No. 19-992

In the Supreme Court of the United States

GREG SKIPPER, Warden

Petitioner,

v.

CURTIS JEROME BYRD,

Respondent.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALASKA, ARIZONA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF THE PETITIONER

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STATEMENT OF AMICI INTEREST

Sometimes, courts expand a legal doctrine "bit by bit, without much thought being given to any single step, until it has assumed an aspect so different from its origin" that it ceases to be recognizable. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970). So it is with the Court's "ever-growing right-to-counsel precedents" interpreting the Sixth Amendment. *Garza v. Idaho*, 139 S. Ct. 738, 759 (2019) (Thomas, J., dissenting). That body of precedent has, bit by bit, transformed the narrow Sixth Amendment right into a broad, detailed scheme regulating the conduct of criminal defense attorneys.

In one of the furthest extensions to date, this Court held that criminal defendants have a Sixth Amendment right to "effective" counsel anytime "a plea bargain has been offered." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). The Court of Appeals below extended this extension a bit more: it held that, even if no "plea bargain has been offered," *id.*, the Sixth Amendment guarantees a right to an attorney's help *obtaining* a plea offer. Pet.App.2a–3a.

Neither Michigan nor the *amici* States seek to revisit existing right-to-counsel precedent. But every time the federal courts write another entry into the constitutional rulebook, they make it a bit more challenging for States to obtain and defend lawful convictions. Thus, the *amici* States join Michigan in resisting applications of this Court's precedents that

stretch the already-stretched right to counsel any further.[1]

SUMMARY OF ARGUMENT

In a sense, this case presents two questions, one doctrinal and one more theoretical. The doctrinal question is this: Do criminal defendants have a Sixth Amendment right to effective counsel with regard to plea bargains that prosecutors never offered? The answer to that question is "no." The theoretical question asks whether courts should decline to extend precedents when doing so creates a rule that contradicts "the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). The answer to that question is "yes." This case offers the Court a chance to say so.

1. As a doctrinal matter, criminal defendants have no right to effective counsel in plea negotiations until the prosecution offers a plea deal. This Court's cases read the Sixth Amendment to guarantee "a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome." *Lafler v. Cooper*, 566 U.S. 156, 160 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012). But the Court has repeatedly cautioned that no defendant has a "right to be offered a plea." *Frye*, 566 U.S. at 148. And it has never recognized a right to effective assistance in

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[1] The *amici* States, who are submitting this brief under Rule 37.4, notified counsel for the parties of their intent to file an *amicus* brief more than ten days before its due date.

connection with plea negotiations before a "plea offer is made." *Lafler*, 566 U.S. at 168.

In its decision below, the Sixth Circuit extended these cases, holding that the Sixth Amendment confers a right to effective assistance in negotiating a plea deal the prosecution never offered. In essence, the Court held that the "right to counsel" includes "the right to an *unoffered* plea deal." Pet.App.23a (Griffin, J., dissenting) (emphasis added). Relying on this rule, the Sixth Circuit awarded habeas relief to Curtis Byrd.

The Sixth Circuit's decision bears all the usual hallmarks of a *certiorari*-worthy case. To begin, it departs from other courts' applications of *Fyre* and *Lafler*. Other circuits and state supreme courts have held that a plea offer is a prerequisite to an ineffective-assistance claim based on plea bargaining. The Sixth Circuit held otherwise.

In addition to sowing confusion, the Sixth Circuit's decision sows chaos—it will create immense practical problems. For starters, prosecutors, along with lower courts and defendants, will struggle to apply the Sixth Circuit's rule. Ineffective-assistance claims require proof of prejudice. But how is anyone supposed to conduct the prejudice analysis in this context? Courts cannot know, with any confidence, what a prosecutor would likely have done in a years-old hypothetical plea negotiation. They will be left to guess whether a defendant suffered any prejudice from his counsel's supposed failure to be more effective in plea negotiations that never happened.

If courts somehow find a violation, what are they supposed to do for a remedy? Under *Lafler*, the proper remedy when an attorney fails to tell her cli-

ent about a plea deal "may be to require the prosecution to reoffer the plea proposal." *Lafler*, 566 U.S. at 171. Prosecutors cannot reoffer pleas they never offered. If the State refuses to offer a plea deal, does the court invalidate the conviction, putting the parties back at square one? Must it *require* the State to come up with a plea offer? Either way, the Sixth Circuit's test risks coercing prosecutors into extending plea deals that they "never formally contemplated or created in the first instance," creating a "'windfall'" for defendants. Pet.App.37a (Griffin, J., dissenting) (quoting *Lafler*, 566 U.S. at 170).

2. Underneath all this lies a broader concern. This Court's Sixth Amendment right-to-counsel cases have spawned a great many procedural rules that jeopardize state convictions. The States have no basis for objecting to rules appearing in the Constitution itself. But they can validly object to rules that derive not from the Constitution, but rather from legal doctrines judicially extended, piece by piece, beyond their justifiable origins. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970). Although this Court's cases have extended the right to counsel beyond its origins, that hardly justifies continuing to do so. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194 n.16 (1999) (quoting Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 169 (1990)). It is time to hit the brakes. This case provides the Court a chance to say that the Sixth Amendment right to counsel has been stretched far enough, and that it ought not be stretched further still.

ARGUMENT

The Court of Appeals found a Sixth Amendment violation because it determined that the "ineffectiveness" of Curtis Byrd's lawyer "deprived" Byrd "of the opportunity to secure a plea deal." Pet.App.2a. But Michigan never offered Byrd a plea deal. It never even began negotiating one. This case therefore presents the question whether the Sixth Amendment guarantees defendants a right to have effective assistance in negotiating a plea bargain even in cases where the prosecution makes no plea offer.

The answer is "no," as Michigan's petition ably explains. That petition gives more than enough reason for granting *certiorari*: the Sixth Circuit's holding creates a circuit split and creates immense practical problems. The *amici* States will touch on these points. But the brief focuses on a broader point: this case presents the Court with an opportunity to clarify that *stare decisis* does not require extending past decisions when doing so means adopting a rule at odds with the Constitution's original meaning. *Lafler* and *Frye* indisputably had no basis in the Constitution's original meaning. While no one is asking the Court to overrule those cases, their lack of grounding in constitutional text is reason enough not to extend them any further.

I. The Sixth Circuit, by stretching the right to counsel to cover hypothetical plea deals, created both a circuit split and practical problems.

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012); *see also Missouri v. Frye*, 566

U.S. 134, 144 (2012). That is the holding of *Lafler* and *Frye*. Those decisions unquestionably broadened the right to counsel. But both came with a limiting principle: Because "a defendant has no right to be offered a plea," *Frye*, 566 U.S. at 148, defendants cannot invoke *Lafler* or *Frye* if "no plea offer is made," *Lafler*, 566 U.S. at 168; *see Frye*, 566 U.S. at 147.

Eight years down the road, some courts have kept on observing these limits, refusing to extend *Lafler* and *Frye* to cases in which the prosecution never offered a plea deal. *See* Pet.App.29a–33a (Griffin, J., dissenting) (compiling cases). The Third Circuit, for instance, recently explained that the right to counsel "does not attach to all aspects of negotiation between defense counsel and prosecutor. Its protections are triggered by formal offers." *United States v. Tarnai*, 782 F. App'x 128, 131 (3d Cir. 2019). And the Tenth Circuit, in a decision by then-Judge Gorsuch, noted that the right to counsel does not extend to a defense counsel's failure "to request a favorable guilty plea." *United States v. Rendon-Martinez*, 497 F. App'x 848, 849 (10th Cir. 2012) (Gorsuch, J.). Decisions from other federal and state supreme courts are in accord. *See, e.g.*, *Delatorre v. United States*, 847 F.3d 837, 845 (7th Cir. 2017); *Ramirez v. United States*, 751 F.3d 604, 608 (8th Cir. 2014); *Sanchez v. Pfeiffer*, 745 F. App'x 703, 705–06 (9th Cir. 2018); *Sutton v. State*, 759 S.E.2d 846, 852 (Ga. 2014); *Fast Horse v. Weber*, 838 N.W.2d 831, 840–41 (S.D. 2013); *Bell v. State*, 71 A.3d 458, 463 (R.I. 2013).

The Sixth Circuit, in its decision below, went the other direction. It held that *Lafler* and *Frye* can apply even in cases where the State never offered a

plea deal. Pet.App.10a–11a. It thus interpreted *Lafler* and *Frye* to guarantee a right to have counsel try to negotiate a plea deal. *See id.* The only other circuit to embrace such a rule is the Fourth, which has approved of an ineffective-assistance claim resting on an attorney's "unreasonabl[e] fail[ure] to pursue plea bargaining." *United States v. Pender*, 514 F. App'x 359, 361 (4th Cir. 2013).

The Sixth Circuit, in addition to contradicting decisions from around the country, created serious practical difficulties for lower courts, criminal defendants, and prosecutors. To understand why, consider that, even in cases where the prosecution made a plea offer, *Lafler* and *Frye* require a great deal of "retrospective crystal-ball gazing" to determine whether a counsel's ineffectiveness during plea bargaining prejudiced a defendant. *Frye*, 566 U.S. at 154 (Scalia, J., dissenting). To prevail under those decisions, criminal defendants must retroactively convince a court, to "a reasonable probability," of all the following: *First*, that "they would have accepted the earlier plea offer" with effective counsel. *Second*, that the prosecution would not have canceled the deal. *Third*, that the trial court would have accepted the deal. And *fourth*, that "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147 (majority).

Extending this framework to capture hypothetical plea offers takes everyone further away from reality—piling "supposition upon supposition." *Bell*, 71 A.3d at 463. Before even getting to the four questions from *Frye*, the court will need to ask: Would the State have entered plea negotiations if asked? If so, would the State have formally offered a plea deal?

If so, what would that hypothetical, never-offered deal have looked like? These extra questions will often be difficult for courts to confidently answer, since they focus on the prosecution's subjective mindset during earlier parts of a case. Relatedly, these questions will set the table for intrusive discovery about the prosecution's plea-bargaining strategy, both as to the specific case and others like it.

The Sixth Circuit's approach also comes with no acceptable remedy. Crafting a remedy for a *Lafler* or *Frye* violation is no mean feat: the remedy must do enough to "neutralize" the constitutional problem, but not so much as to "grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Lafler*, 566 U.S. at 170. An earlier plea offer provides a helpful benchmark for courts to consider. *Lafler*, for example, taught that a court can often cure any plea-bargaining deficiency by simply ordering the State "to reoffer the [earlier] plea agreement." *See id.* at 174. But what is the solution without an earlier offer? If the solution returns a case to when the ineffective bargaining occurred (normally pretrial), then that squanders the resources the State used to secure the conviction. If the solution assumes a plea offer the State never made—or requires the State to offer a plea it would not have considered—it grants the defendant a "windfall" and intrudes on the prosecutor's discretion. *See* Pet.App.37a (Griffin, J., dissenting) (quoting *Lafler*, 566 U.S. at 170).

* * *

The lower courts need guidance regarding the question whether criminal defendants have a right to

effective counsel in connection with plea bargaining that never occurred. And States (along with federal prosecutors) in the Sixth Circuit need relief from the confusion certain to ensue from the decision in this case. The Court should grant *certiorari*.

II. The Court should accept this case to clarify that its right-to-counsel precedents must not be extended any further beyond the Constitution's text.

All of that is reason enough to grant *certiorari*. But there is another reason as well. This case provides the Court an opportunity to embrace an approach to *stare decisis* that would respect this Court's precedents, the Constitution's text, and the country's federalist structure. More precisely, it gives the Court a chance to explain that *stare decisis* does not require extending precedents when doing so would contradict the Constitution's text.

Over the years, this Court's constitutional cases have crafted a "detailed code of criminal procedure." Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 954 (1965). Most of this code now applies to the States through incorporation under the Fourteenth Amendment. As a result, a single state conviction must navigate a maze of constitutional issues—the prohibition of unreasonable searches and seizures, the right to confrontation, the protection against self-incrimination, the guarantee of a jury trial, and the bar on cruel and unusual punishment, among others. *Id.* at 931–32. What is more, over the years the Court has shown "a tendency to read [constitutional] provisions with ever increasing breadth," which vastly expands potential "claims of error in criminal cases." Henry

J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 156 (1970).

To state the obvious, the stakes of these constitutionalized procedural rules are quite high. Every rule provides a basis to reverse a state conviction. Such reversal frustrates "the States' sovereign power to punish offenders." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotation omitted). Reversal also comes with "substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *Lafler*, 566 U.S. at 170 (internal quotation omitted). And on top of all this, imposing mandatory procedural rules denies the States freedom to experiment with other (perhaps better) approaches to criminal law. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. at 950.

Of course, the States cannot legitimately complain about the difficulty of following procedural rules derived from the Constitution itself. And, given the strength of *stare decisis*, they can complain only so much about the burden of complying with existing precedent, wrongly decided or not. But respect for *stare decisis* does not require *extending* those precedents. To the contrary, "fidelity to original meaning counsels against further extension of" precedents when doing so would put the case law at odds (or further at odds) with the Constitution's text. *Hester v. United States*, 139 S. Ct. 509, 509 (2019) (Alito, J., concurring in the denial of certiorari); *accord Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting) (advocating for this rule in the context of the dormant Commerce

Clause). Courts should thus "resolve questions about the scope of [] precedents in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

To see this approach in action, one need look only to last term, and this Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). There, the Court recognized that its method-of-execution case law had stepped beyond the Eighth Amendment's original meaning. *Id.* at 1125–26. While *Bucklew* did not "revisit[] that debate," it refused to adopt a rule that would adopt even greater protection. *Id.* at 1126. Or consider *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). That case declined to overrule *Flast v. Cohen*—the case that gives taxpayers standing to challenge government expenditures under the Establishment Clause. *Id.* at 146–47 (Scalia, J., concurring). Still, the Court refused to extend *Flast* to give taxpayers standing to challenge *tax credits* under the Establishment Clause. *Id.* at 141–42 (majority).

This approach to constitutional *stare decisis* allows the Court to simultaneously respect its precedents, the Constitution, and—in cases bearing on state authority—our federalist structure. Most important, the approach allows the Court to do all this in a principled fashion.

This is an ideal case for application of this approach. As an initial matter, the Sixth Circuit's decision required extending, not merely applying, *Lafler* and *Frye*. Again, those cases held that the Sixth Amendment guarantees criminal defendants effec-

tive counsel in connection with the decision whether to accept a plea deal. *Frye*, 566 U.S. at 148; *Lafler*, 566 U.S. at 168. At the same time, both cases addressed what the Sixth Amendment requires of defense attorneys only once the prosecution offers a plea deal. Neither addressed counsel's responsibilities before the prosecution makes an offer. Since there are plenty of non-arbitrary reasons for distinguishing between the two scenarios—including the difficulty of adjudicating ineffective-assistance claims relating to plea negotiations that never occurred, *see above* 7–8—*Lafler* and *Frye* cannot fairly be read to compel the decision below.

The question therefore becomes whether to extend those cases. And to answer that question, this Court should consider the fact that extending these cases would require extending the Sixth Amendment right to counsel even further beyond its original understanding.

The Sixth Amendment says, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right to counsel, as originally ratified, "meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) (citing *United States v. Van Duzee*, 140 U.S. 169, 173 (1891); W. Beaney, Right to Counsel in American Courts 21, 28–29 (1955)). It "grew out of the Founders' reaction to the English common-law rule that denied counsel for treason and felony offenses with respect to issues of fact, while allowing counsel for misdemeanors." *See Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting). Commenters had sharply criticized

this English common-law practice of denying a defendant the right to obtain counsel. *See* 4 William Blackstone, Commentaries on the Laws of England 349–50 (1769). Thus, by the time of the Constitution's adoption, most States had rejected the practice. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. at 944. The Sixth Amendment's language on counsel "was intended to carry this [rejection] forward." *Id.*

For over a century, the historic meaning of the right to counsel prevailed. *See, e.g.*, *Van Duzee*, 140 U.S. at 173; *Bute v. Illinois*, 333 U.S. 640, 661 n.17 (1948). That changed in the 1930s, when the Court extended the right to counsel to guarantee court-appointed counsel in federal criminal cases. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938); *see also Powell v. Alabama*, 287 U.S. 45, 71 (1932). Then, in the 1960s, the Court extended the right to appointed-counsel to cover the States. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963).

Over the next few decades, the Court extended the right still more. Today, the right to counsel includes the "right to the *effective* assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The right applies even in cases where the defendant "retained" his own lawyer. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985). Thus, what began as a right to choose a lawyer became a right to cry foul if the lawyer chosen performed badly. And the right to effective counsel—whether retained or appointed—applies not just at trial, but at any "critical stage of a judicial proceeding." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). Eventually, the right came to guarantee "a remedy

when inadequate assistance of counsel caused nonacceptance of a plea offer." *Lafler v. Cooper*, 566 U.S. 156, 160 (2012).

The Sixth Amendment right to counsel is thus a case study in what Judge Friendly meant when he wrote of legal doctrines being "expanded bit by bit, without much thought being given to any single step, until" they assume "an aspect so different from [their] origin." Friendly, *Is Innocence Irrelevant*, 38 U. Chi. L. Rev. at 142. Through appeals to "wise policy," *Zerbst*, 304 U.S. at 463, "obvious truth," *Gideon*, 372 U.S. at 344, and "just results," *Strickland*, 466 U.S. at 685—and through plain old reasoning by analogy—the Court has extended the right to counsel, extended its extensions, and extended its extensions' extensions.

The point here is not to call for "reappraisal" of steps taken already. Friendly, *Is Innocence Irrelevant*, 38 U. Chi. L. Rev. at 142. To the contrary, many of those steps resulted in decisions deeply embedded in the American legal fabric—*Zerbst* and *Gideon*, for example. (The States do not even *want* the Court to overrule these cases; Ohio and the other *amici* States provide counsel to indigent defendants as a matter of state law and sound policy.) But even a heightened form of *stare decisis* requires adhering to precedent, not extending it. And when presented with the choice to take one step further from the Constitution, the better choice is to stop stepping. By granting *certiorari* and reversing, the Court can make that clear.

CONCLUSION

The Court should grant the *certiorari* petition.

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