court's precedent).

CONCLUSION

For the foregoing reasons, petitioner Aweis Haji-Mohamed respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit or that it summarily grant relief.

July 2, 2024

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