Anthony S. Barkow*
Rachel E. Barkow*
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third Street, Suite 214
New York, NY 10012
(212) 998-6612

Candice Pitcher (USB #10183)
JONES WALDO HOLBROOK & McDONOUGH PC
170 S. Main Street, Suite 1500
Salt Lake City, UT 84101
(801) 521-3200

Samuel L. Feder*
Nicholas O. Stephanopoulos**
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Attorneys for Amicus Curiae
*admitted pro hac vice
**not admitted in this district/pro hac vice application pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

WELDON H. ANGELOS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Case No.: 2:07-cv-936

Honorable Tena Campbell

MEMORANDUM OF LAW OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO VACATE PORTION OF SENTENCE PURSUANT TO 28 U.S.C. § 2255

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The Center on the Administration of Criminal Law ("Center") is the first and only organization dedicated to defining good government and prosecution practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. The Center's litigation practice aims to use the Center's empirical research and experience to assist in important criminal justice cases at all levels. The issues the Center litigates arise at any stage in the investigative or litigation process, including issues that arise out of plea bargaining. As the Center's name suggests, it is devoted to improving the quality of the administration of criminal justice.

The Center seeks to file this Memorandum of Law to emphasize the importance of policing ineffective assistance of counsel ("IAC") at the plea bargaining stage. It is during plea bargaining that prosecutorial discretion is at its zenith, and that decisions are made by the prosecutor and defense counsel with enormous consequences for the defendant's trial and sentencing. It is important, of course, that prosecutorial discretion at this stage be exercised appropriately. But, as this Memorandum discusses, it is equally crucial that defense counsel perform their role in plea bargaining properly, especially when, as here, a defendant faces multiple consecutive mandatory minimum terms of imprisonment, imposed largely at the discretion of the Executive. Defense counsel must diligently investigate the relevant facts and law, convey all plea offers to the defendant, supply accurate information about potential sentencing exposure, and provide reasoned advice as to whether an offer should be accepted. If they fail in any of these respects, then the Sixth Amendment's guarantee of effective assistance of counsel is breached, and courts must be ready to intervene to safeguard this vital constitutional right.

INTRODUCTION

Plea bargaining – not the trial – is now the foundation of the American criminal justice system. In both state and federal cases, approximately ninety-five percent of convictions are obtained by guilty plea, and courts and commentators are unanimous in recognizing the criticality of the plea bargaining stage. Not only is this stage hugely consequential for most defendants, particularly when offenses carrying mandatory minimum terms of imprisonment are charged or threatened, but the responsibilities of defense counsel during it are particularly complex. Under frequently severe time and resource constraints, counsel must unearth key facts, research the applicable law, manage frightened clients, and negotiate plea terms with prosecutors. IAC claims are a crucial mechanism to ensure that counsel perform these tasks adequately. Courts have uniformly recognized such claims and held that they are available whether the defendant pleads guilty or not guilty.

In the context of not guilty pleas, the case law reveals several recurrent patterns of ineffective representation. First, counsel might fail altogether to convey a plea offer to the defendant. Second, counsel might provide incomplete or incorrect information to the defendant. The terms of a plea offer might be misstated, the defendant's potential sentencing exposure might be miscalculated, or the relevant substantive law might be misunderstood. Third, counsel might give blatantly flawed advice to the defendant, or no advice at all, as to whether he should accept a plea offer. Counsel cannot stay silent (or, even worse, recommend going to trial) when it is clear, given the facts of the case, that the defendant should take the government's offer. In all of these scenarios, courts have been, and should continue to be, willing to find deficient performance by counsel. Courts have also approached the prejudice prong of the IAC inquiry with striking flexibility. Where the defendant testifies that he would have accepted a plea offer but for the

inadequate representation he received, and where objective evidence supports this assertion, courts have tended to, and should continue to, find prejudice.

Here, the information contained in Mr. Angelos's affidavit suggests both inadequate representation and prejudice. Mr. Angelos states that his attorney, Mr. Jerome Mooney, only partially conveyed certain plea offers, miscalculated his potential sentence, did not understand that sentences imposed pursuant to 18 U.S.C. § 924(c) are mandatory and run consecutively, did not communicate to him the strength of the government's case on the § 924(c) counts, failed to recommend that he accept the government's advantageous offers, and did not investigate potentially crucial facts. Mr. Angelos also repeatedly states that he would have accepted the government's offers had he been properly advised by Mr. Mooney. If the Court credits these sworn statements, it should find that Mr. Angelos's Sixth Amendment right to counsel was violated.

ARGUMENT

I. Centrality of Plea Bargaining

While the trial is generally viewed as the cornerstone of the American criminal justice system, it is actually plea bargaining that resolves almost all criminal cases. At the federal level, ninety-five percent of defendants pled guilty in 2007, a rate that has stayed constant for the past decade. *See* United States Sentencing Commission, Overview of Federal Criminal Cases – Fiscal Year 2007, at 3 (2007), http://www.ussc.gov/general/20081222_Data_Overview.pdf. At the state level, the situation is very similar; about ninety-five percent of felony convictions are obtained by guilty plea. *See* Bureau of Justice Statistics, Felony Sentences in State Courts, 2004, at 1 (2007), http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf. For the typical defendant, the law of plea bargaining is therefore far more consequential than what happens at trial.

The centrality of plea bargaining has been repeatedly recognized by courts. Almost forty years ago, the Supreme Court declared that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). A few years later, the Court added, "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). The Court has also characterized "whether to plead guilty" as one of the "fundamental decisions regarding the case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), and described "the time [from the defendants'] arraignment until the beginning of their trial" as "perhaps the most critical period of the proceedings," *Powell v. Alabama*, 287 U.S. 45, 59 (1932). *See also Wright v. Van Patten*, 128 S. Ct. 743, 747 n.* (2008) ("It is well-settled that a court proceeding in which a defendant enters a plea . . . is a 'critical stage' . . . ." (internal quotation marks omitted)) (Stevens, J., concurring in the judgment).

The lower courts, both federal and state, are in accord. *See, e.g.*, *United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) ("process of plea bargaining" is one of "stages of a prosecution deemed 'critical'"); *United States v. Sikora*, 635 F.2d 1175, 1181 (6th Cir. 1980) ("Plea bargaining is most emphatically a 'critical stage' of the prosecution, because a defendant who enters plea bargaining might well surrender the most fundamental right of all[:] the right to trial itself."); *State v. Evers*, 815 A.2d 432, 457-58 (N.J. 2003) ("[T]he plea-bargaining process . . . has become a critical part of the administration of criminal justice." (internal quotation marks omitted)); *In re Alvernaz*, 2 Cal. 4th 924, 933 (1992) ("The pleading – and plea bargaining – stage of a criminal proceeding is a critical stage in the criminal process . . . .").

Scholars also unanimously agree about the enormous significance of plea bargaining in the contemporary administration of criminal justice. Albert Alschuler, a prominent criminal procedure scholar, has written that "plea bargaining has come to affect almost every aspect of our criminal justice system from the legislative drafting of substantive offenses through the efforts of correctional officials to rehabilitate convicted offenders." Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 932 (1983). Professors Robert Scott and William Stuntz have similarly declared that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992); *see also* Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases 339 (1989) ("The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case."); Note, *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims*, 119 Harv. L. Rev. 2143, 2148, 2153 (2006) (hereinafter "*Prejudice and Remedies*").

There is thus no disagreement that plea bargaining is perhaps the pivotal stage in our modern system of criminal justice. Accordingly, courts must be especially attentive to the problems that may arise during plea bargaining. This is particularly true when a defendant pleads guilty to offenses carrying mandatory minimum terms of imprisonment, because in such cases courts have no discretion to vary downward from the required sentence applied due to the prosecutor's charging decision.

II. Importance of Counsel During Plea Bargaining

A lawyer at the plea bargaining stage has a host of crucial legally recognized responsibilities. As the Supreme Court has made clear, the attorney must "make an independent

examination of the facts, circumstances, pleadings and laws involved and then . . . offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). In addition, "Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible?" *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970). These issues may be difficult to investigate, "yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be." *Id.* at 770; *see also Jiminez v. State*, 144 P.3d 903, 905 (Okla. Crim. App. 2006) ("Counsel performs a variety of important functions in plea-bargaining, serving as legal and tactical advisor to the defendant and negotiator and intermediary between the defendant and the prosecuting attorney."); *State v. James*, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (counsel responsible for "discussion of tentative plea negotiations and the strengths and weaknesses of defendants' case so that the defendants know what to expect and can make an informed judgment whether or not to plead guilty").[1]

When attorneys fail to carry out these responsibilities and hence perform deficiently, it is clear that IAC claims may be brought by defendants harmed by their counsel's incompetence. The Supreme Court explicitly held that plea bargaining IAC claims are available to defendants who plead guilty in *Hill v. Lockhart*, declaring that "the two-part *Strickland v. Washington*[, 466 U.S. 668 (1984),] test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985). While the Supreme Court has not yet addressed plea bargaining IAC

[1] The importance of defense counsel's duties during plea bargaining are magnified by the fact that the government is under no obligation at this stage to disclose exculpatory or impeachment evidence. *See United States v. Ruiz*, 536 U.S. 622 (2002). Thus, unlike at trial, defendants are forced to rely entirely on defense counsel to protect their interests during plea bargaining.

claims by defendants who plead *not guilty*, there is a consensus among the federal courts that such claims are valid. *See, e.g.*, *United States v. Herrera*, 412 F.3d 577, 580 (5th Cir. 2005); *United States v. Rashad*, 331 F.3d 908, 912 (D.C. Cir. 2003); *Tse v. United States*, 290 F.3d 462, 464 (1st Cir. 2002); *United States v. Gordon*, 156 F.3d 376, 379-80 (2d Cir. 1998); *United States v. Carter*, 130 F.3d 1432, 1442 (10th Cir. 1997); *cf. In re Alvernaz*, 2 Cal. 4th at 934 ("We conclude, as have all federal and state courts presented with this issue, that the converse circumstances – where counsel's ineffective representation results in a defendant's rejection of an offered plea bargain, and in the defendant's decision to proceed to trial – also give rise to a claim of ineffective assistance of counsel." (internal footnote omitted)).

Given the centrality of plea bargaining and the importance of counsel during this process, courts should pay particular attention to plea bargaining IAC claims. If the Sixth Amendment right to counsel is to have any meaning, plea bargaining is the stage at which it must most vigilantly be enforced. *See Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (recognizing "the importance of counsel during plea negotiations" in case where defendant declined plea offer of five years in prison and received life sentence after trial); *Brady v. United States*, 397 U.S. 742, 758 (1970) (discussing "our expectations that courts will satisfy themselves that pleas of guilty" are entered "with adequate advice of counsel"); *Prejudice and Remedies*, *supra*, at 2153 ("Given the prominence of plea bargaining in today's criminal justice system, the viability of ineffective assistance length-of-sentence claims in the plea bargaining context is particularly important.").

III. Evaluating Plea Bargaining IAC Claims

While IAC analysis is notoriously context-specific, *see, e.g.*, *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), the relevant case law reveals several recurrent fact patterns that are indicative of ineffective assistance at the plea bargaining stage. Courts should be mindful of these

patterns, which are summarized below, and should encourage the development of facts that show whether any of the scenarios materialized in a given case.[2] Here, Mr. Angelos's affidavit provides several distinct grounds for concluding that a Sixth Amendment violation in fact occurred.

1. *Failure to convey plea offer:* Among the most glaring breakdowns during plea bargaining are failures by counsel to convey plea offers from the government to the defendant. The ABA Standards for Criminal Justice ("ABA Standards") state that "[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor," adding that "[i]t is important that the accused be informed both of the existence and the content of proposals made by the prosecutor." ABA Standards § 4-6.2 & cmt. Not surprisingly, courts are unanimous in finding ineffective assistance when offers from the government are never communicated to the defendant. *See, e.g.*, *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 753 (1st Cir. 1991) (per curiam); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982); *Jiminez*, 144 P.3d at 906 ("Courts applying the *Strickland* test in other state and federal jurisdictions have consistently held that counsel's failure to meaningfully convey a plea offer to the defendant is inconsistent with prevailing professional norms."); *Cottle v. State*, 733 So. 2d 963, 966 (Fla. 1999) ("The caselaw uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client."); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988) (same). It is simply indefensible for defendants to be kept in the dark as to the plea proposals they have been offered.

Here, Mr. Angelos's counsel may have failed to convey to him all of the elements of the government's plea offers on three separate occasions. In early 2003, Spring 2003, and Summer

[2] This section primarily addresses situations where the defendant, like Mr. Angelos, pleaded not guilty.

2003, Mr. Mooney apparently told Mr. Angelos the length of the sentence to which the government wanted him to agree – but nothing else. *See* Angelos Aff. at 4 (Mr. Angelos informed only of prison time for plea offer of sixteen years); *id.* at 7 ("I received a call from Mr. Mooney informing me either that the government was willing, or that he believed the government would be willing, to allow me to plea to 12 or 13 years."); *id.* ("Mr. Mooney called to inform me that the government was willing to allow me to plea to 7 or 8 years . . . ."). If Mr. Mooney in fact failed to convey material elements of any of these plea offers, this would constitute a clear-cut Sixth Amendment violation.

2. *Provision of incomplete or incorrect information:* Also indicative of ineffective assistance are situations where an attorney provides incomplete or incorrect information to the defendant during plea bargaining. Counsel might misstate the government's plea offer, *see, e.g.*, *Tower v. Phillips*, 979 F.2d 807, 814 (11th Cir. 1992) , *vacated on reh'g on other grounds*, 7 F.3d 206 (11th Cir. 1993), misinform the defendant as to his potential sentencing exposure if he goes to trial, *see, e.g.*, *Nunes v. Mueller*, 350 F.3d 1045, 1049 (9th Cir. 2003); *United States v. Gordon*, 156 F.3d 376, 377-80 (2d Cir. 1998); *United States v. Day*, 969 F.2d 39, 40-44 (3d Cir. 1992); *Beckham v. Wainwright*, 639 F.2d 262, 266-67 (5th Cir. 1981), or misunderstand the applicable substantive law, *see, e.g.*, *Lewandowski v. Makel*, 754 F. Supp. 1142, 1147 (W.D. Mich. 1990); *People v. Pollard*, 282 Cal. Rptr. 588, 590-91 (Cal. App. 1991), *aff'd in part, rev'd in part*, 818 P.2d 61 (Cal. 1991). *See also* Stephen Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C L. Rev. 841, 853 (1998) ("Often the alleged ineffectiveness involves claims that the attorney provided inadequate information to the defendant regarding the nature of the charges, possible defenses or the range of allowable sentences.").

In all of these cases, the defendant is unable to make an informed decision as to whether to accept or reject the government's plea offer. Placing the defendant in such a predicament violates the ABA Standards, which require counsel to "inform the defendant of the maximum and minimum sentences that can be imposed" and to "know the law" so that the defendant is "advised fully as to his or her rights and as to the probable outcome of alternative choices." ABA Standards § 4-5.1 cmt. Accordingly, courts have consistently found Sixth Amendment violations where incomplete or inaccurate information was provided to the defendant during plea bargaining. *See, e.g.*, *Gordon*, 156 F.3d at 380 ("By grossly underestimating [the defendant's] sentencing exposure in a letter to his client, [counsel] breached his duty as a defense lawyer in a criminal case . . . ."); *Tower*, 979 F.2d at 814 ("[A]n attorney's patently erroneous advice regarding the nature or consequences of a client's decision to plead guilty falls below the wide range of professional competence demanded by the Sixth Amendment." (internal quotation marks omitted)); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992) (Sixth Amendment violated by "trial attorney who, while disclosing the plea offer, provides the defendant with incomplete or misleading information with regard to the offer"). Effective assistance of counsel means accurately apprising the defendant of the probable consequences of both accepting the government's offer and pleading not guilty.

Here, Mr. Angelos's affidavit includes a host of allegations that counsel provided him with incomplete or incorrect information. Most critically, according to Mr. Angelos, Mr. Mooney did not competently advise Mr. Angelos on the mandatory and consecutive nature of the penalties under 18 U.S.C. § 924(c). Mr. Angelos states that Mr. Mooney was not aware or did not convey to him that "a 924(c) count carries a mandatory, not discretionary, 5-year sentence," Angelos Aff. at 3, and that Mr. Mooney "also did not explain that the 924(c) counts carried mandatory sentences that could be 'stacked,'" *id.* at 5. Moreover, according to Mr. Angelos, Mr. Mooney initially

advised him that he "was likely to receive about 2 years" in prison, *id.* at 2, never told him that the guns found in his apartment were identical, for § 924(c) purposes, to the guns allegedly in his possession during the drug sales, *see id.* at 3, 5, and "did not explain, and I did not understand, that the 924(c) count involving the guns found in my apartment was going to be nearly impossible to defend at trial," *id.* at 5. If confirmed by the Court, these legal errors and failures by Mr. Mooney to convey critical information would plainly amount to deficient representation.

3. *Poor or nonexistent advice:* In a third category of cases, the plea offer and likely consequences are accurately conveyed to the defendant, but the attorney then gives highly flawed advice (or no advice at all) as to whether the defendant should accept the offer. Such poor or nonexistent advice may result from a deficiency in counsel's analysis of the pros and cons of accepting the offer, or a failure to provide this analysis to the defendant. Here, too, courts have often found Sixth Amendment violations. In *Turner v. Tennessee*, 664 F. Supp. 1113 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), for example, the government made an offer carrying a two-year sentence to a defendant charged with murder and kidnapping. The defendant rejected the offer on advice of counsel, and then was convicted at trial and sentenced to life imprisonment. Given the severity of the charges, the strength of the evidence, and the generosity of the government's offer, the court held that counsel's "advice not to accept the two-year offer . . . was well below an objective standard of reasonableness." *Id.* at 1121 (internal quotation marks omitted). In *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006), *vacated as moot*, 128 S. Ct. 749 (2008), similarly, an attorney advised his client to reject an offer under which he would plead guilty to first-degree murder and the government would not pursue the death penalty. After the defendant went to trial and was sentenced to death, the Ninth Circuit held that counsel's analysis of the defendant's plea options

was deficient. Counsel "advised his client to go to trial and risk the death penalty even though there was a good possibility that the guilt phase of trial would result in a first-degree murder charge, the same outcome as the plea agreement. This was a huge risk in light of the potential downside, that is, that the court would impose the death penalty." *Id.* at 941.

The same result has followed in cases where counsel did not actually give bad advice but still failed to recommend that the defendant accept an advantageous plea offer. In *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), *clarified and reaff'd on reh'g*, 90 F.3d 36 (2d Cir. 1996), a defendant with no prior criminal history rejected a plea bargain that would have resulted in a one- to three-year sentence, and then received a sentence of twenty years to life after being convicted at trial. Evaluating an attorney who "allowed [the defendant] to reject such offer without giving him any advice as to the wisdom of so doing," the Second Circuit declared that "it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice." *Id.* at 494, 497. In *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978), similarly, the defendant rejected a plea offer carrying a one- to three-year sentence, and then received a sentence of ten to forty years upon his conviction. Because "the case against [the defendant] was very strong in counsel's words," and because counsel was inappropriately motivated by his desire to try his first jury case, the court held that the Sixth Amendment was violated when counsel "neither recommended that [the defendant] should accept [the offer], nor gave any advice on the advisability of accepting it." *Id.* at 522-23. *See also Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) (finding Sixth Amendment violation where "defense counsel offered no advice as to whether the plea bargain should be accepted"); *Carrion v. Smith*, 537 F. Supp. 2d 518, 530 (S.D.N.Y. 2008), *vacated on other grounds*, 549 F.3d 583 (2d Cir. 2008) (same where counsel "did nothing to persuade his client to take what was obviously a very beneficial deal"); *United*

States v. Robertson, 29 F. Supp. 2d 567, 571 (D. Minn. 1998) ("Given the overwhelming evidence presented against [the defendant] at trial . . . and the potential penalties involved, [counsel] provided his client ineffective assistance of counsel by not advising his client to accept any of the plea negotiations offered by the Government.").

These cases establish that counsel must give reasonable advice to a defendant regarding whether he should accept a plea offer, based on proper analysis of the pros and cons of pleading guilty or not guilty. If counsel provides unreasonably poor advice, or fails to give any advice at all, the Sixth Amendment is violated. This outcome is consistent with the ABA Standards, which state that "defense counsel should advise the accused with complete candor concerning all aspects of the case," and that "[o]nce the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision." ABA Standards § 4-5.1 & cmt. A duty of reasonable advice is also embraced by the Model Code of Professional Responsibility, which stipulates that "[a] defense lawyer in a criminal case has the duty to advise his client fully whether a particular plea to a charge appears to be desirable." Model Code of Professional Responsibility EC 7-7 (1992).

Here, according to Mr. Angelos's affidavit, Mr. Mooney initially recommended against accepting the government's plea offer, and then later declined to take a position one way or another. At no time did Mr. Mooney advise Mr. Angelos to accept the government's highly beneficial offer. *See* Angelos Aff. at 3 (counsel recommended against accepting government's initial offer, which would have required cooperation with prosecution, because "he would rather spend a year in the county jail than spend a year cooperating with the gang unit"); *id.* at 5 ("Mr. Mooney did not tell me to consider seriously taking this offer in light of how much more serious the government was taking my case and the more serious nature of the additional counts

threatened by the government."); *id.* at 7 (counsel recommended against accepting government's Summer 2003 offer of seven to eight years because "this plea was not yet within the range he was looking for"); *id.* ("When I asked him whether I should take a plea if it is better than the previous 12 years deal, he only said that it was up to me."). If found credible by the Court, these instances of poor or nonexistent advice would clearly constitute inadequate representation. And, given the enormous sentences that can result – and did result here – from the imposition of consecutive § 924(c) counts, it was particularly important for Mr. Angelos to receive competent advice regarding the consequences of the decision whether to plead guilty or go to trial. This was especially true given Mr. Angelos's apparent naivete regarding federal sentencing. *See id.* at 3 (saying his "only familiarity with the federal system consisted of hearing about people who had received about a 6 month[] sentence for having 6 pounds of marijuana" and noting his "optimis[m]" that he might be facing a maximum of less than "4 or 5 years in prison").

4. *Other deficient performance:* While the above three categories capture most situations in which ineffective assistance of counsel is provided during plea bargaining, other factual scenarios may also give rise to Sixth Amendment violations. In *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973), for instance, a defendant entered his plea after spending only a few minutes talking with his attorney. Noting that the attorney made no effort "to investigate the facts of the charges," "to talk to any witnesses," or "to explore the possibility of a motion to suppress," the Fifth Circuit held that such lack of diligence by counsel during plea bargaining violated the Sixth Amendment. *Id.* at 221-22; *see also* Zeidman, *supra*, at 844 n.23 (noting that "pretrial preparation [is] the most common area of defense counsel incompetence"). In *Tyler v. United States*, 78 F. Supp. 2d 626 (E.D. Mich. 1999), counsel organized a meeting between the defendant and prosecutors to discuss a potential plea agreement, but then failed to show up to that meeting.

The court held that counsel's "abandon[ment of defendant] to the government agents was unreasonable under the prevailing professional norms and was not sound strategy." *Id.* at 632. Lastly, in *State v. Ludwig*, 369 N.W.2d 722 (Wis. 1985), counsel initially rejected a plea offer without consulting with the defendant, then pressured the defendant into rejecting the offer as well. The court held that such coercion constituted ineffective assistance of counsel. *See id.* at 727-28. Accordingly, the Sixth Amendment is violated during plea bargaining when counsel conducts a deficient investigation, is absent during negotiations with prosecutors, or pressures the defendant into entering a particular plea.

Here, there is no indication that Mr. Mooney was absent during negotiations or pressured Mr. Angelos into a plea, but there is some evidence that Mr. Mooney did not adequately investigate key facts. In his affidavit, Mr. Angelos lays out a series of leads, bearing on the credibility of several government witnesses, that he wanted Mr. Mooney to investigate. *See* Angelos Aff. at 6-7. According to Mr. Angelos, "Mr. Mooney never fully investigated these issues or brought them to the attention of the government during plea negotiations." *Id.* at 7; *see also id.* (neither Mr. Mooney nor the investigator asked for a tape in which a government witness said "the FBI had gone to his house to pressure him to say that [Mr. Angelos] had a gun during the May 21 drug transaction"). If the Court were to credit this assertion of a deficient investigation, it could be a basis on which to find unreasonably poor representation.

5. *Prejudice:* Under *Strickland*'s two-part test, of course, the defendant must establish *both* that counsel's assistance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result. In the context of plea bargaining IAC claims, the key prejudice question is whether the defendant would have pleaded differently had he received acceptable representation. Courts have answered affirmatively even when presented with nothing

more than the defendant's own testimony and a wide disparity between the sentences offered and actually imposed. *See, e.g.*, *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003) ("[A] significant sentencing disparity in combination with defendant's statement of his intention is sufficient to support a prejudice finding."); *Gordon*, 156 F.3d at 381 ("[A] disparity provides sufficient objective evidence – when combined with a petitioner's statement concerning his intentions – to support a finding of prejudice under *Strickland*."); *McBroom v. Warren*, 542 F. Supp. 2d 730, 738 (E.D. Mich. 2008) (finding prejudice solely on account of disparity between offered and actual sentences).

Even when courts have required more evidence for a finding of prejudice, they have been willing to look widely for objective indications that the defendant would have accepted a plea offer but for counsel's deficient representation. In *In re Alvernaz*, for example, the California Supreme Court identified as "pertinent [prejudice] factors" "whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." 2 Cal. 4th at 938. Similarly, the court in *Turner* held that the defendant had been prejudiced because he made a counteroffer after rejecting the government's proposal, and appeared at all times to be under counsel's control. 664 F. Supp. at 1122. And in *Jiminez*, the dispositive evidence of prejudice was that at trial the defendant had no good defense to the charges against him, thus suggesting he could not have thought he would prevail after pleading not guilty. *See* 144 P.3d at 907; *see also Lewandowski*, 949 F.2d at 889 (finding prejudice where defendant had initially entered guilty plea, only to withdraw it on counsel's advice); *Williams*, 605 A.2d at 110 (same where counsel advised defendant not to testify

at trial). These cases demonstrate that *Strickland*'s prejudice inquiry should be approached flexibly.

Here, Mr. Angelos states repeatedly in his affidavit that he would have accepted the government's plea offer had he been adequately advised by his attorney (particularly regarding the § 924(c) counts). *See* Angelos Aff. at 3-4 ("Had Mr. Mooney informed me that the guns found in my apartment could support a 924(c) count and that a 924(c) count carries a mandatory, not discretionary, 5-year sentence, I would have been willing to plead guilty to one 924(c) count and the three drug counts."); *id.* at 4 (same); *id.* at 5 ("Had Mr. Mooney explained to me that I was facing a likely 7 years on the counts I admitted and a mandatory 30 years if the government convicted me of just one of the other 924(c) counts, I would have accepted the government's offer of 16 years. . . . Had he explained these possibilities originally, I would have pled to the original offer of the three drug counts and a single 924(c) count."); *id.* at 8 (same). The affidavit also reveals a very wide disparity between the initial sentence offered to Mr. Angelos (three and one-half years) and the sentence ultimately imposed (fifty-five years), persistently inadequate advice by Mr. Mooney, Mr. Angelos's amenability to a plea bargain, and the absence of any viable defense to the § 924(c) charges – all factors that courts have relied upon as objective evidence of prejudice. Accordingly, if the Court deems Mr. Angelos's affidavit to be credible, it should hold that he was prejudiced by Mr. Mooney's deficient representation.

CONCLUSION

Because the vast majority of cases are resolved by guilty plea and the responsibilities of counsel are particularly complex during the plea bargaining stage, courts should be especially attentive to plea bargaining IAC claims. As discussed above, there exist a number of common scenarios – counsel's failure to convey a plea offer to the defendant, counsel's provision of incomplete or incorrect information, counsel's unreasonably poor advice as to how to plead, among them – that are strongly suggestive of a Sixth Amendment violation. Courts should watch carefully for these scenarios and should not hesitate to find denial of effective assistance of counsel where, as here, they appear to have materialized. While plea bargaining IAC claims may appear difficult to evaluate because of their dependence on the defendant's testimony as well as "private communications between attorney and client that may have occurred long before their significance is apparent," "in the final analysis . . . the difficulty of these questions is no greater than others faced by our trial courts and will yield to good advocacy, judicial wisdom and the presumptions of competence and regularity." *Pollard*, 282 Cal. Rptr. at 594.

Respectfully submitted this 27th day of February, 2009.

/s/ Candice Pitcher

Anthony S. Barkow
Rachel E. Barkow
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third Street, Suite 214
New York, NY 10012
(212) 998-6612

Candice Pitcher
JONES WALDO HOLBROOK & McDONOUGH PC
170 S. Main Street, Suite 1500
Salt Lake City, UT 84101
(801) 521-3200

Samuel L. Feder
Nicholas O. Stephanopoulos*
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Attorneys for Amicus Curiae
*not admitted in this district/pro hac vice application pending