

Supreme Court Case No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

CLARENCE W. SEELEY, JR.,
Petitioner

vs.

STATE OF INDIANA,
Respondent.

**On Petition for a Writ of Certiorari
To the Court of Appeals of Indiana**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Counsel has a “critical obligation” to advise the client of the advantages and disadvantages of a plea bargain to meet the Defendant’s right to the effective assistance of counsel. *Padilla v. Kentucky*, 559 US 356, 370 (2010). The State has a duty not to interfere with the defendant’s right to counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). (“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”)

Mr. Seeley rejected a plea he would have otherwise taken because the State withheld information critical to his counsel’s advice regarding the plea. When counsel’s performance is deficient and causes the rejection of a plea, relief is granted to “neutralize the taint” of the constitutional violation. *Lafler v. Cooper*, 566 U.S. 156, 157-158 (2012).

The question not yet settled by this Court is whether there should be a remedy when the State interferes with counsel’s ability to advise his client as required by the Constitution, and the client rejects a plea agreement he would otherwise have taken and receives a greater sentence at trial.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Mr. Clarence W. Seeley, Jr. The Respondent is the State of Indiana.

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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

The Memorandum Decision of the Court of Appeals of Indiana, the highest state court to review the merits, filed May 31, 2017, appears at Appendix A1-A6 to the petition and is unpublished.

The Findings of Fact and Conclusions of Law issued by the Fayette Circuit Court on June 6, 2016, appears at Appendix B1-B4 and is unpublished.

The Order filed August 2, 2017 in the Court of Appeals of Indiana denying rehearing appears at Appendix C1.

The Order filed October 24, 2017 in the Indiana Supreme Court denying Petitioner's application for transfer appears at Appendix D1.

JURISDICTION

The Indiana Supreme Court denied transfer on October 24, 2017. A Petition for Extension of Time was timely filed under Application No. 17A757, and on January 18, 2018, Justice Kagan granted an extension of time to file the Petition for a Writ of Certiorari to and including March 23, 2018. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.

Constitution of the United States, Amendment XIV:

. . . No State shall . . . deprive any person of life, liberty or property without due process of law

INTRODUCTION

There is no case addressing governmental interference with counsel's ability to render effective advice in plea bargaining. Certiorari should be granted to address this legal lacuna.

In 2009 in Indiana, dealing in a controlled substance was a class B felony offense, which carried a maximum sentence of twenty (20) years. Ind. Code 35-48-4-2. If the State alleged a statutory aggravator, the charge could be elevated to a class A felony, in which event the maximum sentence was fifty (50) years. The aggravator is not a matter that may be found by a judge at sentencing. It is an element of the crime which must be proved and found by a jury beyond a reasonable doubt.

Clarence Seeley was charged with dealing a controlled substance, a class B felony. The State specifically alleged an aggravator, that the delivery occurred within 1,000 feet of a school or public park, raising the level to a class A felony.

Pursuant to local rules of Fayette County, Indiana, the State was required to file its list of witnesses and exhibits (including any scientific evidence or results of testing) 45 days in advance of trial. The State filed its witness and exhibit list, but specifically did *not* list any witness or exhibit that could prove the aggravator. Neither did it list any witnesses or exhibits to provide that Mr. Seeley had access to Lortabs. Finally, in compliance with the local rules, the State provided to Seeley's counsel the "buy" tape it intended to use at trial. The tape was largely inaudible. It was difficult to distinguish whether it was a man or woman on the tape and it was not possible to discern Mr. Seeley's voice.

Carol Weber, who had been appointed to represent Mr. Seeley, received two (2) plea offers from the State. The first was dated August 19, 2009, and the second was dated January 8, 2010. Both offers were similar and permitted Mr. Seeley to plead guilty to the class B felony charge but required him to receive the maximum penalty of twenty (20) years if he did so.

Counsel specifically discussed the advantages and disadvantages of the plea with her client as she was required to do to fulfill her Sixth Amendment obligation. *Padilla v. Kentucky*, 559 U.S. 356, 370 (2010); *Libretti v. U.S.*, 516 U.S. 29, 50-51 (1995). She and Mr. Seeley reviewed the witnesses and exhibits that had been disclosed to them by the State. Ms. Weber relied on the State's discovery disclosures in rendering her advice. She did not know, and had no reason to believe, that the State was withholding discovery it had been ordered to produce to her. Mr. Seeley rejected the plea because the State had no witnesses who could prove the A felony aggravator and that at trial, he could receive no more than 20 years, the plea offered, even if he were convicted. The plea offer expired the day before trial, January 31, 2010.

On the first day of trial, the State appeared with a new witness list adding four (4) new witnesses and adding two (2) new exhibits – prescription records showing that Mr. Seeley had a prescription for the drug sold (Lortabs) and an enhanced “buy” tape. The new witnesses and exhibits dramatically changed the State's case.

Without the new witnesses, the State could not prove the aggravator. Without the new prescription exhibit (and the newly added pharmacist witness

to testify to the exhibit), the State could not prove that Mr. Seeley had access to Lortabs to sell. Without the new enhanced “buy” tape, the State could not prove Mr. Seeley’s voice was on the tape and whether it was a man or woman’s voice on the tape. This was important as there were several people in the house and the informant advised law enforcement that he was intending to buy from a woman.

Both defendant and his counsel were misinformed as to the evidence against him. The State’s new witness list of previously undisclosed witnesses and exhibits dramatically changed the State’s case, and importantly, included a witness to prove the aggravator for the A felony. Counsel Weber attempted to obtain a continuance, but she was forced to proceed to trial without time to either plea bargain or depose the witnesses and prepare for their testimony. The State’s belated disclosure on the day of trial caused his counsel to be ineffective at trial because his counsel was forced to proceed to trial without any preparation of those witnesses and exhibits.

Mr. Seeley was convicted and sentenced to 50 years for the A felony offense, thirty (30) more years than he would have received under the plea agreement.¹

Mr. Seeley filed post-conviction proceedings in the trial court and alleged that the State had caused his counsel to be ineffective in plea bargaining by withholding its evidence in violation of clearly established court rules. Counsel

¹ Mr. Seeley was also convicted as an habitual offender and received 80 years, but the State conceded that the habitual offender finding was incorrect so the habitual offender finding was removed, and the sentence reverted to the original 50-year sentence.

would have advised Mr. Seeley differently about the plea if she had known that the State would, in violation of the Local Rules, appear the first day of trial with an additional witness list. Mr. Seeley would have accepted the plea if the State had provided him its true list of witnesses and exhibits. His counsel would have been in a position to effectively advise him as to the risks of a trial.

Counsel is clear that she could not render effective assistance as to the plea when a significant portion of the State's case had been withheld. She had to know the evidence against Mr. Seeley if she were to effectively advise him as to the advantages and disadvantages of the plea offer. Mr. Seeley was clear that he would have accepted the plea bargain if he had known the true witnesses against him. The post-conviction court agreed that Mr. Seeley had rejected the plea because of the State's non-disclosure; however, it did not find a Sixth Amendment violation because it concluded that it was the State's conduct and not defense counsel's actions that had caused Mr. Seeley to reject the plea. In so doing, the State denied Mr. Seeley's right to the effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668 (1984) focused on the fundamental fairness of the proceeding and counsel's role in producing just results. *Strickland* also recognizes that governmental interference violates the right to effective counsel if it interferes with the ability of counsel to make independent decisions.

Padilla holds that omitted advice is the same as wrong advice. Because the State withheld the names of its witnesses and crucial exhibits, counsel could not effectively advise her client. Counsel did not know that she was omitting advice or giving bad advice because of the State's interference in her ability to give

advice. Mr. Seeley seeks certiorari to define the parameters of, and the remedy for, ineffectiveness of counsel when the State has interfered in the plea-bargaining process.

STATEMENT OF THE CASE

A. Statement of the Facts

Carol Weber was appointed to represent Clarence Seeley on June 8, 2009. After she was appointed, the State made two (2) plea offers, one dated August 19, 2009, and the second dated January 8, 2010. Counsel Weber met with Mr. Seeley on several occasions to discuss trial strategy and to discuss the Plea Offer tendered by the State. At the time the second plea was offered, trial had been pending for months and witness and exhibit lists had been filed in apparent accordance with the local rules.

The local rules required disclosure of witnesses and exhibits 45 days before trial. Counsel believed she had received full disclosure from the State of its witnesses and exhibits. She had not. She consulted with Mr. Seeley about the second plea offer in January, a few days before trial. Trial was set for February 1, 2010, and the time for disclosing witnesses and exhibits had expired.

Both Plea Offers reduced the charge from a class A felony to a class B felony. A class B felony carried a range of sentence between 6 (six) and 20 (twenty) years while a class A felony carried a range of penalties between 20 (twenty) and 50 (fifty) years.

When counsel and Mr. Seeley discussed the plea, they discussed the witnesses and exhibits the State would present. They specifically discussed the absence of any witness who could testify as to the aggravating element and elevate the offense from a class B felony to a class A felony. The “main reason” Mr. Seeley rejected the plea offer was the State’s failure to disclose any witness

who could prove the aggravating element. The plea offer required him to accept the maximum sentence of the B felony (20 years). Because the plea offered him only the maximum sentence for a class B felony, the plea offered him no apparent advantage.

At the time the plea was being considered a few days before trial, the evidence was not strong on the class B felony offense, and there was no witness to elevate the offense to a class A felony. The State's case consisted of an informant who told police he thought he was going to purchase Lortabs from a woman in a residence. The purchase occurred in a home, and there were several people in the home.

The original "buy" tape was largely inaudible. Counsel and Mr. Seeley listened to the "buy" tape together. They could not distinguish voices, not even whether the voices were male or female. Neither of them could hear Mr. Seeley's voice on the tape. The State had no witnesses to testify to the transaction other than the informant, and he was inconsistent. There was no physical evidence other than the largely inaudible "buy" tape.

On the first day of trial, the evidence changed. By then a jury was waiting and the plea offer had expired. The State presented a new list of four (4) additional witnesses and two (2) additional exhibits. Three of these new witnesses substantially enhanced the likelihood the State could prove the underlying class B felony offense. These three witnesses included a pharmacist to testify that he had located pharmacy records establishing that Mr. Seeley had a prescription for Lortabs (the controlled substance sold to the confidential

informant); John Pause a technician who enhanced the “buy” tape; and a laboratory technician for lab results. The fourth new witness was a surveyor, who was the only witness who could and did prove the aggravating element raising the level of offense from a class B felony to a class A felony. None of these witnesses had been disclosed to counsel prior to the first day of trial.

In addition, counsel was handed two (2) new exhibits. The first exhibit was an enhanced “buy” tape on which voices could now be distinguished. The second exhibit was a prescription record showing that Mr. Seeley had a prescription for Lortabs. By adding these new witnesses and exhibits, the State was now able to present evidence to prove the aggravating element and raise the level of conviction to a class A felony with a maximum sentence of fifty (50) years. These new exhibits significantly strengthened the State’s case because the difference between a man’s and woman’s voice could be clearly discerned on the buy tape. The prescription records proved that Mr. Seeley had the capability of possessing and selling the very drug sold.

On January 28, 2010 a deposition of the confidential informant was taken at the jail with counsel and in Mr. Seeley’s presence. The State knew that trial was the following Monday, that it had a duty to disclose its witnesses and exhibits, and that the plea offer would expire before trial; nevertheless, the State remained silent as to the names of the new witnesses and the additional exhibits. Had the State made known that it had significant additional evidence, counsel would have been able to effectively discuss the plea with Mr. Seeley.

B. Prior Treatment of the Issues

On August 8, 2011, Clarence W. Seeley, Jr. filed a Petition for Post-Conviction Relief alleging that his counsel was ineffective. On March 9, 2016, the trial court conducted an evidentiary hearing. The witnesses at the hearing were trial counsel Carol Weber and Mr. Seeley.

On June 6, 2016, the trial court entered Findings of Fact and Conclusions of Law. The trial court found that the “main reason” the plea offer was rejected by Mr. Seeley was the State’s failure to disclose that a witness would testify to the aggravating factor, raising the offense from a class B felony to a class A felony. The court further found that the State added four (4) new witnesses and two (2) new exhibits on the morning of trial, and that Weber properly moved to exclude the new evidence as a violation of the court’s discovery order. The trial court concluded that counsel properly requested a continuance of the trial so that she could prepare for the new witnesses and exhibits. Counsel’s motions were denied and trial proceeded. The State was permitted to present the newly added witnesses and exhibits over proper objection.

Although the trial court concluded that Mr. Seeley had rejected the plea as a result of the State’s action in withholding its evidence, the trial court believed there was no Sixth Amendment violation of the right to effective assistance of counsel because trial counsel had done nothing wrong. It did not believe that the State could cause ineffectiveness. Therefore, the trial court’s review was limited to defense counsel’s actions, even though it agreed that the

State had violated the discovery order. Seeley specifically raised *Padilla* and *Lafler* in the trial court as grounds for relief.

On appeal to the Court of Appeals of Indiana, Mr. Seeley again argued that his right to counsel had been denied in plea bargaining and also at trial because the State had violated the order that it disclose its witnesses and relevant physical evidence. In the Court of Appeals, Seeley specifically argued that the right to counsel was intertwined with the due process clause and that he had been denied due process of law as guaranteed by the Fifth and Fourteenth Amendments when the State led him to believe that he had been afforded the right to discovery, and then surprised him with witnesses whose testimony substantially added to the weight of the State's case.

Seeley relied on the Indiana case of *Johns v. State*, 240 N.E.2d 60, 65 (Ind. 1968) which had previously held that it was a violation of due process to lead a defendant to believe he had been afforded the right of discovery when he had not. Seeley further argued that because his counsel had been misled, she could not be effective in the plea-bargaining process and at trial. She had to know the evidence against Mr. Seeley before she could effectively advise him. He again raised *Padilla* and *Lafler* and his constitutional rights under the Sixth Amendment.

On May 31, 2017, the Indiana Court of Appeals denied relief. The court's discussion on the merits is very short. The court recognized that there could be a Sixth Amendment violation resulting from direct governmental interference with the right to counsel, but it denied relief based on *United States v. Roy*, 855

F.3d 1133, 1148 (11th Cir. 2017) and *Perry v. Leeke*, 488 U.S. 272, 279 (1989). The Court of Appeals held that in order to make a claim for governmental interference, that interference must arise from either a statute or court order. Thus, there was no discussion on the actions of the State and its interference with counsel's effectiveness in the plea-bargaining process.

Mr. Seeley filed a Petition for Rehearing because the court had not addressed *Lafler* or *Missouri v. Frye*, 566 U.S. 134 (2012) (along with many other cases cited by Mr. Seeley), and because he believed the appellate court's interpretation that there must be a court order or statute was wrong. The Court of Appeals denied rehearing on August 2, 2017.

Mr. Seeley then filed a Petition to Transfer to the Indiana Supreme Court. Seeley raised the same constitutional issues (Fifth, Sixth, and Fourteenth Amendments) as he had previously raised. He further argued that the Court of Appeals had misinterpreted *Strickland* to add a requirement that, to show governmental interference causing ineffective assistance of counsel, the interference must arise from either a statute or a court order as set forth in *Roy*. He also again raised *Lafler* and argued that the Court of Appeals' interpretation rendered *Lafler* and *Strickland* at odds with each other. By failing to address *Lafler*, the Indiana Courts failed to give effect to, and harmonize, *Lafler* with *Strickland*. On October 24, 2017, the Indiana Supreme Court denied discretionary transfer.

At all levels of the proceeding, Mr. Seeley argued that the court should “neutralize the taint” of the constitutional violation (the governmental interference) pursuant to *Lafler*.

REASONS FOR GRANTING THE PETITION

- I. **The Court should grant the Petition because there is no case defining whether it is a Constitutional violation when the State interferes with counsel's ability to advise her client regarding a plea agreement, and the client rejects a plea he would otherwise have taken.**

A defendant may satisfy the familiar two-prong test of *Strickland v. Washington*, 466 US 668 (1984) by showing that his counsel's conduct was deficient, and that he suffered prejudice as a result; however, *Strickland* also recognized that governmental interference which affects counsel's ability to make independent decisions about how to conduct a defense may deprive a defendant of his Sixth Amendment right to counsel. The Court should grant the Petition for a Writ of Certiorari to set forth whether, and under what circumstances, the State's interference with counsel's ability to advise her client about a plea bargain is a constitutional violation of the right to counsel.

In order to appreciate the question presented and the basis for granting certiorari, it is important to review counsel's duty in advising the client about a plea bargain, and the implementation of that duty. A defendant has the right to the effective assistance of counsel during plea bargaining because it is a critical stage of the proceedings. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). *Hill v. Lockhart*, 474 U.S. 52 (1985).

“ . . . It is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forego.”

Libretti v. United States, 516 U.S. 29, 50-51 (1995).

A failure of counsel to provide this advice may form the basis of a claim of ineffective assistance of counsel. *Id.* at 51. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Court discussed counsel’s duties and whether omitted advice was the same as affirmative misadvice. *Padilla* found that there was no relevant difference “between an act of commission and an act of omission.” *Id.* at 370.

Padilla also concluded that limiting effective assistance of counsel claims to omitted advice would lead to absurd results and provide “an incentive to remain silent on matters of great importance.” *Padilla* at 370. Silence in important matters regarding a plea is “fundamentally at odds with the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement’.” *Id.*

This case raises the same concerns as *Padilla* but addresses improper silence by the State as opposed to improper silence by defendant’s counsel. The silence in Mr. Seeley’s case, as did the silence in *Padilla*, denied him the right to effective assistance of counsel in plea bargaining. His counsel could not evaluate the advantages and disadvantages of the plea offer because the State remained silent when it had a duty to speak.

The State had a duty, pursuant to *Fayette County LR21-CR00-CR-13*, to provide the defendant and his counsel the names of its witnesses and its exhibits 45 days in advance of trial. The State filed a witness list but did not include several critical witnesses and exhibits which completely changed the strength and complexion of the State’s case. The State’s conduct misled trial counsel into

believing that she had been afforded discovery in compliance with the court's trial rules and that she knew what the State's evidence was going to be.

Silence in the face of a duty to speak (i.e. provide court ordered lists of witnesses and exhibits) is no less damaging to the defendant than silence of his counsel by failing to inform the client of matters important to his assessment of a plea offer. In either event, the defendant is deprived of information necessary for him to evaluate the risks inherent in trial versus the wisdom of accepting a plea agreement. Pursuant to *Padilla*, "it is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the 'mercies of incompetent counsel'." *Id.* at 374 citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Mr. Seeley rejected a plea agreement because the State interfered with his counsel's ability to effectively advise him as to that plea agreement. In order to fulfill her duty of competently advising Mr. Seeley, she had to know the witnesses and evidence the State would present against him.

"Effective counseling is dependent upon knowledge of the facts, and it is essential that weaknesses as well as strengths be discovered and intelligently assessed."

Hale v. State, 54 N.E.3d 355, 358 (Ind. 2016).

The State is not required to make a plea offer; however,

" [w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."

Lafler at 168.

The State had a duty to follow court rules and provide its list of witnesses and exhibits to counsel in a timely fashion. If it had done so, counsel would have been able to fairly and effectively counsel Mr. Seeley regarding the plea.

When counsel was asked if the lack of information as to the State's witnesses impacted her ability to provide effective advice in the plea bargain process she stated:

“...if they were going to have those witnesses it was something Clarence had to know so *I couldn't give him information I did not have so yes, I could not be effective...*”

To establish that ineffective assistance of counsel led a defendant to reject a plea offer, he must show that the result would have been different with competent advice. *Lafler* at 163. Specifically, he must demonstrate that he would have accepted the plea offered, that the court would have accepted the plea, and that by going to trial he received a more severe sentence. *Id.* When a defendant makes this showing, the remedy should be to “neutralize the taint” of the constitutional violation, but not grant a windfall to the defendant. *Id.* at 170. The “taint” is typically neutralized by setting aside the more severe sentence and permitting the defendant to avail himself of the original plea.

The Court recently reviewed *Lafler* in *Lee v. U.S.*, 582 U.S.____, 137 S. Ct. 1958 (2017). The Court reviewed whether the erroneous advice he had received in the plea-bargaining process was prejudicial and whether it would have been rational for *Lee* to reject a plea in the face of seemingly insurmountable evidence. “The question is whether *Lee* can show he was prejudiced by that erroneous advice.” *Id.* *Lee* received bad advice because his counsel was

misinformed as to the law. Mr. Seeley received bad advice because his counsel was misinformed by the State as to the evidence against him. In both instances, the client was prejudiced by erroneous information.

Geders v. United States, 425 U.S. 80 (1976) addressed governmental interference in counsel's independent decision making and found it to be a constitutional violation of the right to counsel. In *Geders*, the defendant was prevented from consulting with counsel in an overnight recess. The prosecutor had made the request of the court. The lack of *opportunity* for consultation overnight denied the defendant his right to counsel guaranteed by the Sixth Amendment. *Id.* at 91.

Geders recognized the importance of the role of counsel, "because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Id.* at 88. A defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 89 citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). *Geders* neither reviewed prejudice nor discussed the harmless error doctrine. As in *Geders*, Mr. Seeley was denied the opportunity for meaningful consultation at a critical stage of the prosecution because his counsel was deprived of information she was entitled to know. There was a court rule in effect, which the State disregarded.

At the time Counsel Weber and Mr. Seeley were consulting about a plea agreement, they did not know that the State would add four (4) new witnesses on the day of trial. In addition to witnesses, the State also added an enhanced CD, which the State alleged contained Mr. Seeley's voice, and pharmacy records

showing that Mr. Seeley actually had a prescription for the pills sold. The State's ability to prove that Mr. Seeley had such a prescription showed his ability to provide the pills to the informant. Evidence that an otherwise mumbling or unclear CD had been enhanced so that it was possible to (theoretically) hear Mr. Seeley's voice made a significant increase in the strength of the State's case. Counsel should have been given this information, along with the other information not disclosed, especially that regarding the charged aggravator, in order to counsel Mr. Seeley regarding the acceptance of a plea.

By charging Mr. Seeley with an aggravated offense, the State knew it would have to prove the aggravator beyond a reasonable doubt. By waiting until the last minute and until the plea offer had already expired to provide evidence and witnesses, which it knew was necessary, affirmatively misled defense counsel.

It is well-established that a client who receives bad advice from counsel and foregoes a plea bargain is entitled to relief if he receives a more severe sentence. *Lafler. Padilla* makes clear that there is no difference between no advice or bad advice. Thus, it is no less harmful for a Defendant to be harmed by no advice or bad advice of his counsel because the State has caused that advice, than it is if his counsel is unaware of the law. Incompetence can be created by defense counsel or created by situations beyond his or her control.

The facts are not in dispute. The post-conviction court found that Mr. Seeley rejected the plea because the State had not disclosed its evidence in accordance with its duty to do so. Mr. Seeley was denied a remedy in the trial court because it was not his counsel, but the State who had acted improperly. A

defendant whose counsel is unable to advise him about a plea due to the State's conduct is no less prejudiced than a defendant whose counsel has been deficient.

Whether ineffective counsel originates with defense counsel or with the State, this Court should provide a remedy and "neutralize the taint" of the Constitutional violation. This Court's intervention is necessary to uphold the guarantees of the Sixth Amendment and to provide a remedy for interference in counsel's ability to provide Constitutionally adequate assistance in evaluating a plea offer.

This Court should grant certiorari to address ineffectiveness in the plea-bargaining process which has not been caused by defense counsel. The focus should be on "neutralizing the taint" to the Defendant when he has suffered prejudice and is then further deprived of his right to receive counsel during the plea negotiation process.

If a defendant may only prove ineffective representation resulting from his counsel's actions, and not from outside influences, similarly situated defendants will be left without such a remedy.

II. The Court should grant the Petition because Indiana, in reliance on 11th Circuit precedent, has imposed a condition not imposed by this Court in *Strickland*, which condition improperly expands the requirements of *Strickland*.

Indiana relied on an 11th Circuit decision of *United States v. Roy*, 855 F.3d 1133, 1148 (11th Cir. 2017) to impose a condition that the State's interference with the effective assistance of counsel must arise from either a statute or a court order. This is wrong and imposes a condition not expressed or intended by *Strickland*. *Strickland* states:

“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”

Strickland at 686.

This quotation is supported by a number of cases from this Court, the first of which is *Geders v. United States*, 425 U.S. 80 (1976). Nothing in either *Strickland*, *Geders*, or the other cases cited in *Strickland* suggest that governmental interference must come from a statute or court order. By imposing its incorrect interpretation, Indiana has caused a conflict between *Strickland* and *Lafler* which does not, and should not, exist.

Lafler provides a remedy to defendants who have rejected a plea offer due to the ineffectiveness of their counsel. This Court has been responsive when governmental conduct has rendered counsel’s assistance to the defendant ineffective. *U.S. v. Morrison*, 449 U.S. 361, 364 (1981).

It matters not to a defendant whether his counsel was unable to render proper advice about a plea bargain because of his counsel’s inadequacies or because his counsel was caused to be ineffective by the State. The result is the same. The defendant has been prejudiced by rejecting a plea due to the failure to receive adequate advice about that plea offer. The origination of the inadequacy does not lessen the prejudice. It would not be fundamentally fair to provide some defendants a remedy denied to others merely because of the origin of the inadequate advice over which inadequacy the defendant has no knowledge or control.

This Court should grant certiorari to establish clearly that governmental interference need not result only from a statute or court order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Caroline B. Briggs", is written over a horizontal line.

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