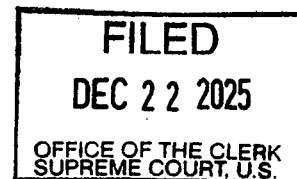


Case No. 25-7556

UNITED STATES SUPREME COURT

ORIGINAL



Hung Duong NGUON, Petitioner,

v.

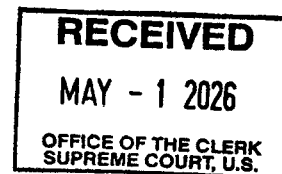
James S. HILL, Warden - Respondent.

No. 25-2784
September 30, 2025

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

Brief for Petitioner

Hung Duong Nguon, CDCR #: K-49644, Housing: B-7-246, Richard J. Donovan Correctional Facility,
480 Alta Road, San Diego, CA 92179-0001. In Pro Se (Note: Nguon-pronunciation: "noon".)



QUESTIONS PRESENTED

The State does not dispute that they offered a plea agreement of 9-year to defendant before trial began. Furthermore, for the record the State does not dispute there was a close-court hearing among defendant's counsel, the prosecutor, and the judge, where the prosecutor began complaining to counsel that the State's plea offer of 9-year needed to be made aware to defendant, which the judge got involved and ordered counsel to tell defendant about the offer. And lastly, the State does not dispute that since 2005 to the present day, the State have continuously deemed defendant a "danger to society" in order to retain him in state custody. The questions presented are:

1.) Consistent with the holding in *Strickland v. Washington*, 466 U.S. 668 (1994)—which held that to prove prejudice on a claim of ineffective assistance of counsel a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"—has prejudice been shown where defense counsel deliberately failed to inform defendant of the plea offer, until the prosecution urged and the judge ordered counsel to do so, to which counsel's ill advised defendant to reject the plea bargain, and as a result of counsel's failure defendant ended with a sentence of "Life plus 3 years" when he could have pled guilty to a 9-year prison sentence before trial took place?

2.) Could counsel's action and inaction to the above question created deficient performance and ineffective assistance of counsel in violation of the Sixth Amendment?

3.) What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

4.) Whether a defendant must demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test set out in *Strickland v. Washington*, 466 U.S. 668 (1994), for establishing ineffective assistance of counsel.

5.) Whether death behind bars from continue incarceration is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

6.) Whether the Due Process Clause of the Fourteenth Amendment was violated from a state trial court failing to instruct the jury in the penalty phase that under state law the defendant can be deemed ineligible for parole indefinitely if the State continue to cite defendant's future dangerousness is at issue, where the state law have continuously prohibited the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

7.) Can a continue incarceration of a 19-year-old first-time offender who have been incarcerated for over 30 years for a conviction of kidnapping during the commission of carjacking violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment?

8.) Whether the Eighth Amendment provision against cruel and unusual punishment is offended when the State [continuously cites Mr. Nguen is a "danger to society" in order to retain] him behind bars — incapacitating him to the point that he will eventually died in state custody that runs in conflict when the State offered him a heavily discounted sentence of 9-year before trial?

9.) Does such an excuse from the State violate the Eighth and Fourteenth Amendments, since the State did not view Mr. Nguen a "danger to society" no more than 9-year of incarceration based on The plea agreement?

PARTIES TO THE PROCEEDING

Hung Duong Nguen was the defendant/petitioner in the proceedings below.

James S. Hill was the plaintiff/respondent in the proceedings below.

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INTRODUCTION

Mr. Hung Duong Nguon received advice from his counsel that was objectively unreasonable. The advice was simple and breathtakingly wrong; namely, that Mr. Nguon just had a mistrial and the State is offering 9-year before the second trial take place. Counsel explained to Mr. Nguon that the State had a weak case that's why they were offering him such a low deal when he's facing a life sentence, which counsel persuaded Mr. Nguon to decline the offer and take the case to trial. *Williams v. Taylor*, 529 U.S. 362, 391 (2000); *Strickland*, 466 U.S. at 694.

The results of counsel's affirmative ~~in~~ willingness on his own accord to notified Mr. Nguon of the nine (9) years plea offer are equally clear on the record. Mr. Nguon would have accepted the 9-year plea agreement and not have gone to trial but for his counsel's errors. Under the first part of the *Strickland* standard, this Court should find that Mr. Nguon's trial counsel had an absolute duty to keep Mr. Nguon informed of plea communications. Mr. Nguon had not prevented his defense counsel Bruce Evan BROWN from carrying out this obligation. Rather, "E[ven] the record from court transcript clearly shows the prosecution complaint to BROWN inside the courtroom, due to the fact BROWN collected ["not"] to tell Mr. Nguon at all about the plea agreement, wherefore the judge ordered BROWN to tell Mr. Nguon about the plea offer. BROWN then told Mr. Nguon to decline the offer. (*Strickland v. Washington*, 466 U.S. 668 (1984).) Nonetheless, Mr. Nguon relied on the advice, rejected a favorable plea offer he otherwise would have accepted, stood trial, and suffered the very consequence his counsel had assured him he was going to win the trial. Overall, Mr. Nguon was prejudiced by his counsel's misadvice. This Court's established Sixth Amendment precedents holding that plea bargaining is a critical stage in criminal proceedings and that counsel's bad advice at that stage warrants relief.

Mr. Nguon at that time was a young kid, he didn't know any better. Whatever his counsel was telling him, he just agreed and follow along. The trial did ~~in~~ not cure counsel's bad advice at all. In fact, it made it much worst to the point that he's condemned to die behind bars by the State. Any competent lawyers would have advised Mr. Nguon to pled guilty and received the 9-year offer and

avoid a life sentence. *Harrington*, 562 U.S. at 104.

Habeas courts have long had broad authority to fashion remedies in cases such as this one. Mr. Nguon seeks to make the ["informed"] choice that his counsel's misadvice had taken from him and to accept the same deal that the State had previously and openly offered. Cases involving similar, but less stark, circumstances have resulted in similar remedies. Such a remedy comports with the traditional authority of habeas courts to tailor a proper right for such a grievous constitutional wrong.

This Court in *Coker v. Georgia*, 433 U.S. 584 (1977), indicated that a punishment is unconstitutionally excessive if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592. The disproportionality of Mr. Nguon's life sentence ^{compare} to others with much more serious crimes of murder and kidnapping for torture/ransom, the record clearly indicated from 1995 to 2026 the State requires them to do much less time than Mr. Nguon before the State released them from prisons. Retribution from the State against Mr. Nguon who listened to the ill-advised of his counsel to decline the offer and take the case to trial serve no legitimate penal objective other than cruel and unusual punishment. Moreover, the State cannot retract by saying they never offered Mr. Nguon a 9-year plea bargain when it is on record. By offering Mr. Nguon such a heavily discounted sentence, an inference may properly be raised that the State did not view Mr. Nguon as a "danger to society" and that the State did not feel "the need to counter his threat with incapacitation." *Andrade*, 538 U.S. at 81, 123 S.Ct. 1166 (Souter, J. dissenting); *Reyes*, 399 F.3d at 970 n. 9; *Fuentes v. Tilton*, 2008 WL 2619803, at 13; *People v. Hallen*, 17th Cal. App. 4th 1080, at *1091.

This Court has long held "that it is a precept of justice that punishment for crime should be graduated and proportion to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Thus Court has thus interpreted the Eighth Amendment to "proscribe[] 'all excessive punishments, as well as cruel or unusual punishments that may or may not be excessive.'" *Kennedy*, 554 U.S. at 419 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n. 7 (2002)). Even though the jury and sentencing judge did En3ot sentenced Mr. Nguon

So then the State says it's still ten years too late if Montgomery is taken into consideration. Mr. Nguyen then argued in 2016 when Montgomery came into effect, his case was not applicable at the time because he was not a juvenile, nor given LWOP to qualified and appeal. Furthermore, in 2016 Mr. Nguyen have been incarcerated less than 20 years, not enough to argued his continue incarceration was the functional equivalent of "Life-without-parole." Only until Mr. Nguyen had reach[ed] that threshold of being incarcerated for over 25 years did he qualified to contest the State have equivalently turned his continued incarceration into a de facto of "Life-without-parole," with the addition of West's Ann. Cal. Penal Code §2905 supporting his contention of being a "Youth offender" at the time of his offense did he set forth to argued of evolving laws giving retroactive to his case that required review from the court before permitting the State to have their way and condemn him to die behind bars, since the State repeatedly justified his sentence was legal when it was given at sentencing.

Petitioner is not challenging his sentence, he is challenging the State's false pretense by deeming him a "danger to society" indefinitely that no jury or sentencing judge agreed; plus the State offered him a 9-year imprisonment in exchange for a guilty plea before trial could very well draw the inference that the State did not view him as a "danger to society" over 9-year. *Andrade*, 538 U.S. at 81, 123 S.Ct. 1166 (Souter, J. dissenting).

SUMMARY OF ARGUMENT

Graham v. Florida, 130 S.Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), identified numerous features of adolescence that make teen offenders less culpable than adults: Biologically and physiologically and psychologically, teens are given to impulsive, heedless, sensation-seeking behavior and excessive peer pressure. Through inexperience and neurological underdevelopment, they lack mature behavioral controls. They are shaped by environments they did not choose and cannot change or escape. Their youthful characters are transitory, their adult character unpredictable.

These features are widely recognized by our legal and cultural institutions. Each bears centrally on the retributive, deterrent, and incapacitative justifications for Life sentence like in Mr. Nguon's case given possible for parole within 7 years turned into over 30 years where no parole is given at all but demand the maximum exposure of a lifetime imprisonment until death even though Mr. Nguon did not commit any new offense or convicted in court of any new crime that would justified the State collaterally attacking his sentence by deeming him incorrigible and a "danger to society" indefinitely raises serious questions. It also threatens "public confidence in the fairness of our system of justice."

A lifetime imprisonment for a young teenager first-time offender who committed a nonhomicide offense is exceptionally cruel and unusual, as well as excessive punishment that's in conflict with our Constitution. *Gall*, 552 U.S. at 54 (excessive punishment may decrease respect for the law). The Eighth Amendment precludes the State that mandates extreme prison sentences for especially young teenager like Mr. Nguon, whose nonhomicide offense were not among the "worst of the worst." Interpreting the Eighth Amendment's prohibition on cruel and unusual punishments, this Court has repeatedly stressed that youth offenders are a special and unique class of criminal offenders who have a distinct level of maturity, mental capacity, and vulnerability to negative influences.

The State of California created a liberty interest for parole. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures. (*Swanheart v. Cooke*, 562 U.S. —, 131 S.Ct. 859, 862, 178 L.Ed.2d 732 (2010) (per curiam) (citing *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) (emphasis in original).) Nonetheless, the sentencing court sentenced Mr. Nguon to "life plus 3 years" with the possibility of parole. If no "possibility of parole" was in played, the State would not have requested the sentencing judge to sentence Mr. Nguon to "life plus 26 years." Nevertheless, the State now argued they have full discretion and authority to maximize his "Life plus 3 years" to a [life]time of continued imprisonment without parole. This conclusion is wrong because it (a) is wholly at odds with the purposes and judicial construction of the parole system for inmates with life sentences in California, and in particular with the liberal construction afforded West's Ann. Cal. Penal Code §§3040, 3041, 3041.5 and 3041.7 by the Legislature; (b) does not serve the purposes of Youth Offender according to P.C. §3051; and (c) is in conflict with this

Court's decisions in *Miller v. Alabama*, 132 S.Ct. 2455 and *Montgomery v. Louisiana*, 577 U.S. 190.

Initially, the jury and sentencing judge permitted Mr. Nguyen to be sent to CDCR to be [rehabilitated] for a short period of time and be release on parole, not punish him until death by old age. Only those incapable of positive change — those who are irreparably corrupt — may be sentenced to "life-without-parole," which in Mr. Nguyen's case the State [never] proved beyond a reasonable doubt before a jury that he's irreparably corrupt and must be locked in prison for the remainder of his entire life. The State[s] finding, without an articulated basis, that a nineteen (19) years old child like Mr. Nguyen is permanently incorrigible and beyond rehabilitation can lead the majority of our democratic society to feel confused about the judgment on a nonhomicide offense with no physical harm committed to the victim could warrant such harsh[ed] punishment. When we explore for the past 30 years, California have granted parole to [t]housands of lifers convicted for murder(s) of every kinds that we can imagine — some are quite heinous, sadistic, and maliciously cruel to their victims before they were murdered in cold blood, whereas, Mr. Nguyen's offense is not murder and over 30 years of his continued incarceration the State continuously deem[ed] him as a "danger to society." Even when we delve into similar situated offense, we have kidnappers that torture their victim(s), sexually molested little kids, or holding them for ransom — here, these lifer inmates the State find them suitable to be released back into the community within 10-20 years. While on the contrary, Mr. Nguyen's kidnapping of a 27-year-old man involved no torture, no ransom, in fact, Mr. Nguyen didn't even lay one finger on the victim, but the State somehow, someway find it's justifiable to [con]demned him to die behind bars even though his individual culpability to his offense "does [not]" warrant such extreme and finality of punishment that no amount of rehabilitation would do, nor any [e]xtended years under State custody would [e]ver seem enough cannot altogether be aligned with our Constitution.

Courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. See also *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (quoting these last two statements from *Strickland*). In determining prejudice from deficient performance, a court "must consider the totality of the evidence before the court or jury." *Strickland*, at 696. *Strickland* established the applicable standard. The specific context of particular cases determines

how that standard is applied.

Here Petitioner have demonstrated the requisite prejudice under the second prong of the Strickland test based on the fact he could have taken the 9-year Offer had it not been for counsel's error producing a large effect on his sentence of "Life plus 3 years" could be condemned on the basis. "There is a very strong reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." (*Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993); *Durrive v. United States*, 4 F.3d 548, at 551 (7th Cir. 1993). Thus, not only did this amount to constitutionally deficient performance, but was so deficient as to raise a presumption of prejudice, resulting in a violation of Petitioner's Sixth Amendment right to counsel.

The Ninth Circuit did not properly reviewed the merits and the underlying state court decision in determining that Mr. Nguyen was entitled to habeas relief on his grounds. Mr. Nguyen's claims were subject to the AEDPA standard of review in 28 U.S.C. §2254(d)(1) and §2254(d)(2) and that the Ninth Circuit's decision were contrary to or an unreasonable application of this Court's clearly established federal law. As explained in Justice O'CONNOR's opinion for the Court in *Williams v. Taylor*, 529 U.S. 362, 412-413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.

As this Court "has repeatedly stressed," it is "important" to the "Judiciary and the public" for courts to "correct[] grossly prejudicial errors of law that undermine confidence in our legal system." *Greenlaw v. United States*, 554 U.S. 237, 262 (2008) (Alito, J., dissenting). Especially so with plea agreements because this phase is critical to defendant's fate. Serious separation of powers concerns attend sentences

unauthorized by Congress or the Constitution, given that the legislature, not the judiciary, authorizes punishment. Here in Mr. Nguon's case, we have the State's offering a 9-year plea agreement, trial ensued resulted in a conviction, the State's requested Mr. Nguon be sentence to "life plus 26 years," the sentencing judge rejected the request and sentenced Mr. Nguon to "life plus 3 years." The State never filed an appeal from their rejected "life plus 26 years" request, instead the State found a loophole where by citing Mr. Nguon continue to pose a "danger to society" in order to keep him in prison for as long as they want. Mr. Nguon argued he has a due process right to appeal in court that he is not a danger to society. The State replied he doesn't have a due process right because his sentence is legal, and that they are under no obligation to give him parole, which Mr. Nguon contested, "What is the point of the State requesting "life plus 26 years," when just a sticker of "life" by itself give the State full power to maximize it to 100 years to life if they wanted to. The State has threatened Mr. Nguon's liberty and undermine public confidence in our criminal justice system.

"[T]he right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759 (1970). The Sixth Amendment protects a defendant against an attorney's deficiencies which adversely affect the outcome of the criminal case. Had counsel explained to Mr. Nguon that if he's convicted in trial and end up with a life sentence, the State can use that life sentence to condemn him to die behind bars. And even though his charges doesn't carried LWOP, the State is under no obligation to never grant him parole in 7-year or 15-year or even 25-year, that life by itself is enough for the State to condemn him until he die behind bars. Mr. Nguon's counsel didn't tell him none of this, and neither did the judge at the plea agreement phase. Had counsel did his job by fully informed Mr. Nguon that if he does not take the 9-year plea offer, he's risking of spending the rest of his life behind bars and die in prison. There is no way in a million years would Mr. Nguon declined the "9-year plea agreement" after being fully informed. The Court has often used the standards of the American Bar Association as guidelines for determining whether counsel's performance is reasonable. See, e.g., *Rompilla v. Beard*, 545 U.S. at 387; *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Padilla*, 130 S.Ct. at 1482. The ABA's Model Rules of Professional Conduct require a lawyer "to promptly inform the client of any decision or circumstance with respect to which the client's informed consent... is required by these rules." ABA Model Rule 1.4(a)(1). One such decision is whether to plead guilty. *Id.*, Rule 1.2(a).

The Comment to Rule 1.4 makes clear, as the first example of this duty to inform the client, that "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case must promptly inform the client of its substance." *Id.*, Rule 1.4, Comment 2. The ABA's Standards Criminal Justice likewise require that "[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." ABA Criminal Justice Standard 4-6.2.6D. Mr. Nguon's counsel persuaded him not to take the plea bargain, counsel didn't fully inform about the life sentence as mentioned above, and court transcript shows counsel didn't even want to tell Mr. Nguon at all about the State's Offer, so when Mr. Nguon didn't take the "9-year plea agreement" — he did *not* make an "informed consent decision" that's required by our Constitution ultimately prejudice him at the "Plea Agreement Phase," as well as the "Trial Phase," and "Sentence Phase." His trial, conviction, and sentence cannot be upheld due to his counsel's error prejudicing Mr. Nguon at every level of the court proceedings.

ARGUMENT

La Hung Duong Nguon was Denied Effective Assistance of Counsel when His Lawyer Failed to Inform Him of the State's Plea Offer.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel during plea bargain negotiations. (*Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-1481 (2010).) The standard is the familiar one set out in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant establishes ineffective assistance by showing (1) "that counsel's representation fell below an objective standard of reasonableness," *Id.* at 668, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Premo v. Moore*, 131 S.Ct. 733, 737-738, 739-740 (2011); *Wright v. Van Patten*, 552 U.S. 120, 124 (2007); *Hill*, 474 U.S. at 57-58.

Mr. Nguon's counsel failing to inform him of the prosecutor's plea offer unquestionably fell below an objective standard of reasonableness. Had counsel acted with reasonable professional competence as he should have according to the ABA Model Rule and ABA Criminal Justice Standard, Mr. Nguon would have pleaded guilty and received

the "9 years plea agreement." Because of counsel's deficient performance, however, Mr. Nguon received a sentence of "life plus 3 years," where he's been incarcerated for over 30 years. But for counsel's deficient performance, the result of the proceeding in Mr. Nguon's case would have been different. Strickland, 466 U.S. at 694.

The well-established Strickland standard of prejudice appropriately and effectively addresses counsel's deficient performance. Plea negotiations are a critical stage in the criminal process. Padilla, 130 S.Ct. at 1486. When the prosecution complaint to Mr. Nguon's counsel of his failure to inform Mr. Nguon about the "9 year plea agreement"—that was bad. As counsel replied: "I didn't know I had to tell him,"—did not make it any better. The prosecutor told the judge, "Counsel have a conflict of interest with Mr. Nguon" (emphasis added)—this made it even worst as the opposing counsel can see this. The judge got involved and told counsel the "9 years plea agreement" needed to be told to Mr. Nguon. Counsel telling Mr. Nguon to decline the "9 years plea agreement," where he spend more time persuading Mr. Nguon to decline the Offer, and zero time explaining of the consequences of life imprisonment does not equate to reasonable professional competence. Thus, when Mr. Nguon declining the Offer he did not make an "informed consent decision" because his counsel's error deliberately holding back vital information, since he at that time was not aware a life sentence with possibility of parole the state could hold him in prison until he died. This lack of awareness undermines the reliability of the "declining of the plea" and renders it fundamentally unfair and unreliable, because Mr. Nguon would have taken the Offer had he been fully informed, and counsel not persuading him to decline it. Limiting "relief" to standing trial does not remedy the prejudice.

A. The Right to Effective Assistance of Counsel Ensures the Fairness of ["All"] Stages (i.e. Preliminary Hearings, Plea Negotiations, Trial, and Sentencing) of a Criminal Prosecution.

The Sixth Amendment guarantees effective assistance of counsel "in all criminal prosecutions," from the moment the defendant is arrested to the moment he is sentenced. (Powell v. Alabama, 287 U.S. 45, 57 (1932); Rompilla v. Beard, 545 U.S. 374, 380 (2005).) Effective assistance of counsel protects the integrity of criminal prosecutions, not just criminal trials. This Court is well aware pretrial plea negotiations are a critical stage

of the criminal process. (Burger v. Kemp, 483 U.S. 776, 807-808 (1987).) The Sixth Amendment also guarantee counsel to assure aid to Mr. Nguon when he's confronted with both the intricacies of the law and the advocacy of the prosecutor. (United States v. Louveig, 467 U.S. 180, 189 (1984).) Effective counsel is necessary to provide fairness to the defendant and reliability to the proceeding because the complex nature of criminal law demands an expertise and experience well beyond the un-trained layperson. The inherent process of negotiating a plea agreement required a well-trained counsel to navigate through these complexities that Mr. Nguon can't do by himself. When counsel made the choice not to tell Mr. Nguon about the "9 years plea agreement" and played dumb with the prosecution that "he didn't know he had to tell Mr. Nguon about it," can well be said: (1) Counsel failed to negotiate a plea agreement on behalf of Mr. Nguon; (2) Counsel who's a licensed lawyer who had passed the state bar exam made a choice not to tell Mr. Nguon about the offer present a conflict of interest that he's out to harm Mr. Nguon, rather than to help Mr. Nguon who didn't know anything about the law at the time; (3) When the prosecution told the judge counsel have a problem with Mr. Nguon is enough to lay the foundation of prejudice because counsel's actions and inactions presented indisputable fact that Mr. Nguon's counsel abandoned him when Mr. Nguon needed his counsel the most at this critical stage that seal his fate; (4) By these three accounts, we can extrapolate a conflict of interest existed between counsel and Mr. Nguon, because Mr. Nguon thought his counsel was trying to help him, but the moving force of counsel's actions and inactions presented a preponderance of evidence his counsel was out to harm him; (5) Even after the judge told counsel to tell Mr. Nguon about the "9 year plea agreement," counsel consciously elected to "not" inform Mr. Nguon about the life sentence that the State can hold him in prison until he die if he's convicted in a jury trial; (6) "Misinformed" did not stop there due to the fact counsel persuaded Mr. Nguon to decline the plea agreement; (7) Counsel replied to the prosecutor that he didn't know it was an offer he needed to tell Mr. Nguon could well be said there existed "no" "negotiating a plea agreement" between counsel and the prosecutor, as an "effective assistance of counsel" would have thought on Mr. Nguon behalf (e.g. "Nine years is kind of high," effective assistance of counsel ("EAC") said, "he's a young kid, first-time offender... maybe you can look at seven—if possible." And so on as the negotiating between two counsel.); and this zero negotiating a plea agreement for Mr. Nguon prejudice him to the point that Mr. Nguon was "without" counsel during the "Plea Agreement Phase;" (8) Overall, Mr. Nguon did not make an "informed consent decision" when he declined the "9 years plea agreement."

"Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." *Preme*, 131 S.Ct. at 741 (emphasis added). A layperson defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. at 53 (emphasis added). The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Rob v. Flores-Ortega*, 528 U.S. at 471; citing *United States v. Cronin*, 466 U.S. 648, 659 (1984). The plea negotiation process is a critical stage of the criminal proceeding involving a confrontation between an expert prosecutor and an equally expert defense attorney who must protect the defendant's rights throughout the process that settles the defendant's fate in 95 percent of all cases. Without effective assistance of defense counsel, this process breaks down and the validity and reliability of the outcome of the proceeding is called into question.

Had the prosecutor not offered a plea bargain, the trial court could not have compelled him to do so. (*Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).) Once plea negotiations begin, however, Mr. Ngoun has a constitutional right to effective assistance of counsel during the plea negotiation process. That is the right Mr. Ngoun was denied. Furthermore, it is because the prosecutor made the "9 years plea agreement" with defense counsel rather than to Mr. Ngoun personally that effective assistance of counsel is required during the plea negotiation process.

B. Failure to Inform Mr. Ngoun of a Plea Offer Amounts to Constitutionally Deficient Performance.

No duty is more basic to the role of counsel than that of informing Mr. Ngoun of a plea offer made by the prosecutor. "An attorney undoubtedly has a duty to consult with the client regarding important decisions," including an offer to plead guilty, which "is an event of signal significance in a criminal proceeding." (*Florida v. Nixon*, 543 U.S. 175, 187, (2004) (internal quotation marks omitted).) This Court has made it clear that "it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement." (*Chibretti v. United States*, 516 U.S. 29, 50 (1995).) Since counsel has a constitutional obligation to consult with Mr. Ngoun about a plea offer, and the advantages and disadvantages of accepting

a plea offer, counsel has the constitutional obligation to inform Mr. Nguon that the prosecutor has made a plea offer. Counsel's failure¹ to advise Mr. Nguon of the "9 year plea agreement" offer amounted to constitutionally deficient performance, as stated on page 1st from number 1-8. *Rodriguez-Rodriguez*, 929 F.2d at 752; *Pham*, 317 F.3d at 182; *Caruso*, 689 F.2d at 438; *Brannen*, 48 Fed. Appx. at 53; *Arnold v. Thaler*, 630 F.3d 367, 370 (5th Cir. 2011) (per curiam); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), cert. denied, 479 U.S. 937 (1986); *Blaylock*, 20 F.3d at 1465-66; *United States v. Castro*, 365 Fed. Appx. 966, 967 (10th Cir. 2010); *Oliver v. United States*, 292 Fed. Appx. 886, 887 (11th Cir. 2009), cert. denied, 129 S.Ct. 2029 (2009); *United States v. Moullag*, 557 F.3d at 669.

Undoubtedly trial counsel failed¹ to meet his professional responsibility to fully inform Mr. Nguon of the State's plea offer. In failing to do so, his performance fell short of the level of competence required by the Sixth Amendment.

C. Failure to Communicate a Plea Offer, Failure to Fully Inform of The Advantages and Disadvantages of the Offer, Misinforming Mr. Nguon and Persuading Him to Reject the Plea Unknowing, Unintelligent, and Involuntary Resulted in Mr. Nguon Unaware of and Unable to Choose Between the Alternatives that would Have Been Available but for Counsel's Deficient Performance.

Failure to communicate a plea offer falls well short of the competence demanded of defense counsel. Competent counsel is necessary for any defendant to determine what, in fact, he or she might be guilty of in the first instance, as well as what the prosecutor may be able to prove. Such assessments are at the core of the plea bargaining process. (See *Preme v. Moore*, 131 S.Ct. 733, 741 (2011) (noting that "plea bargains are the result of complex negotiations suffused with uncertainty," during which attorneys must "make careful strategic choices in balancing opportunities and risks").) When Mr. Nguon's counsel chose not to participate in the plea bargain and its negotiations with the prosecutor, and with Mr. Nguon himself, we can ascertain counsel's deficient performance resulted in a lapsed plea. (Haller, *supra*, 132 S.Ct. at 1385; *Faye*, *supra*, 132 S.Ct. at 1409.) Had counsel communicated the plea offer to Mr. Nguon promptly without being foreclosed by the prosecutor and judge; had counsel fully inform Mr. Nguon of the advantages and disadvantages of the Offer; had counsel not misinforming Mr. Nguon; and had counsel not persuaded Mr. Nguon to Reject the Offer — the result would have been different because Mr. Nguon would have

taken the "9 year plea agreement," and there wouldn't be a trial at all. "[I]f a 'particular guarantee' of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation 'complete.'" *Bullcoming v. New Mexico*, No. 09-10876, 2011 WL 2472799, at *9 (U.S. June 23, 2011) (quoting *Gonzalez-Lopez*, 548 U.S. at 146). This Court has consistently held that the right to counsel attaches at all critical pretrial stages. See *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964); *United States v. Wade*, 388 U.S. 218, 236-38 (1967); see also *Powell v. Alabama*, 287 U.S. 45, 57 (1932) ("[D]uring perhaps the most critical period of the proceedings against... defendants... from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, ... [criminal defendants are] as much entitled to [the aid of counsel] during that period as at the trial itself").

D. Mr. Nguon Suffered Prejudice Because had He Been Informed of the Plea Offer and Its Pros and Cons Without being Misinformed in any Sorts of Ways the Outcome would have Been Different: He would Have Taken the "9 years Plea Agreement" and Received a Much Shorter Sentence.

1. Prejudice is Found where Counsel's Constitutionally Deficient Performance Results in a Different Result to the Criminal Proceeding Including the Plea Negotiation Process.

The second part of the Strickland standard requires a showing of prejudice: a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, 466 U.S. at 694.) This measure of prejudice applies to ineffective assistance during plea negotiations, as well as trials. (*Padilla*, 130 S.Ct. at 1482; *Hill*, 474 U.S. at 57-59.) Reasonable performance by trial counsel would have resulted in a different outcome to the plea process — at least a guaranteed of a "9 years incarceration" for Mr. Nguon. Any amount of additional jail time constitutes prejudice under the Strickland standard. *Glover, supra* (involving ineffective assistance of counsel during non-capital sentencing).

Justice Alito stated that "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." (130 S.Ct. 1493 (Alito, J., concurring)). Counsel failing to advise Mr. Nguon promptly of the "9 year plea offer"

-just as surely distorted his decision-making process and undermined the fairness and integrity of the criminal process. This logic supports the conclusion that trial counsel was constitutionally required to discuss with Mr. Ngum the options presented in the prosecutor's plea offer; a 9-year prison sentence that guaranteed a release date; a life sentence if Mr. Ngum is convicted before a jury; there's no guarantee that Mr. Ngum will be granted parole in 7-year because the State is not obligated to give Mr. Ngum parole; counsel recommending Mr. Ngum to take the plea deal and avoid gambling with a life sentence where the State can hold him in prison until he die, etc. — None of this was told to Mr. Ngum where his counsel was forced by the prosecutor and the judge. Had counsel done his job professionally and according as the law required him to do — there wouldn't be a trial because Mr. Ngum would have ["accepted"] the "9 years plea agreement" immediately. Nonetheless, these options had nothing to do with a trial. But their absence most certainly had an effect on the outcome of the plea process.

Many of the Federal Courts of Appeals apply Hill in a manner appropriate to account for the situation presented in this case. These courts have applied the Hill measure of prejudice to allegations that, but for counsel's unprofessional errors, the defendant would have [accepted] the plea offer and not gone to trial. (See Turner, 858 F.2d at 1206-1207; Griffin v. United States, 330 F.3d at 737 (the second element of the Strickland test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice); Williams v. Jones, 571 F.3d at 1090 (but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty); United States v. Carter, 130 F.3d at 1112 (as for the prejudice prong, there must be a reasonable probability that, but for incompetent counsel a defendant would have accepted the plea offer); Coulter v. Herring, 60 F.3d at 1504 (the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial)).

2. Trial Counsel's Misadvice Caused Immediate Prejudice to Mr. Ngum that was Not Cured by His Subsequent Trial.

If not for counsel's inexplicable advice that the prosecution have a weak case that's why they

were offering such a low plea agreement, and that Mr. Nguon should decline the offer and take the case to trial, and leaving out all the important facts that if he's convicted he will be sentenced to life where the state has full authority to hold him in prison until he die from old age because the state is not obligated to give him parole in 7-year or 15-year or 25-year. Mr. Nguon has more than amply shown that he was prejudiced by his counsel's concededly defective performance.

Accordingly, the relevant inquiry is whether counsel's deficient performance affected the outcome of the plea process — i.e., whether but for counsel's flawed advice, Mr. Nguon would have accepted the state's offer and chosen to enter a guilty plea. There should not, and would not have been a trial in this case at all had Mr. Nguon received minimally competent advice. Mr. Nguon's counsel renders blatantly defective assistance at the plea bargaining stage from the beginning where counsel did not participate in any type of negotiations with the prosecutor because whatever the offer was he never had any intentions to discuss it with Mr. Nguon — and to the end, counsel wasn't any help either by persuading Mr. Nguon to decline the offer. In *Padilla*, this Court held that "[b]efore deciding whether to plead guilty, a defendant is entitled to the 'effective assistance of counsel.'" 130 S.Ct. at 1480-81 (emphasis added). The competent advice of an attorney is necessary to protect a defendant's right to make an informed choice about whether or not to plead guilty. Mr. Nguon's incompetent counsel's errors took this "informed choice" away from him, due to the fact he did not make an informed decision when he declined the offer. This Court has recognized the importance of a criminal defendant's right to make informed choices in other contexts. In *Miranda v. Arizona*, for example, the Court emphasized that the procedural safeguards required by the Fifth Amendment were necessary in light of defendants being "thrust into an unfamiliar atmosphere," to ensure that defendants' statements "were truly the product of free choice." 384 U.S. 436, 457 (1966).

A defendant can show prejudice under *Strickland* where his counsel's deficient performance causes him to reject a plea bargain, even if he is subsequently convicted at trial. *United States v. Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) (per curiam) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on [S]ixth [A]mendment grounds if counsel's performance during plea bargaining fell below 'the range of competence demanded of

attorneys in criminal cases'") (quoting *Strickland*, 466 U.S. at 687); *United States v. Gordon*, 156 F.2d 376, 380-81 (2d Cir. 1948) (per curiam); *United States v. Day*, 969 F.2d 39, 43-45 (3d Cir. 1992); *United States v. Brannon*, 48 F. App'x 51, 53 (4th Cir. 2002) (per curiam); *Beckham v. Wainwright*, 639 F.2d 267 (5th Cir. 1981); *Turner v. Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989), reinstated and reaffirmed, 940 F.2d 1000, 1001 (6th Cir. 1991), cert. denied, 502 U.S. 1050 (1992); *Julian v. Bantley*, 495 F.3d 487, 498-500 (7th Cir. 2007); *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001); *Nunes v. Miller*, 350 F.3d 1045, 1052 (9th Cir. 2003); *Williams v. Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) (per curiam), cert. denied, 130 S.Ct. 3385 (2010); *Oliver v. United States*, 292 F. App'x 886, 887 (11th Cir. 2008), cert. denied, 129 S.Ct. 2027 (2009); *United States v. Bavaria*, 116 F.3d 1498, 1512-13 (D.C. Cir. 1997) (per curiam). In light of this unanimous consensus of the federal courts of appeals, and the fact that such precedents are longstanding, dating back nearly thirty years, see, e.g., *United States ex rel. Canuso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982). The majority of state courts to consider the issue have adopted a similar rule. See, e.g., *In re Pers. Restraint of McCready*, 996 P.2d 658 (Wash. Ct. App. 2000) (finding Sixth Amendment violation where counsel's misadvice regarding maximum and minimum sentences deprived defendant of ability to make informed choice regarding plea offer); *State v. Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997) (defendant entitled to relief where he rejected plea offer based on counsel's incorrect representations that defendant had viable defenses at trial); *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997) ("[I]t has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial."); *Williams v. State*, 605 A.2d 103 (Md. 1992) (same); *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) ("[W]e conclude... that when a defendant demonstrates that ineffective representation at the pretrial stage of a criminal proceeding caused him or her to proceed to trial rather than to accept an offer of a plea bargain... the defendant has been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment... even if defendant thereafter receives a fair trial."); *Larson v. State*, 766 P.2d 261, 262-63 (Nev. 1988); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *People v. Alexander*, 136 Misc. 2d 573, 518 N.Y.S.2d 872, 880 (N.Y. Sup. Ct. 1987); *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex. Crim. App. 1987); *Tucker v. Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *Lloyd v. State*, 373 S.E.2d 1, 3 (La. 1988); *State v. Simmons*, 309 S.E.2d 493, 498 (W. Va. Ct. App. 1983); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

3. Common Sense Supports this Universal Consensus.

A decision based upon erroneous advice in any number of contexts, even beyond criminal proceedings, will irretrievably affect all of the proceedings that follow. Thus, it does not matter that a surgeon performs flawlessly if patient consent was obtained based on a wholly erroneous diagnosis—that the event occurred at all is malpractice and harmful. Nor would it matter if a contractor perfectly constructed a building on property that the contractor improperly surveyed. And in the context of a criminal proceedings, it would be equally prejudicial—and much like Mr. Nguon's case—for counsel to persuade him to decline the plea agreement and take the case to trial because the prosecutor have a weak case, upon which Mr. Nguon ended up convicted with a life sentence that has no end in sight. See *Padilla*, 130 S.Ct. at 1495 (Scalia, J., dissenting) (competent advice is required with regard to "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction") (internal quotation marks omitted); see also, e.g., *Julian*, 495 F.3d 482, 496-500 (defendant was prejudiced by loss of guilty plea where counsel unreasonably misunderstood this Court's holding in *Apprendi v. New Jersey*, 530 U.S. (2000), and incorrectly advised client that his maximum sentence would be thirty rather than sixty years of imprisonment. See also *Gordon*, 156 F.3d at 377-81 (defendant was prejudiced where he rejected plea offer based on counsel's representation that his maximum sentence exposure was 120 months when in reality he faced a maximum sentence under the guidelines of 327 months); *Day*, 969 F.2d at 43-45 (defendant may show prejudice where counsel's grossly incorrect advice regarding actual sentence exposure—which was more than double the length of imprisonment that counsel represented—likely affected his decision regarding whether or not to accept plea offer).

Mr. Nguon was a young kid and he trusted his counsel's advice and declined the offer based on counsel's errors and withholding vital information that he needed to know in order to make an informed consent decision. Resulting in Mr. Nguon proceeding to trial, where he was convicted and sentenced to "life plus 3 years," and over 30 years of continued incarceration the State have no intention of ever releasing him from state custody until he's ["dead"]. Surely such grossly incorrect advice by counsel, and such a disastrous result for Mr. Nguon, should be remediable.

4. Mr. Nguon Has Amply Shown a Reasonable Probability that but for His Trial Counsel's Deficient Performance He Would Have Accepted the Plea Offer.

On record from court transcript the prosecutor complained to Mr. Nguon's counsel that the "9 years plea agreement" needed to be told to Mr. Nguon. Then the prosecutor complained to the judge that counsel have a problem and a conflict of interest with Mr. Nguon. The judge then ordered counsel to tell Mr. Nguon about the State's offer. With these simple accounts that's on record, we can clearly see the substandard assistance of counsel. Behind closed doors when counsel was talking to Mr. Nguon, it was much, much worse, which Mr. Nguon at the time was just a young kid and didn't know anything about the law to be able to discern what his counsel was telling him was helpful to him, or causing a detrimental affect to his constitutional rights to effective assistance of counsel. Mr. Nguon at that time didn't know what the Sixth Amendment was, nor any of the United States Amendments; and he would not be able to put together "one single page" of this Certiorari, much less even a single sentence. Ignorant of the law at the time, Mr. Nguon solely relied on his counsel to help him through the extraordinary complexities of the law, and [l]istened to his counsel's guidance and advise — guidance and advise that [he himself] was not able to distinguished if it's helpful or harmful. The record speaks for itself, as opposing counsel was able to distinguished Mr. Nguon's counsel had a problem and a conflict of interest with Mr. Nguon. But, to Mr. Nguon himself, his youth, his ignorant, and his gullibility — he was not able to recognized his counsel was harming him. (See, e.g., Day, 969 F.2d at 44-45.)

Take for example when the prosecutor complaint to counsel about the "9 years plea agreement" he never inform Mr. Nguon about as required by our Constitution. "I didn't know I had to tell him," (i.e. Mr. Nguon) counsel replied in court before the prosecutor and judge. Counsel's answer itself is quite incompetent and prejudicial. (Turner, 858 F.2d at 1206.) Mr. Nguon would have [a]ccepted the "9 years plea agreement" had it not been the cumulative effect of his counsel's errors. In *Harrington v. Richter*, this Court reaffirmed that:

"[I]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require showing that counsel's actions more likely than not altered the outcome. ..." 131 S.Ct. 770, 781-92 (2011) (internal quotation marks added and citations omitted) (emphasis added).

namely, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 46 U.S. at 69—i.e., that the outcome of the plea process would have been Mr. Nguyen's acceptance of the State's offered plea of "9 years." Mr. Nguyen has more than made the required showing. It is plain from the record that the only reason that Mr. Nguyen did not accept the offered plea deal is because of his counsel's indefensible advice that he should decline the plea bargain because the prosecutor have a weak case was unfounded. Counsel did not take any part in the "plea agreement phase" by "negotiating" with the prosecutor; counsel did not promptly inform Mr. Nguyen of the "9 years offer"; counsel had to be told by the prosecution and judge to relate the offer to Mr. Nguyen; counsel's unwillingness to tell Mr. Nguyen by himself about the offer can lead to the inference that counsel's collected to bypass the "plea bargain phase" and take the case to trial without ever asking Mr. Nguyen's for his "informed consent decision" that he [sic] entitled to, upon telling Mr. Nguyen about the offer; counsel deliberately misinformed him the prosecutor have a weak case and that he should decline the plea agreement; counsel on purpose did not tell Mr. Nguyen about the advantages and disadvantages of the offer; counsel did not inform Mr. Nguyen about the life sentence where the State can hold him until he die in prison, etc. Counsel's defective understanding of the law, ineffective assistance of counsel, and deficient performance all led up to the decline of the offer, and a trial that counsel wanted all along.

The stark difference between the "9 years" Mr. Nguyen was offered in the plea deal and the minimum sentence he ultimately received following trial of "life plus 3 years" for which he have been incarcerated for over 30 years as the State is condemning him to die behind bars—is further evidence that Mr. Nguyen would have ["immediately"] accepted this opportunity for a reduced sentence but for his counsel's ineptitude. It is more than "reasonably probable" that Mr. Nguyen would have accepted the offered plea if he had been aware that a "9 years plea agreement" give him a guaranteed of a release date from state prison, whereas, a life sentence the State have the choice to hold him in prison indefinitely until he died. See, e.g., Day, 469 F.2d at 45 ("[W]e do not find it at all implausible that a young man would think twice before risking even 3800 extra days in jail just to gain the chance of acquittal of a crime that he knew that he had committed").

Mr. Nguyen was entitled to effective counsels who would advise him of the State's plea offer. He was entitled to awareness of the alternatives available to him before he accepted or declined the offer, a straightforward

application of the Strickland test applies because, but for counsel's deficient performance, the outcome of Mr. Nguon's proceeding would have been different. Mr. Nguon does not seek to modify or supplant the Strickland test. There is no dispute that the initial offer was open and that its rejection was the result of counsel's incompetence. The record amply reflects that stark fact when counsel replied in court to the prosecutor: "I didn't know I had to tell him," (i.e. Mr. Nguon was not promptly informed of the "9 years plea agreement.") is enough prejudice and incompetency to cover [redacted] this whole argument. Because of counsel's misadvice, Mr. Nguon is now serving a much higher sentence than that offered in the plea bargain. Mr. Nguon has demonstrated that he suffered prejudice, and that this prejudice was not cured by his subsequent trial. Cf. *Blaver*, 531 U.S. at 203 (2000) (holding that a defendant suffered prejudice under Strickland where, following a fair trial, his counsel provided ineffective assistance during the sentencing phase, resulting in an increase in the jail time he would serve). It is well-settled that even a single isolated error may constitute deficient performance under Strickland. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

5. No Greater Showing is Required to Entitled Mr. Nguon to Relief.

Even allowing some theoretical 'possibility' that the prosecutor or judge may later withdraw or rejected the plea deal, Mr. Nguon has more than made the requisite showing that there is a "reasonable probability" that, if not for his counsel's grossly unreasonable advice, the proceeding would have resulted in Mr. Nguon's accepting the plea deal of "9 years." See also *Williams*, 571 F.3d at 1091 ("[W]e are not dealing with the government's discretion to make or withdraw a plea offer. Rather we are dealing with an offer that was rejected because of counsel's ineffective assistance, with disastrous results for [the defendant]. In the end, this ineffective assistance and the resulting prejudice is attributable to the State").

Viewing counsel's failure to promptly inform Mr. Nguon about the "9 years plea agreement" from his perspective at the time counsel decided to forgo the ["negotiation"] of the "Plea Bargain Phase" on behalf of Mr. Nguon's who [never] waived such rights and applying a "heavy measure of deference," to counsel's own judgment, this Court should find counsel's decision was unreasonable, as well as what counsel stated before the prosecutor and judge that he didn't know it was an offer that needed to be told to Mr. Nguon—is quite contrary to prevailing professional norms. The justifications counsel offered for his omission betray a startling ignorance of the

law — or a weak attempt to shift blame for inadequate preparation. Such a complete lack of participating in the "Plea Bargain Phase" and failing to negotiate "low prison terms" on behalf of Mr. Nguon is one and the same as counsel abandoning this phase altogether and put Mr. Nguon at risk of facing a "life sentence" and/or death behind bars, and the reliability of the adversarial testing process.

II. The Appropriate Remedy is to Allow Mr. Nguon to Plead Guilty to the "9-year plea agreement" Offer because that is the Only Remedy that will Restore Him to the Position He would Have Occupied had Counsel Not Been Ineffective.

The ordinary remedy for constitutional violations is to restore the victim of the violation to the position he would have occupied had the violation not occurred. The constitutional violation suffered by Mr. Nguon was the loss of the opportunity to accept the State's original offer — the State's offer to plead guilty for a recommended sentence from the State of "9 years" in state prison. The only way to restore Mr. Nguon to the position he would have occupied had counsel advised him of the plea offer and fully informed him of the advantages and disadvantages mentioned in this certiorari is to allow him to plead guilty under the terms of the plea offer.

Mr. Nguon going to trial is not a remedy or cure the prejudice he suffered from counsel's constitutionally deficient performance at the "Plea Bargain Phase". The declined of the plea agreement was not constitutionally adequate because it was not knowingly, intelligently and voluntarily entered. Counsel's deficient performance left Mr. Nguon unaware of the full range of options offered to him by the State. And the resulting sentence of "Life plus 3 years" in prison cannot cure the prejudice suffered from the loss of the opportunity to a "9-year" prison sentence for the offense.

Permitting Mr. Nguon to plead guilty to his offense with the recommendation of a 9 years sentence will not provide him a windfall he is not entitled to, it does not violate the separation of powers doctrine, it does not deprive the trial court of its discretion, it does not interfere with finality in criminal proceedings, and it will not lead to sandbagging by defense attorneys.

A. The Standard Remedy for Ineffective Assistance, as with All Constitutional Violations, is to Place the Defendant in the Position He Would Have Occupied in the Absence of the Violation.

The remedy for a constitutional violation "must closely fit the constitutional violation." *United States v. Virginia*, 518 U.S. 515, 547 (1996). Constitutional remedies are "necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

Remedies for deprivation of effective assistance of counsel are no different. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. at 364. "Our approach has thus been to identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel." *Id.* at 365. As the Court has observed, "[t]he adequacy of any remedy is determined solely by its ability to mitigate the constitutional error." *Rushen v. Spain*, 464 U.S. 118, 119-120 (1983). An appropriate remedy returns the defendant to the point before the constitutional violation in order to put him in the position he would have occupied but for the error. The most common form of relief offered in cases involving forgone plea offers is a conditional writ requiring the state to reinstate the original offer. See, e.g., *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006) (affirming grant of conditional writ requiring reinstatement of plea offer and subsequent grant of unconditional writ ordering defendant's release); *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006) (ordering "the district court to direct the state to release [Mr. Nguon] unless... the state offers [Mr. Nguon] a plea agreement with the 'same material terms' offered in the original plea agreement."); *Nunes*, 350 F.3d at 1057; *Turner*, 858 F.2d at 1204 (ordering a "new plea hearing during which a rebuttable presumption of vindictiveness would attach to any plea offer made by the state in excess of its original... offer"); *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994) (remanding for consideration of ineffective assistance claim and instructing that defendant "should have the choice between going forward with a new trial or accepting the government's original plea offer"); see also *Day*, 969 F.2d 39 (approving of the remedy of ordering the state to reinstate the offer). While some courts have found it appropriate to order a defendant released where time served was longer than the plea offer on which the ineffective assistance was rendered. See, e.g., *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996); *Williams v. Jones*,

No. 03-cv-201, 2010 U.S. Dist. LEXIS 103596 (E.D. Okla. Sept. 29, 2010) (adopting agreement of both parties to issue writ and release defendant). Finally, other courts have issued conditional writs that allow the defendant to plead guilty or proceed to a new trial. See, e.g., *Gordon*, 156 F.3d at 381-82; *Beckham*, 639 F.2d at 267 n.7.

III. The State [Continuously] cites Mr. Nguon is a "Danger to Society" in order to Retain^{ed} Him behind Bars—Incapacitating Him to the point that He Will Eventually Die in State Custody Runs in Conflict when the State Offered Him a Heavily Discounted Sentence of 9-year Before Trial.

Mr. Nguon committed his offense in 1995, and the facts has always been the same. The facts was the same when the State's offered Mr. Nguon a "9 years plea agreement." The facts was the same at sentencing, but the State requested the sentencing judge to sentence Mr. Nguon to "Life plus 26 years" ^{because} they gained a conviction. The judge immediately denied such harsh punishment against Mr. Nguon, and the jury agreed. Even now after 30 years of his incarceration the facts remained^{ed} the same, yet the State [continuously] cites Mr. Nguon is a "danger to society" in order to retained him in prison until he died.

The State offered Reyes a deal of four years imprisonment in exchange for a guilty plea to the triggering perjury charge. By offering Reyes such a heavily discounted sentence, an inference may properly be raised that the State did not view Reyes as a "danger to society" and that the State did not feel "the need to counter his threat with incapacitation." *Andrade*, 538 U.S. at 81, 123 S.Ct. 1166 (Souter, J., dissenting); *Reyes v. Brown*, 399 F.3d 964, n. 9, (9th Cir. 2005). (e.g. Reyes was sentenced to "Life plus 26 years," and he succeeded on his appeal.)

The jury did not agreed to sentence Mr. Nguon to "Life-without-parole" and/or the Death penalty, where he's to die behind bars. The Sentencing judge did not sentenced Mr. Nguon to LWOP and/or the Death penalty. Given the fact that the judge and jury was [against] sentencing Mr. Nguon to a harsh sentence, the State's request of "Life plus 26 years" was immediately shot down. Mr. Nguon argued that the State have illegally turned^{ed} his sentence of "Life plus 3 years" into a de facto of LWOP, while at the same time denying him his constitutional rights to appeal in court that he's not a "danger to society." The Court held in *People v. Caballero*, (2012) 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291 (Caballero) that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida* (2010) 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (Graham) applied to sentences, including Caballero's term of 110 years to life.

(Caballero, at p. 268, 145 Cal. Rptr.3d 286, 282 P.3d 291.) The legislator extended "Youth Offender" who are 26-year-of-age and under, which Mr. Nguon qualified since he was only 19-year-old at the time of the offense, (Sen. Bill No. 394 (2017-18 Reg. Sess.); Stats. 2017, ch. 684, §1.5.)

Since Mr. Nguon have been incarcerated over 30 years and have appeared before the Board eight times without ever receiving a parole date, the State has turned his "life with possibility of parole" into a functional equivalent of life without parole and, pursuant to *People v. Contreras* (2018) 4 Cal.5th 349, 229 Cal. Rptr.3d 249, 411 P.3d 445 (Contreras) and *People v. Heard* (2022) 83 Cal. App.5th 608, 299 Cal. Rptr.3d 634 (Heard), the trial court was required to consider his section 1170(d) petition on the merits, which they surreptitiously ignored, thus, permitting the State to illegally change his sentence to LWOP without any judge or jury permitting it. And when Mr. Nguon exercise his First Amendment rights to appeal, the State responded "time-barred," and that it is a legal sentence giving the State full discretion to hold Mr. Nguon in prison for the "rest of his life."

Here, the California Supreme Court found there was no rational basis to deny section 1170(d) relief to "functionally equivalent LWOP offenders," while providing it to juvenile offenders sentenced to express life without parole. (Barto, *supra*, 104 Cal. App.5th at p. 450, 104 Cal. App.5th 435; *People v. Thompson*, 112 Cal. App.5th 1058, 334 Cal. Rptr.3d 849 (2023). While in Mr. Nguon's case when he was before the California Supreme Court seeking for the ["same"] relief, they denied him.

A. Mr. Nguon [Con]tinue Incarceration Violates the Eighth Amendment's prohibition against Cruel and Unusual Punishment as Explained in *Miller*.

Echoing language from *Braham*, *supra*, 560 U.S. at page 68, 130 S.Ct. 2011, the author of Senate Bill No. 9 stated: "The sentence of life without parole is a sentence intended for the worst of the worst criminals and crimes. As such, it is inappropriate for juveniles." (Assem. Com. on Public Safety Analysis, *supra*, p. 7.) The legislative analyses concluded "sentencing minors to die in prison is barbaric" (Assem. Com. on Appropriations, Analysis of Sen. Bill No. 9 (2011-2012) Reg. Sess.) as amended Aug. 15, 2011, p.2). The defendant "would have no opportunity to 'demonstrate growth and maturity' to try to secure his release" and that, under *Braham* "a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." (Caballero, at p. 268, 145 Cal. Rptr.3d 286, 282 P.3d 291.) In contrast to the defendant in *Caballero*, Mr. Nguon was eligible for parole in 2005, but the State keeps on citing

again and again eight times from 2005 to 2024 that he's a "danger to society," and therefore must remain ~~in~~ under state custody.

The average inmate mortality reviews prepared by the California Correctional Health Care Services ("CCHCS") that state the total number of deaths each year of inmates in California prisons and the ages of the inmates at death. (See <https://cchcs.ca.gov> [as of April 8, 2025] archived at <<https://perma.cc/7URW-P3LF>>.) The CCHCS inmate mortality reviews (also called inmate death reviews) reflect mortality rates in the California prison population from 2010 to 2022. In 2010 the average age at death of inmates in California was ["54 years"] — more than 20 years shorter than the life expectancy of 76.9 years for a free person in the community in America. So according to this data, Mr. Nguon will be dead in a few years, unless the State argued that Mr. Nguon will live past 100 years. This is cruel and unusual for the State to illegally and unconstitutionally condemned him to "die behind bars" when on court record the jury and sentencing judge was specifically [a]gainst sentencing Mr. Nguon to a harsh sentence], which was why he immediately rebuked the State's recommendation of "life plus 26 years."

During trial the jury was never asked by the judge, prosecutor, or Mr. Nguon's counsel to determine the following issues beyond a reasonable doubt:

- "(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
- "(2) whether the conduct of the defendant committing his crime presented evidence of heinous, sadistic, and maliciously cruel to his victim;
- "(3) whether the criminal acts and conduct of defendant presented a preponderance of evidence that he's irreparably corrupt and must be sentence to "life-without-parole" and
- "(4) if raised by evidence from the State, whether the conduct of the defendant's crimes is justifiable of the punishment of "Death ^{behind} Bars" from old age and/or disease.

The jury was never asked any of this because Mr. Nguon's offense was [not] LWOP and/or capital punishment. Indisputable evidence from the State offering a "7 year plea agreement" to Mr. Nguon automatically discredit these four questions altogether. The sentencing judge would have [not] fought for Mr. Nguon by striking down the State's request for "life plus 26 years" had the jury found [TRUE] to any of the four questions. Yet the State [relentlessly attacks Mr. Nguon's sentence by deeming him incorrigible and a "danger to society" in order to circumvent the Eighth and Fourteenth Amendments to the U.S. Constitution

so that LWOP and/or the death penalty may be issued to Mr. Nguyen without just cause. Mr. Nguyen stands condemned for an offense of kidnapping during a commission of carjacking of a 27-year-old man in which the victim was neither killed nor subjected to any physical harm, since Mr. Nguyen did not raise one finger on the victim — no torture, no ransom, no extortioning involved. The California Penal Code and its statutory laws does not require such an offense to be sentenced to LWOP and/or the death penalty. Irrespective of these facts the State transgresses the U.S. Constitution by declaring Mr. Nguyen's "life sentence" is legal, and that the State is under no obligations whatsoever to grant him early release and/or parole. When Mr. Nguyen challenged his "individual culpability to his offense" does not require a "lifetime of imprisonment without parole" or to die behind bars. The State replied back they have full authority to hold him in state custody for a lifetime. Mr. Nguyen then argued before the district court and the Ninth Circuit that it is to die in prison, then it is a slow death no difference from torture. District judge overruled his argument by announcing Mr. Nguyen wasn't sentenced to death or LWOP to raise such argument. At the Ninth Circuit, Mr. Nguyen pleaded for a hearing for the State to prove that he's irredeemable to justify the State deeming him a continue threat and "danger to society," and that if the State is able to prove such thing, he asked for immediate execution by any means (i.e. lethal injection, electrocution, firing squad, gas chamber, etc.), so that his pains and sufferings may end, since to him his continue incarceration until he died from old age or disease or kill by another inmate(s) is much worst than immediate death itself.

This Court has held that the Eighth Amendment forbids "punishments of torture, ... and all others in the same line of unnecessary cruelty," *Wilkinson v. Utah*, 99 U.S. 130, 136, 25 L. Ed. 345. The State holding Mr. Nguyen in prison until he died from a slow dying death is similar to the State deliberately inflicting pain against Mr. Nguyen for the sake of pain. Observing also that "[p]unishments are cruel when they involve torture or a lingering death [;] ... something inhuman and barbarous [and] ... more than the mere extinguishment of life," the Court has emphasized. (*In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519. P. 1530.) Eighth Amendment standards are not static, and the prohibition against cruel and unusual punishment is not "confine[d] to such penalties and punishments as were inflicted by the Stuarts." (*Weems v. United States*, 217 U.S. 349, 372 (1910).) Instead, the clause prohibiting cruel and unusual punishment is "progressive, and is not fastened to the obsolete but may acquire meaning as a public opinion becomes enlightened by a humane justice," *Id.* at 378, and informed by "the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).

B. Retribution is Permissible Only if Punishment is Proportioned to the Offenses.

This Court has observed that a defendant's punishment "... must be tailored to his personal responsibility and moral guilt." *Enmund*, 73 L.Ed.2d at 1154. Mr. Ngoun argues that the proportionality test expressed by this Court in *Coker v. Georgia*, 433 U.S. 584 (1977) is applicable to his case. When we take a look at the early 1900's, this Court has applied the Eighth Amendment to invalidate an exceedingly long prison term. In *Weems v. United States*, 217 U.S. 349 (1910), the sentence involved was 12 years at 'cadena temporal', i.e. hard labor with chains, plus lifetime restrictions for falsifying a public record. Although the *Weems* Court based its decision that the sentence was unconstitutional in part on the inherent cruelty of the punishment, it also relied on the separate grounds that the Eighth Amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment and that the length of punishment must be proportioned to the offense. *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976) (Stewart, Powell and Stevens, JJ., plurality opinion); see *Weems*, 217 U.S. at 367-68, 371-73, 377; accord, *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring); compare *Weems*, 217 U.S. at 411 (dissenting opinion) (characterizing the majority as holding that "because the mere term of imprisonment... [the sentence can be reviewed for an abuse of legislative discretion]"); see also *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Further decisions from this Court appeared to endorse the continuing validity of the *Weems* proportionality principle as a restriction on excessively long sentences. *Telfries and Stephens, Defendants, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1378 & n. 164 (1979) (citing cases); see, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (White, Stewart, Blackmun and Stevens, JJ., plurality opinion), quoted approvingly in *Ingraham v. Wright*, 430 U.S. 651, 691 n. 9 (1977) (White, Brennan, Marshall and Stevens, JJ., dissenting); *Furman v. Georgia*, 408 U.S. 238, 272 n. 14 (1972) (Brennan, J., concurring); id. at 457 (Powell, Burger, Blackmun and Rehnquist, JJ., dissenting); *Enmund v. Florida*, ___ U.S. ___, 73 L.Ed.2d 1140, 1146 (1982); See also *Bordenkircher v. Hayes*, 434 U.S. 357, 370-71 (1978) (Powell, J., dissenting).

For the record, the State does not dispute the sentencing judge rejected the State's request for "life plus 26 years" to be given to Mr. Ngoun. Had the judge granted the State's request and sent Mr. Ngoun to "life plus 26 years," Mr. Ngoun's argument would've been baseless. If there was no court system in America and no judge to referee the case and no jury to decide guilty or not guilty, but only the prosecutor itself to decide, taken upon the role of judge, jury, and prosecutor—Mr. Ngoun would have been sent to the firing squad and be

shot in the head and it would be over with. No need of prison because it's just a wasteful expense. Here in the U.S. we have a justice system that's highly revered, where justice and fairness demanded by our Constitution to be given fairly and equally among the poor or wealthy. When the State decided to inhibit Mr. Nguon's constitutional rights they crossed boundaries that make a mockery to our judicial system, as if they had carte blanche authority to supersede the sentencing judge and jury, as well as the U.S. Constitution and this Court itself. Without hesitation the sentencing judge rejected the "Life plus 26 years" request by the State, but he did not stop there, since he poured forth a cornucopia of laudation of Mr. Nguon's achievement (i.e. Mr. Nguon achieved a v. v GPA in high school, graduated in the top of his class, went to College of Notre Dame as a double major: Business Administration and Computer Science, first-time offender with no criminal record, etc.), and expressed his principle of fairness—that Mr. Nguon did not deserve such a harsh punishment as the State's openly requested. The judge even reprimanded the State of its retribution and vindictiveness against Mr. Nguon who is not among the worst of the worst that deserve a long prison sentence.

It's a rarity in America where a judge whom presided over the trial and now sentence Mr. Nguon with leniency and defending him against the State's request for a stiff sentence. The judge didn't do it because he like Mr. Nguon. Oh no, not at all. The judge did it base on the principle of our Constitution—justice and fairness for all. What made a straight A's student with such a bright future ahead of him to go commit a crime that's so uncharacteristic of his nature? Mr. Nguon was extorted for months, where he was threatened with death along with his whole family.

Quite the opposite with the State whom offered Mr. Nguon a "9 years plea agreement" before trial now take up a different position by presenting "new facts" that maximally increases his sentence to "death behind bars", which these "new facts" that Mr. Nguon poses a "danger to society" over 30 years and indefinitely was not submitted to a jury to prove beyond a reasonable doubt. (Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).) The State's "new facts" condemned Mr. Nguon to die behind bars that was never presented to the jury, and certainly the ^{judge} who did not approved the State's requested "Life plus 26 years" would have ["denied with prejudice"] on erroneous facts to condemn Mr. Nguon behind bars. (Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311.) Thus, violating Mr. Nguon's Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and

jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved.

The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. (E.g., *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368.) Here, the State scheme that keeps from the jury facts exposing Mr. Nguon to greater and additional punishment raises serious constitutional concerns. (*McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S.Ct. 2111 (1986). California has a recidivist law that increases punishment for some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime. (*Kilbourn v. State*, 9 Cal. 560, 567, 1933 WL 11837) ("No person ought to be, or can be, subjected to cumulative penalty, without being charged with a cumulative offence".) Mr. Nguon is not a recidivist, so the State uses this "new facts" that determine his [future dangerousness] in order to aggravate his sentence to LWOP and/or Death behind bars. This "new facts" is an element that the jury was never proven of Mr. Nguon's future dangerousness of over 30 years or a lifetime that required LWOP and/or Death behind bars. (*State v. Freeman*, 27 Vt. 529, 1855 WL 2492 (1855).)

IV. The Decisions of this Court Firmly Establish that the Power of the Legislature to Set Criminal Sentences is and Must be Subject to Eighth Amendment Review.

The legal issues raised by this case are indistinguishable from those decided by this Court in *Solem v. Helm*, 463 U.S. 277. First, the Eighth Amendment's ban on "cruel and unusual" punishment incorporates a notion of proportionality. Thus the State illegally turned his sentence to LWOP and/or Death behind bars created a disproportionate to when the judge sentenced him in 1997 violates constitutional standards. Second, it is the responsibility of the courts to enforce the relevant constitutional standard by considering: (a) the gravity of the offense; (b) the sentence imposed by the same jurisdiction for other crimes; and (c) the sentence imposed by other jurisdictions for the same crime — in Mr. Nguon's case more should be focus on his continued incarceration of over 30 years as the State unjustifiably condemning him to die behind bars.

This standard does not interfere with legislative prerogatives except insofar as it ensures that those prerogatives are exercised in conformity with the Constitution. Under *Marbury v. Madison*, 5 U.S. 137 (1803), the courts would be shirking their duty if they did anything less.

Although rarely invoked, *Solem* operates as an important safety valve that can and should be activated in extreme cases. *Solem* itself was one such case; and Mr. Ngwen strongly believe that his case is another.

A. *Solem's* Requirement of proportionate Sentencing is Consistent with Nearly a Century of Eighth Amendment Law.

The principle that grossly disproportionate sentences violate the Eighth Amendment was first articulated by Justice Field, who dissented in *O'Neil v. Vermont*, 144 U.S. 323 (1892), on the ground that the Eighth Amendment barred "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." Id. at 334-40. Mr. Ngwen have been incarcerated for over 30 years, which this Court should be concern that the State expect him to remained in state custody until he die is very disproportionate compare to other like offense. Considering in the abstract, the judge and jury did not authorized for Mr. Ngwen to received L.A.P and/or die behind bars from old age — as convincing evidence corroborated when the judge denied with prejudice with an addition of reprimanding the prosecutor for even asking a sentence of "life plus 26 years" to be given to Mr. Ngwen. After considering this, when we take a look of his over 30 years of incarceration, it becomes quite excessive punishment, along with the State condemning him to die behind bars is cruel and unusual punishment. Mr. Ngwen continue incarceration is "grossly" disproportionate to his individual culpability to his offense, and it's [grossly] disproportionate to the judge's intended sentence to where this strictly forbid the State exact a harsh punishment against Mr. Ngwen. As this Court noted in *Solem*:

It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of prison were not.

463 U.S. at 289.

Kidnapping in the commission of carjacking it without doubt deserving of serious punishment; but in terms of moral depravity with no physical injury to the person and its affect to the public, it does not compare with murder, which does involve the unjustified taking of human life. From 1995 to 2026, the average convicted murderers served only half the time of Mr. Ngum, and the State released them from prison. This produces two complementary results, neither of which can be justified in logic or law. Nonetheless, the denial of effective judicial review is not only a deprivation of due process; it is equally a cruel and unusual punishment when Mr. Ngum is effectively deprived of the benefit of an independent review by the judiciary on the vital question of whether he must "die behind bars" when no jury or judge approved¹, and neither does his individual culpability to his offense or statutory laws required².

In dissenting from the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, 890-91 (1963), Justice Goldberg asked on behalf of himself, Justice Douglas and Justice Brennan:

"(2) is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive... severity are greatly disproportioned to the offenses charged?'"

Mr. Ngum's case raises the questions asked by Justice Goldberg in 1963. Here, Mr. Ngum contends that under the evolving standards of decency test enunciated in *Weems*, *supra*, and ratified in *Trop v. Dulles*, 356 U.S. 86 (1958), the State's imposition of the death penalty against Mr. Ngum known a slow dying death behind bars is no different from torture constitutes cruelly excessive punishment. There can be no doubt that there is a prevailing worldwide view that "death behind bars" as a punishment for Mr. Ngum's case violates "standards of decency more or less universally accepted." Mr. Ngum's point is simply that the State of California is forever justified in inflicting the disproportionate punishment of "death behind bars" against him when the prevailing fact³ stated herein this ~~was~~ certiorari ~~was~~ against it one hundred (100) percent. In Eighth Amendment terms, penalties which have improper or solely retributive objectives, run afoul of the warnings contained in virtually all of the cruel and unusual punishment cases against "unnecessary cruelty." See e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1948).

B. The Deep Rooted Principle of Parsimony Should be Applied to Mr. Ngum's Case.

The parsimony principle can be traced back at least to Montesquieu, who wrote in 1748 that

"[a]ll punishment which is not derived from necessity is tyrannical." Baron de Montesquieu, *The Spirit of the Laws*, Bk. XIX. 14 (O. Bell & Sons, Ltd. 1914). The simple but profound idea was immensely influential on generations of later thinkers. Writing in 1764, the pioneering criminologist Cesare Beccaria acknowledged his debt to Montesquieu:

Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical. A proposition which may be made more general thus. Every act of authority of one man over another for which there is not an absolute necessity, is tyrannical. It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

Cesare Beccaria, *An Essay On Crimes and Punishments* 20 (Adolph Case ed. 1984). On this basis, Beccaria argued that criminal punishments must be strictly limited to the minimum necessary to preserve public peace and security, for "all that extends beyond this, is abuse, not justice." *Id.*

The English philosopher Jeremy Bentham advocated a similar principle, which he justified in more overtly utilitarian terms. "The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given." Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation*, ch. XIV, para. 13 (1781). These thinkers and their ideas had great influence on the founding generation in America. "In every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted." Deborah A. Schwartz & Jay Byrnes, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *Buff. L. Rev.* 783, 813 (1975); see also *Ollmann v. United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) ("Beccaria and his French and English followers influenced American thought in the critical years following our Revolution.")

In the twentieth century, influential criminal law reformers such as Norval Morris identified parsimony as one of the bedrock principles that must guide any legitimate sentencing process. In Morris's formulation, the parsimony principle required that "the least restrictive or least punitive sanction necessary to achieve a defined social purpose should be chosen." Norval Morris, *The Future of Imprisonment: Toward A Punitive*

Philosophy, 72 Mich. L. Rev. 1161, 1162 (1974). Punishment not limited by an idea of parsimony is immoral and wasteful—such punishment is "merely gratuitous serving no legitimate purpose." Sharon Dolovich, Legitimate Punishment in Liberal Democracy, 7 Buff. Crim. L. Rev. 307, 401 (2004). The parsimony principle thus provides an important reminder that "punishment requires moral justification" and that "more punishment than necessary to the purpose of retribution is not justifiable." Mary Ellen Gale, Retribution, Punishment, and Death, 18 U.C. Davis L. Rev. 973, 1015 n. 123 (1985). As Morris explained, a "system of criminal justice that is not infused with parsimony in punishment... creates an intolerable engine of tyranny." Norval Morris, Madness and the Criminal Law 155 (U. Chicago Press 1982).

V. At a Minimum, Mr. Nguon is Entitled to a Remand for a Finding as to Whether He is Permanently Incurable.

No court has ever decided whether Mr. Nguon is or is not permanently incurable. Upon information and belief, since the jury and judge never taken into consideration of sentencing Mr. Nguon to LWOP and/or Death behind bars because they were against sentencing him to a harsh punishment, and the judge's rejection of the State's request of "life plus 26 years"—we can extrapolate the judge and jury [does NOT] find Mr. Nguon to be permanently incurable. While on the other hand, the State disagreed and find Mr. Nguon to be "permanently incurable" as they take action by continuously deeming him a "danger to society." The State cannot condemn a curable youthful teenager to LWOP and/or Death behind bars after considering his curability any more than it can condemn an intellectually-disabled defendant to death after considering his intellectual disability. (See Atkins, 536 U.S. at 320-21; Ford, 477 U.S. at 405, 106 S.Ct. 2595.) Remand is appropriate so that the trial court must decide whether Mr. Nguon is permanently incurable as the State deliriously claimed] as they continuously deemed him as a "danger to society," and thus, must remained in prison for the remainder of his life until he die. Considering curability as one factor among several is wholly distinct from recognizing that only "permanently incurable" youthful teenagers may be sentence to LWOP.

To be sure, the State cannot condemn] Mr. Nguon to LWOP and/or Death behind bars due to the fact "[t]here is [nothing] in the trial record or appellate courts' record thereafter that would support

a finding that the offense reflects irreparable corruption." But the State is simply wrong when it asserts that Mr. Nguon's sentence is legal, and they have full discretion to maximize it to the end, for one, the State of California created a liberty interest for parole (See *Cooke v. Solis*, 606 F.2d 1206, 1213 (2d Cir. 1978); *Board of Prisoners v. Allen*, 482 U.S. 369, 377-381, 107 S.Ct. 2415, 46 L.Ed.2d 303 (1985); *Graham v. Florida*, 560 U.S. 473, 12 (2000).), and for the State to release over a thousand inmates convicted of murder that have "life sentences" from 1995-2006, while condemning Mr. Nguon to "die behind bars" for a nonhomicide offense is unconstitutional.

A. Mr. Nguon is NOT permanently incorrigible.

Several times Mr. Nguon requested the State to prove their claim, which the State for over a year still does not even attempt to show that Mr. Nguon is permanently incorrigible. In this rare case, the record plainly establishes Mr. Nguon's capacity for reform, and the Court should order him "time served" and release from state custody.

CONCLUSION

For these reasons, this Court should grant certiorari to consider the Constitution requiring that a criminal judgment be overturned because of the actual ineffective assistance of counsel. Furthermore, the Court should direct on remand for a finding as to whether Mr. Nguon is permanently incorrigible, since California is illegally condemning him to "die behind bars" violates the Eighth Amendment.

Dated: February 23, 2026

Dated: April 9, 2026

Respectfully submitted,

Hung Duong Nguon

Hung Duong Nguon

In Pro Se