No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH LAVIGNE,

Petitioner,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit violated the Sixth Amendment and this Court's precedent in *Strickland v. Washington*, 466 U.S. 668 (1984), *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Lafler v. Cooper*, 566 U.S. 156 (2012) by requiring a habeas petitioner asserting ineffective assistance of counsel to provide more than a reasonable probability of prejudice when counsel failed to advise the petitioner that a charge to which he pled guilty was time-barred as a matter of law?

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The initial opinion of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction and sentence can be found at *Lavigne v. Hooper*, No. 23-30807, 2025 WL 522580 (5th Cir. Feb. 18, 2025) (unpublished), *opinion withdrawn and superseded on reh'g*, No. 23-30807, 2025 WL 1904564 (5th Cir. July 10, 2025). The Fifth Circuit's opinion on rehearing, which granted rehearing on the evidentiary hearing issue but affirmed the denial of relief on the ineffective assistance of counsel claim, is set forth at App. 001 and can be found at *Lavigne v. Hooper*, No. 23-30807, 2025 WL 1904564 (5th Cir. July 10, 2025) (unpublished).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

This case presents the question of what showing a habeas petitioner must make to establish *Strickland* prejudice when trial counsel fails to advise the defendant that a charge to which he is pleading guilty is time-barred as a matter of law. The Fifth Circuit held that Petitioner Kenneth Lavigne failed to establish prejudice even though: (1) he attempted to withdraw his guilty plea at the sentencing

hearing before the court imposed sentence; (2) he immediately filed a *pro se* motion to quash upon learning the charge was time-barred; (3) he filed sworn declarations in state habeas proceedings stating he would not have pled guilty had he known; and (4) the Fifth Circuit itself found his trial counsel constitutionally deficient for failing to advise him of the time bar.

I. Factual background

In 2013, Louisiana charged Petitioner Kenneth Lavigne with second-degree murder, in violation of LA REV. STAT. § 14:30.1 (1990), in the cold case prosecution of the 1990 death of Jeannie Lavigne, who was the aunt by marriage to Petitioner. ROA.540. In 2016, as part of a negotiated plea agreement, the State dismissed the murder charge and instead charged Lavigne with one count of manslaughter in violation of LA REV. STAT. § 14:31 (1990) (which carried up to 21 years imprisonment) and one count of second degree kidnapping in violation of LA REV. STAT. § 14:44.1 (1990) (which carried a term of 5 to 40 years imprisonment). ROA.408-12.

What Lavigne did not know at the time he entered his plea was that the kidnapping charge was time-barred under Louisiana law. Louisiana has a prescriptive period of six years for felony crimes that mandate imprisonment at hard labor for less than a life term. LA. CODE CRIM. PROC. art. 572(1) (1990). Second-degree kidnapping is one such crime. *See* LA REV. STAT. § 14:44.1 (1990) ("Whoever commits the crime of second degree kidnapping shall be imprisoned at hard labor for not less than five nor more than forty years."). As Lavigne committed his crime in 1990, this

six-year prescriptive period had run by 1996—nearly two decades before he was charged with second-degree kidnapping in 2016.

Neither the "Boykin Form," nor the plea colloquy contained any advice of, or waiver of, the prescriptive periods by Lavigne. *See* ROA.408-12 (Boykin Form); ROA.624-53 (Transcript). Lavigne was never advised by his attorneys that he was waiving prescription or even what the statute of limitations was for his offenses. ROA.280. Had counsel filed a motion to quash on this basis, the charge would have been dismissed as a matter of law.

Nevertheless, Lavigne pled guilty to both charges under the mistaken belief that he would receive a lenient sentence. At sentencing, when Lavigne realized that he had received bad counsel and advice from his appointed attorneys, he attempted to withdraw his plea *before* the sentence was imposed. ROA.552-54. His motion to withdraw his plea was denied, ROA. 554, and he and was sentenced to twenty-one years for manslaughter and forty years for kidnapping, to run consecutively—a total of sixty-one years imprisonment and an effective life sentence. ROA.54-56.

II. Proceedings below

Upon learning the kidnapping charge was time-barred when he arrived in prison, Petitioner filed a *pro se* motion to quash the second degree kidnapping charge as prescribed. ROA.531-37. This motion was denied by the district court. ROA.538. Lavigne appealed the denial of the motion to quash, again *pro se*, and was denied by the Louisiana First Circuit Court of Appeal, ROA.831, and the Louisiana Supreme Court. ROA.835.

He subsequently filed a *pro se* state application for post-conviction relief alleging ineffective assistance of counsel. ROA.577-81 (application); ROA.587-676 (memorandum in support). The first of his five claims was that his trial counsel failed to ever inform him that the second degree kidnapping charge that was a part of his plea was prescribed and that "[h]ad he known that the charge was time barred, he would not have pled guilty." ROA.593-94; *see also* ROA.595 ("Had petitioner known beforehand that the second degree kidnapping charge had prescribed, he would not have pled guilty to that charge. In fact, the record reflects that prior to sentencing on the kidnapping charge petitioner attempted to withdraw his guilty plea.").

The state trial court denied relief:

> Mr. Lavigne knowingly, intelligently, freely, and voluntarily negotiated a plea agreement in order to avoid a life sentence. It was made abundantly clear to Mr. Lavigne before the plea was accepted that he would receive no less than 21 years on the Second Degree Kidnapping charge, and it would be within the Court's discretion as to whether that sentence would run concurrent or consecutive to the sentence he received for manslaughter. Both the State and Mr. Lavigne are bound by the terms of that agreement. He cannot complain now that the charge to which he negotiated to plead guilty was prescribed at the time.

ROA.119. Louisiana appellate courts declined review. ROA.871, 197.

Lavigne then filed a federal habeas petition under 28 U.S.C. § 2254. ROA.5. Lavigne again raised five issues, the first being "The trial court erred in denying petitioner's claim of ineffective assistance of trial counsel that failed to inform petitioner that the second degree kidnapping charge to which he would plead guilty was time barred by statute of limitations." ROA.15. The district court, after determining the state court had not properly applied the *Strickland* standard and

therefore reviewing *de novo*, denied relief. The district court concluded that trial counsel was not deficient for failing to advise Lavigne about the statute of limitations. ROA.325-33, 358.

The Fifth Circuit granted a certificate of appealability and initially affirmed in an unpublished opinion issued February 18, 2025. *Lavigne v. Hooper*, No. 23-30807, 2025 WL 522580 (5th Cir. Feb. 18, 2025) (unpublished), *opinion withdrawn and superseded on reh'g*, No. 23-30807, 2025 WL 1904564 (5th Cir. July 10, 2025). Lavigne filed a petition for panel rehearing, and the Fifth Circuit granted rehearing on a separate issue not relevant to this petition. App. 001; *Lavigne v. Hooper*, No. 23-30807, 2025 WL 1904564 (5th Cir. July 10, 2025) (unpublished).

In its decision, the Fifth Circuit first agreed that the state court applied the incorrect standard under *Strickland* thus providing *de novo* review of Lavigne's ineffectiveness claim. App. 006. Next, the Fifth Circuit reversed the district court's conclusion that that trial counsel's performance was constitutionally deficient for failing to advise about the statute of limitations. App. 009-012. The Fifth Circuit analyzed Louisiana's statute of limitations regime and determined that the second degree kidnapping charge was indeed long prescribed and that "trial counsel rendered ineffective assistance when he failed to file a motion to quash on that basis." App.012.

But the Fifth Circuit nevertheless affirmed the denial of the petition on the statute of limitations issue because it concluded that Lavigne failed to establish prejudice. The court stated that Lavigne must "affirmatively prove, not just allege,

prejudice," and that he failed to establish "a reasonable probability that Lavigne would not have entered the plea deal because one of the charges was time-barred given how advantageous the plea could have been—and Lavigne alleges he was assured it would be." App. 014.

In its opinion on rehearing, the panel acknowledged that Lavigne had attempted to withdraw his plea at the sentencing hearing, filed a *pro se* motion to quash upon learning of the time bar, and submitted sworn declarations stating he would not have pled guilty had he known. App. 013-015. Nevertheless, the panel concluded this evidence was insufficient. The court reasoned that Lavigne's attempt to withdraw his plea occurred because the sentences were consecutive, not because he knew about the time bar. The court further determined that Petitioner's motion to quash, filed after he received a sixty-one-year sentence, said little about his original calculation when facing a potential life sentence. Finally, the court dismissed Petitioner's sworn statements as post hoc assertions that cannot support an ineffective assistance claim. App 013-015.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve whether the Fifth Circuit has imposed a prejudice standard that exceeds what the Sixth Amendment and this Court's precedent require. The decision below conflicts with this Court's holdings in *Strickland*, *Hill*, and *Lafler* by demanding proof beyond the "reasonable probability" standard. It also creates a circuit split with the Second Circuit regarding whether courts may assume a defendant would not plead guilty to charges known to be time-

barred. Finally, the question presented is of exceptional importance because it affects how courts nationwide evaluate prejudice in guilty plea cases where counsel fails to advise defendants about fatal defects in the charges.

I. The Fifth Circuit's heightened prejudice standard conflicts with this Court's holding that a defendant need show only a "reasonable probability" of a different result

The Fifth Circuit's decision is incompatible with this Court's clearly established precedent regarding the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has held that to establish prejudice in the guilty plea context, a defendant must establish a reasonable probability that, but for counsel's deficient conduct, he would have instead proceeded to trial, or pled guilty on more favorable terms. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985); *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012). A reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. Critically, a defendant need not show that counsel's deficient conduct more likely than not altered the outcome. *Id.*

The Fifth Circuit paid lip service to this standard but applied a far more demanding test. Despite acknowledging that Lavigne need only show a "reasonable probability" and not that counsel's errors "more likely than not altered the outcome," App. 012-14, the panel concluded that Lavigne's multiple pieces of evidence—his contemporaneous attempt to withdraw his plea, his immediate motion to quash upon learning of the time bar, and his sworn statements in post-conviction proceedings—were insufficient to meet his burden.

The panel's analysis reveals that it required something approaching metaphysical certainty rather than reasonable probability. The court dismissed Lavigne's attempt to withdraw his plea by parsing his possible motivations and concluding it must have been about consecutive sentences rather than the time bar. It rejected his motion to quash as not probative because his circumstances had changed after sentencing. It discarded his sworn statements as mere "post hoc assertions." In so doing, the Fifth Circuit demanded a type and quantum of proof that no habeas petitioner could reasonably provide, particularly one proceeding *pro se* in state court.

This demanding standard cannot be squared with this Court's directive that a reasonable probability is simply one sufficient to undermine confidence in the outcome. When a defendant attempts to withdraw his plea before sentencing, immediately challenges the conviction upon learning of a fatal defect, and consistently maintains under oath that he would not have pled guilty had he been properly advised, confidence in the outcome should be undermined. The Fifth Circuit's contrary conclusion demonstrates it has imposed a heightened standard incompatible with *Strickland* and its progeny.

Moreover, the Fifth Circuit's decision violates *Lee v. United States*, 582 U.S. 357 (2017). *Lee* states that in the plea context, "we do not ask whether, had he gone to trial, the result of the trial would have been different than the result of the plea bargain." *Id.* at 364. Instead, the courts consider whether the defendant has demonstrated a "reasonable probability that, but for counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial." *Id.* at 364-65. *Lee* was clear that "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to *contemporaneous evidence* to substantiate a defendant's expressed preferences." *Id.* at 369 (emphasis added).

Here, the record is full of Lavigne's *contemporaneous* actions—attempting to withdraw the plea and filing a motion to quash—support rather than contradict his claim that knowledge of the time bar would have affected his decision. *Lee* does not stand for the proposition that sworn statements can never establish prejudice or that contemporaneous actions must be given the uncharitable interpretation the Fifth Circuit applied here.

The prejudice standard exists to ensure defendants receive effective assistance of counsel, not to create an insurmountable barrier for those whose counsel was admittedly deficient. By requiring proof beyond reasonable probability, the Fifth Circuit has rendered the prejudice prong virtually impossible to satisfy in guilty plea cases, particularly for defendants who only learn of their counsel's errors after conviction. This heightened standard conflicts with this Court's precedent and warrants review.

II. The Fifth Circuit's decision creates a circuit split on whether courts may assume a defendant would not plead guilty to time-barred charges

The Fifth Circuit's decision highlights a circuit split on a recurring and important question: whether a defendant who pled guilty to a time-barred charge must affirmatively prove he would have rejected the plea, or whether courts may

assume that no rational defendant would knowingly plead guilty to a charge that could be dismissed as a matter of law.

The Second Circuit addressed this precise issue in *United States v. Hansel*, 70 F.3d 6 (2d Cir. 1995). There, the court held that when a defendant pleads guilty to time-barred counts based on counsel's deficient advice, the defendant's waiver of the statute of limitations defense cannot be deemed knowing and intelligent. The court stated unequivocally: "we may assume that [the defendant] would not have pled guilty to counts that he knew to be time-barred." *Id.* at 8. The Second Circuit thus recognized that the nature of the error—counsel's failure to inform the defendant that charges are legally invalid—supports a presumption of prejudice.

The Fifth Circuit's approach stands in stark contrast. Rather than recognizing the obvious prejudice that flows from pleading guilty to a charge that could be dismissed on purely legal grounds, the Fifth Circuit placed the burden squarely on Petitioner to prove what the Second Circuit recognized as common sense: that a defendant would not knowingly plead guilty to a time-barred charge. The Fifth Circuit demanded contemporaneous evidence and rejected Petitioner's sworn statements, his attempt to withdraw the plea, and his immediate filing of a motion to quash as insufficient proof.

This circuit split matters. Time-barred charges appear with some frequency in criminal cases, and defendants regularly assert ineffective assistance claims based on counsel's failure to identify statute of limitations defenses. The Second Circuit's approach properly recognizes that when counsel fails to advise a defendant about a

fatal legal defect in a charge, the defendant suffers prejudice as a matter of course—no rational person would plead guilty to a charge that could be dismissed. The Fifth Circuit's contrary approach requires defendants to produce evidence that, in many cases, simply will not exist or will be subject to post hoc reinterpretation, as occurred here.

The conflict between these approaches cannot be reconciled. One circuit presumes prejudice from the nature of the error; the other demands affirmative proof even when the defendant provides multiple forms of evidence supporting his claim. This Court should grant certiorari to resolve this split and provide clear guidance to lower courts about the proper prejudice standard in cases involving guilty pleas to time-barred charges.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this October 8, 2025,

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