No. _____

In The
Supreme Court of the United States

BLAINE LAFLER
Petitioner,

v.

ANTHONY COOPER
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Anthony Cooper faced assault with intent to murder charges. His counsel advised him to reject a plea offer based on a misunderstanding of Michigan law. Cooper rejected the offer, and he was convicted as charged. Cooper does not assert that any error occurred at the trial.

On habeas review, the Sixth Circuit found that because there is a reasonable probability that Cooper would have accepted the plea offer had he been adequately advised, his Sixth Amendment rights were violated. The writ was conditioned on Michigan re-offering the plea agreement. The question presented is:

> Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain but the defendant is later convicted and sentenced pursuant to a fair trial?

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Blaine Lafler, Warden of a Michigan correctional facility. The Respondent is Anthony Cooper, an inmate.

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OPINIONS BELOW

The opinion of the Sixth Circuit is unpublished. Pet. App. 1a-22a. The order of the United States District Court granting the petition is also unpublished. Pet. App. 24a-42a. The decision of the Michigan Court of Appeals affirming Cooper's conviction is unpublished. Pet. App. 44a-47a.

JURISDICTION

The opinion of the Sixth Circuit filed May 11, 2010, affirmed the decision of the Eastern District of Michigan granting Cooper habeas relief. Pet. App. 1a – 22a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides:

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

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

INTRODUCTION

After a fair and reliable trial, Respondent Cooper was convicted of assault with intent to commit murder in a Michigan court, but the United States Court of Appeals for the Sixth Circuit determined that he was entitled to a writ of habeas corpus because his trial counsel deficiently advised him to reject a plea bargain before trial. This decision violates the statutory restrictions on federal habeas corpus review of State court convictions and is wrong as a matter of Sixth Amendment interpretation. It created a species of prejudice cognizable under the Sixth Amendment that ignores the Amendment's purpose: to ensure a fair trial for the criminally accused. The kind of prejudice suffered by Cooper cannot form the basis for relief under the Sixth Amendment because his conviction was obtained after an admittedly fair and reliable trial.

28 U.S.C. § 2254(d) required the Sixth Circuit to limit its review to whether the State court adjudication contravened "clearly established" Supreme Court law. This Court has not clearly established that a criminal defendant in Cooper's situation is prejudiced in a way that is cognizable under the Sixth Amendment. Neither *Strickland v. Washington* nor *Hill v. Lockhart*, the two cases relevant to the issue, supports such a new rule. [1] The prejudice requirements of both those cases limit relief to circumstances where counsel's deficient performance affected the fairness or existence of a trial. *Strickland* requires that a defendant show that his counsel's conduct affected the fairness or reliability of a trial that was held, and *Hill* requires

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985).

that a defendant show that his counsel's conduct resulted in his client's decision to forgo a trial altogether. No case from this Court addresses the situation where deficient performance resulted in a fair and reliable trial rather than a plea. Accordingly, the Sixth Circuit was required to reject Cooper's claim under §2254(d) because it could not be supported by this Court's clearly established precedent.

Moreover, as a matter of constitutional law, even if counsel deficiently advises his client to reject a plea deal, there is no violation of the Sixth Amendment if the defendant thereafter receives a fair trial. When prosecutorial misconduct prevents a plea bargain, this Court has found that a receipt of a fair trial bars relief. The same rationale should prevent relief here. In *Strickland*, this Court identified the purpose of the Counsel Clause as ensuring that a defendant receives a fair trial. The purpose of the Clause is fulfilled despite bad advice by counsel to reject a plea offer when the conviction nevertheless results from a fair trial. It is true that a criminal defendant in this situation may receive a harsher sentence than he would have but for his counsel's deficient performance, but because that injury does not stem from any unfairness in the trial that resulted in the harsher sentence, it is not actionable under the Sixth Amendment.

The Constitution guarantees a criminal defendant a fair trial or fair plea, and Respondent had a fair trial. And while the Constitution also guarantees effective counsel, it does not require a court to overturn a conviction based on a fair trial because effective counsel would have procured a more favorable plea.

STATEMENT OF THE CASE

A. The Facts of the Crime

Cooper's imprisonment arises from the March 25, 2003, shooting of Kali Mundy outside of an apartment building in Detroit. As Ms. Mundy walked towards her car, she saw Cooper pull up in a vehicle. Mundy and Cooper began walking towards each other. When they were about six-feet apart, Cooper pulled out a handgun, pointed it at Mundy's head, fired, but missed. Mundy ran but Cooper fired additional shots and hit her in the thigh and buttocks. She collapsed at the door of a nearby house. One bullet perforated her intestines and the resulting injury was life-threatening. Mundy survived after a two and one-half week hospital stay.

Detroit Police Officer Randell Coleman happened to be nearby and witnessed the shooting. He radioed a description of the shooter, and he saw two other officers almost immediately apprehend Cooper.

B. State Court Proceedings

At a pretrial conference the prosecutor acknowledged a sentence offer of 51-to-85 months (on the minimum sentence) in exchange for pleading guilty to assault with intent to murder. Pet. App. 48a – 49a.[2] At the end of the pretrial conference, trial counsel stated that he had talked with Cooper about the offer and that the offer would not be accepted. Pet. App. 51a. Trial counsel had mistakenly advised Cooper that

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[2] Michigan has an indeterminate sentencing scheme in which a criminal defendant receives a minimum sentence and a maximum sentence. *People v. Lowe,* 484 Mich. 718, 724; 773 N.W.2d 1, 3-4 (2009).

the location of the wounds precluded a finding that he intended to murder the victim.[3] Following trial, the accuracy and fairness of which was not challenged by Cooper in his federal habeas proceeding, the jury found Cooper guilty as charged. Cooper was subsequently sentenced to a minimum prison term of 185 months for the assault conviction and lesser terms for related firearm convictions. The maximum sentence was 30 years.

Cooper filed a direct appeal with the Michigan Court of Appeals and raised, among others, the following claim:

> Defense counsel rendered ineffective assistance, under the State and federal constitutions, where he failed to convey the sentencing benefits of the plea offer to [Cooper] and ignored his desire to plea guilty.

Cooper received an evidentiary hearing on his ineffective assistance of counsel claim. Following the hearing, the trial court determined that there was no ineffective assistance of counsel based on the record. Pet. App. 52a-55a.

On March 15, 2005, the Michigan Court of Appeals issued an unpublished *per curiam* opinion affirming Cooper's convictions. Pet. App. 44a-47a. The court summarily rejected the claim on the merits, finding that "[t]he record fails to support [Cooper's]

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[3] Petitioner does not challenge the finding by the District Court and Sixth Circuit that counsel's advice was based on a mistaken belief regarding State law. Pet. App. 12a-16a.

contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant." Pet. App. 45a. On October 31, 2005, the Michigan Supreme Court denied Cooper's application for leave to appeal. Pet. App. 43a.

C. Federal Court Proceedings

Cooper, through counsel, filed a petition for writ of habeas corpus, raising the following claim:

> Trial counsel rendered incompetent advice during the plea bargaining process which denied [Cooper] the effective assistance of counsel.

The District Court conditionally granted habeas relief, requiring the State to release Cooper if it did not re-offer him the 51-to-85 month sentence agreement on the minimum. Pet. App. 42a.

The Sixth Circuit affirmed. Modifying the prejudice component of *Hill* to fit the facts of the case, the court found that to sustain a claim of ineffective assistance of counsel, Cooper was required to show a "reasonable probability that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer." Pet. App. 12a. The Sixth Circuit reasoned "to say that there is no prejudice because [Cooper] ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants. . . . [Cooper] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 18a-19a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit contravened 28 U.S.C. §2254(d)(1) where this Court has not clearly established entitlement to relief for ineffective assistance of counsel during plea bargain negotiations when the defendant is later convicted and sentenced pursuant to a fair trial.

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress placed strict limits on when federal courts can grant habeas relief. In particular, 28 U.S.C. § 2254(d)(1) forbids federal courts from granting habeas relief based on a state court merits decision unless that decision conflicts with "clearly established Federal law, as determined by the Supreme Court of the United States." The Michigan Court of Appeals summarily denied Petitioner's claim on the merits by finding that "[t]he record fails to support [Cooper's] contentions that defense counsel's representation was ineffective because . . . he did not obtain a more favorable plea bargain for defendant."

Pet. App. 45a. Though brief, this adjudication was on the merits and is entitled to § 2254(d)(1) deference.[4]

This Court has not clearly established that a defendant is prejudiced as that term has been defined by this Court's ineffective-assistance-of-counsel jurisprudence when the defendant rejects a plea offer because of deficient advice by his attorney but is then convicted after a fair and reliable trial. A defendant is not prejudiced in a cognizable way in that situation because he ultimately received precisely the process that the Counsel Clause of the Sixth Amendment guarantees – a fair trial. Although lower courts have held that a defendant can state a Sixth Amendment claim in this situation, several courts have reached the contrary conclusion. Until this Court resolves the question, a State court cannot be said to conflict with "clearly established Federal law, as determined by the Supreme Court of the United States" when it denies such a claim of ineffective assistance of counsel.

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[4] *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310-312 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000)(*en banc*); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). In *Harrington v. Richter*, 130 S. Ct. 1506 (2010), this Court granted certiorari and asked the parties to address the question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?" The Sixth Circuit assumed for purposes of argument that this was a merits determination. Pet. App. 36a. And even if this Court determines that AEDPA deference does not apply, the decision is wrong on the merits. *See* Argument II.

In *Arave v. Hoffman*, the Court granted certiorari, in part, to address this precise issue.[5] The Court specifically ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[6] The court dismissed the case, however, under Rule 46 on mootness grounds and never reached the merits.[7] Accordingly, the issue of whether a criminal defendant suffers cognizable prejudice in such a situation remains open. This Court did not clearly establish an answer in *Arave* and has not done so in any subsequent case.

A. This Court's ineffective-assistance-of-counsel-jurisprudence does not clearly establish entitlement to relief when counsel's deficient performance results in a fair and reliable trial.

Neither *Strickland* nor *Hill* supports a finding of cognizable prejudice when deficient performance results in nothing more than a fair and reliable trial. *Strickland* exists specifically to ensure that a criminal defendant receives a fair trial. While a criminal defendant in Cooper's position has obviously suffered a form of factual prejudice – but for the bad advice he likely would have accepted a plea bargain with a more favorable sentence – that sort of prejudice is not the type of injury this Court's ineffective-assistance-of-counsel jurisprudence was created to remedy.

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[5] *Arave v. Hoffman*, 552 U.S. 1008 (2007).

[6] *Arave*, 552 U.S. at 1008.

[7] *Arave v. Hoffman*, 552 U.S. 117 (2008).

Strickland noted that "the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial."[8] The Court explained that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[9] The *Strickland* test was developed to ensure a fair trial.[10] Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[11] Despite the loss of the favorable sentencing agreement, the State process in this case ultimately produced a just result: Cooper's trial was fair and reliable and his sentence was lawful and proportionate.

The *Strickland* prejudice inquiry was likewise designed to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[12] Therefore, "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system

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[8] *Strickland*, 466 U.S. at 684-685.

[9] *Strickland,* 466 U.S. at 685.

[10] The Sixth Amendment right to *counsel of choice*, also based on the Counsel Clause, is not grounded on fair trial concerns but is not implicated by this case. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).

[11] *Strickland,* 466 U.S. at 686.

[12] *Strickland,* 466 U.S. at 691-692.

counts on to produce just results."[13] The trial here was undeniably reliable as Cooper does not contest anything that occurred there.

To the extent there was a breakdown in the adversarial plea-bargaining process, it merely resulted in the loss of a settlement – it did not affect the fairness of the proceeding that produced the conviction. As this Court found in *Lockhart v. Fretwell*, the "prejudice" component of ineffective assistance "focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or fundamentally unfair. . . . Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[14] Cooper had no right to settle his case.[15] There is nothing about counsel's performance in Cooper's case that calls into question the justness, fairness, or reliability of his trial. As a consequence of counsel's bad advice, Petitioner went to trial and received a fair and reliable proceeding – which, this Court held in *Strickland*, is all that the Sixth Amendment's Counsel Clause seeks to protect.

Nor does *Hill* support the decision of the Sixth Circuit. In *Hill*, the habeas petitioner argued that his counsel's deficient advice caused him to *accept* a plea offer and forego his constitutional right to a fair trial. This is a critical factual distinction from the present

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[13] *Strickland*, 466 U.S. at 696.

[14] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[15] *Mabry v. Johnson*, 467 U.S. 504, 510-511 (1984), abrogated on other grounds by *Puckett v. United States*, 129 S. Ct. 1423 (2009).

case. This Court found that in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would *not* have pleaded guilty and would have insisted on going to trial.[16] This application of the *Strickland* standard is in keeping with its purpose; more than adversely affecting the fairness of the trial, the deficient performance in *Hill* resulted in the complete loss of a trial. The same is not true of the situation presented by this case. When counsel's deficient advice results in nothing less than a fair and reliable trial, the interests of the Counsel Clause have been fully served. Because Cooper was not cognizably prejudiced, there was no violation of the Sixth Amendment.[17]

In *Wright v. Van Patten*, this Court reiterated that the term "clearly established federal law" in 28 U.S.C. § 2254(d)(1) is a narrow one and that only decisions that "squarely address[]" the issue in a case fit the bill.[18] Because there was no such decision that could form the basis for the Sixth Circuit's decision in this case, the Court should grant the petition and reverse the Sixth Circuit.

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[16] *Hill,* 474 U.S. at 58-59.

[17] *Gonzalez-Lopez*, 548 U.S. at 147 (2006) ("The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there--effective (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense . . . . [A] violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.").

[18] *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).

B. The existence of divergent remedies applied by lower courts indicates a lack a clear direction emanating from this Court.

Moreover, lower courts have imposed divergent remedies in this situation. This provides further evidence that there is no clearly established law from this Court controlling the lower courts' choice of remedy. Some courts have granted the defendant a new trial.[19] Other courts have specifically enforced the forgone plea offer.[20] And still other courts have crafted remedies that are hybrids of the new-trial and reinstatement-of-plea approaches or that are entirely

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[19] *See, e.g.*, *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998); *State v. Taccetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *People v. Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State v. Lentowski*, 569 N.W.2d 758, 761-62 (Wis. 1997); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *Ex Parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

[20] *See, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *Satterlee v. Wolfenberger*, 453 F.3d 362, 368-69 (6th Cir. 2006); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (requiring specific enforcement of the original plea unless the prosecution shows non-vindictive reasons for changing or withdrawing it); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea); *De Jesus Garcia Jiminez v. State*, 114 P.3d 903, 907 (Ok. Ct. Crim. App. 2006).

different.[21] Lastly, some courts believe no remedy is appropriate because there is no prejudice in the first place.[22]

In *Carey v. Musladin*, this Court stated, "Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the issue.[23] The lack of uniformity in the lower courts'

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[21] *See, e.g.*, *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (ordering defendant's sentence to be reduced to the time he had already served and him discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial); *In re Alvernez*, 830 P.2d 747, 760 (Cal. 1992) (permitting prosecutor to choose between resubmission of the original plea within thirty days or a new trial); *Tucker v. Holland*, 327 S.E.2d 388, 396 (W.Va. 1985) (refusing to reinstate the original plea but directing trial court to consider that plea for approval (or rejection)); *Harris v. State*, 437 N.E.2d 44, 45 (Ind. 1982) (permitting defendant to choose between reinstatement of the original plea or a new trial); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. App. 1978) (directing trial court to consider original plea for approval unless state withdraws plea, in which case defendant gets a new trial); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. 1978) (granting defendant the opportunity to engage in a new plea bargain with the advice of counsel, and if discussion breaks down, a new trial).

[22] *See, e.g.*, *State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000); *see also United States v. Springs*, 988 F.2d 746, 749 (7th Cir. 1993) (No prejudice as matter of law for failing to advise defendant to take plea bargain where subsequent, less favorable, plea was voluntarily entered). This Court recognized that this is one of the possible remedial options through the phrasing of its question in *Arave*: "What, if any, remedy should be provided . . . " *Arave*, 552 U.S. at 1008 (emphasis added).

[23] *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

approaches to this issue is powerful evidence that this Court's ineffective-assistance-of-counsel jurisprudence does not clearly establish a right to specific performance of the plea-bargain as ordered by the Sixth Circuit. Because this Court has not clearly established the appropriate remedy, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed.

II. Irrespective of the limitations imposed by §2254(d)(1), the State court correctly denied relief.

In habeas corpus proceedings, this Court has the authority to clarify constitutional rules as long as these clarifications do not create new rules providing a basis for obtaining habeas relief. For example, in *Berghuis v. Thompkins*, the Court did not limit its holding to a determination of the reasonableness of the State court decision, but also found that it was correct.[24] So too here, not only did the State court issue a decision that did not contravene clearly established precedent of this court, the result was also correct.

There is no constitutional right to relief for a criminal defendant who has been convicted after a fair and reliable trial on account of his attorney's failure to secure a more favorable resolution of the case. To be sure, the plea bargaining process is critical to the functioning of our criminal justice system. But not every break-down in that system violates the Constitution. Even where a break-down in the plea

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[24] *Berghuis v. Thompkins*, 560 U.S. ____ ; 130 S. Ct. 2250, 2264 (2010).

bargaining process is attributable to a mistake of defense counsel, if the system nevertheless nets a fair and reliable trial, then the purpose of the Counsel Clause has been fulfilled.

As Judge Easterbook wrote in *United States v. Springs*, "[n]ot every adverse consequence of counsel's choices is 'prejudice' for constitutional purposes."[25] In that case, the Seventh Circuit found that a criminal defendant, as a matter of law, could not demonstrate *Strickland* prejudice for defense counsel's failure to secure a favorable plea deal, where the defendant subsequently voluntarily accepted a second, less-favorable deal and pled guilty. This is because, as this Court stated in *Fretwell*, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[26] "Prosecutors need not offer discounts and may withdraw their offers on whim. Defendants have no substantive or procedural right to bargain-basement sentences. As a matter of law, Springs did not suffer 'prejudice' from the representation he received."[27]

Limiting the Counsel Clause as in *Springs* would also be consistent with the reasoning of *Mabry v. Johnson* and *Weatherford v. Bursey*.[28]

In *Mabry*, the government offered a plea but when defense counsel called later and attempted to

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[25] *Springs*, 988 F.2d at 749.

[26] *Fretwell*, 506 U.S. at 372.

[27] *Springs*, 988 F.2d at 749.

[28] *Weatherford v. Bursey*, 429 U.S. 545 (1977).

accept the deal, the prosecutor changed his mind and withdrew it. The defendant subsequently accepted a harsher plea bargain. The defendant argued that due process principles entitled him to the benefit of the first offer, and the Sixth Circuit agreed, holding that "fairness" prevented the government from withdrawing the original plea offer after it had been accepted.[29] This Court reversed, explaining that only the plea that resulted in the sentence had constitutional significance:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.[30]

The Court held that even if the prosecutor was "negligent or otherwise culpable" in reneging on the original plea agreement, the Constitution's concern is only "with the manner in which persons are deprived of their liberty."[31] The same reasoning applies here. Cooper is in prison because of a fair and reliable trial,

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[29] *Mabry*, 467 U.S. at 506.

[30] *Mabry,* 467 U.S. at 507-08.

[31] *Mabry,* 467 U.S. at 511.

not because of a plea offer that was never executed. The prosecutor's conduct in *Mabry* did not affect the fairness of the proceeding that resulted in that defendant's imprisonment, and so too defense counsel's conduct here did not affect the fairness of the proceeding that resulted in Cooper's imprisonment.

Weatherford is similar. There, the defendant complained that an undercover government agent, pretending to be a co-defendant, affected the fairness of the plea bargaining process. The Supreme Court noted that the prosecution's misconduct may have denied the defendant the opportunity to engage in plea bargaining, but it found that there was no cognizable prejudice because the defendant "was not denied a fair trial."[32] An unfairly lost opportunity to resolve the case on more favorable terms did not provide grounds for relief because the conviction was ultimately obtained after a fair trial. There is no principled reason the result of the present case should be different.

Cooper had a fair trial. His counsel performed competently at trial and it produced a just and reliable result. Cooper does not dispute that. It is strange then, that the Counsel Clause could be interpreted to require the State to vacate the conviction that resulted from that trial and require it to offer Cooper a plea bargain to which he never had entitlement. The Court should reverse the judgment and of the Sixth Circuit and clarify that the Counsel Clause does not support such a result.

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[32] *Weatherford*, 429 U.S. at 560.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY COOPER,	**)**	
Petitioner-Appellee,	**)**	
	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
v.	**)**	COURT FOR THE EASTERN
	)	DISTRICT OF MICHIGAN
BLAINE LAFLER,	**)**	
Respondent-Appellant.)		

BEFORE: KENNEDY, COLE, Circuit Judges, and JORDAN*, District Judge.

CORNELIA G. KENNEDY, Circuit Judge. The state appeals the district court's grant of habeas relief to a petitioner who rejected a guilty plea based on the advice of counsel. The district court held that petitioner's counsel provided objectively unreasonable advice, and that petitioner relied on that advice in rejecting the plea, going to trial, and receiving a much higher sentence. Because we agree the state courts' decision rejecting petitioner's argument was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and because the terms of the district court's conditional writ are reasonable, we AFFIRM.

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* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2003, around 7:30 in the evening, Kali Mundy left an apartment building where she was visiting an acquaintance. As she entered her car, she saw the petitioner pull up in a Ford Explorer being driven by Tava Simon. Mundy had met petitioner once or twice prior, and exited her car as he exited his. They began walking towards each other. When they were six feet away from one another, Mundy testified, petitioner pulled out a handgun, pointed it towards Mundy's head, and fired.

An uninjured Mundy ran, but the shots continued. She was about forty yards away when a bullet hit her in the buttocks and another her thigh. She heard at least four shots being fired throughout the ordeal. She continued running, eventually collapsing at a neighbor's door.

An ambulance transported Mundy to a nearby hospital, where doctors discovered she had four bullet holes – two entrance wounds and two exit wounds. During an exploratory surgery, Dr. Ian Rubenstein discovered that one of the bullets had pierced her intestines, which were leaking. In Rubenstein's opinion, this was a life-threatening injury. Through surgery, he was able to repair Mundy's intestines, and Mundy was discharged after spending two-and-one-half weeks in the hospital and an additional period in rehabilitation. Mundy continues to experience daily pain from the incident.

Fortuitously, there were several police officers in the vicinity that evening. Officer Randell Coleman witnessed the shooting from several blocks away. He radioed a description of the shooter, who was running away from the scene of the shooting. Two other officers were in the vicinity, and Coleman witnessed them detain

petitioner almost immediately. A small amount of marijuana was discovered in petitioner's pocket. Petitioner was transported to the police station, where a gunshot residue test was performed on him. William Steiner, a forensic chemist with the police department, testified that the test was positive, which indicated that petitioner had been in the presence of a firearm that had been discharged recently.

Petitioner was charged in the district court in Wayne County, Michigan, with Assault with Intent to Murder, Possession of a Firearm by a Felon, Possession of a Firearm in the Commission of a Felony, misdemeanor Possession of Marijuana, and a habitual offender enhancement. On April 14, 2003, Mundy, Coleman, and the arresting officer testified at petitioner's preliminary examination. At the examination, petitioner was represented by Brian McClain, who represented petitioner through sentencing. Following their testimony, the district court bound petitioner over to stand trial on all charges.[1]

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[1] Rather than using a grand jury system, Michigan utilizes a preliminary examination where a district court "determine[s] whether probable cause exists to believe that a crime was committed and that the defendant committed it." *People v. Lowery*, 274 Mich. App. 684, 684, 736 N.W.2d 586, 589 (2007) (citing *People v. Perkins*, 468 Mich. 448, 452, 662 N.W.2d 727, 730 (2003)); *see also* Mich. Comp. Laws § 766.13. If the district court finds that there is sufficient evidence, the defendant is bound over to the circuit court to stand trial. Although the state need not prove its case beyond a reasonable doubt to have a defendant bound over, the district court must focus "his or her attention to whether there is evidence regarding each of the elements of the offense, after examining the whole matter." *People v. Greene*, 255 Mich. App. 426, 444, 661 N.W.2d 616, 627 (2003) (quotations omitted). For a felony

After the preliminary examination hearing, the prosecutor communicated a verbal plea offer to McClain. The deal would have allowed petitioner to plead guilty to assault with intent to murder and face a below-guidelines minimum sentence of 51 to 85 months imprisonment. Petitioner indicated a willingness to accept a plea offer because he "was guilty,"[2] but the conversation he had with his attorney changed his mind. McClain had recently received Mundy's medical records, and believed that the nature of her injuries counseled against accepting a plea. At a post-conviction hearing, McClain recalled that during this conversation he advised petitioner not to plead guilty because the assault with intent to commit murder charge "could not be supported by the evidence." Petitioner had a similar recollection. As he remembered it, because the victim was shot below the waist, McClain "told me that wasn't attempted murder," and that "they couldn't find me guilty of the charge [of assault with intent to commit murder] because the woman was shot below the waist." Petitioner specifically denied that McClain had ever told him: "I think you can be convicted of assault with intent to murder even if I think this is really nothing more than a great bodily harm [sic], certainly a jury still might find you guilty of assault with intent to murder." McClain was confident that the prosecution would ultimately offer a plea deal of 18 to 84 months closer to trial. McClain later admitted, however, that he could not remember a time

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charge, a defendant may appeal the bindover decision to the circuit court, the Michigan Court of Appeals, and the Michigan Supreme Court. *See id*. at 434, 661 N.W.2d at 621. Petitioner's counsel did not appeal the district court's decision to bind petitioner over for trial.

[2] McClain also testified that petitioner had indicated a desire to plead guilty.

when the prosecution's plea offer improved by the time of trial, absent a change in the evidence.

Thus, at a pre-trial conference on July 17, 2003, a week before trial was to begin, the prosecution provided petitioner and his counsel a written plea agreement of 51 to 85 months. McClain indicated on the record that the prosecutor's offered deal was "not reasonable," that there "is insufficient evidence" and that the "Prosecution does not have the evidence to try to [sic] this case."[3] The prosecutor, offended by McClain's comment that the offer was unreasonable, then stated "I withdraw this offer." (*Id.* at 4.) Undeterred, McClain then said, "We're just rejecting the offer." (*Id.* at 5.) Petitioner, who was present at the conference, was reading the plea offer he had just received. He was not asked about the plea agreement, and did not offer any comment on it.

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[3] On the record, McClain emphasized at length his view of the prosecution's evidence:

> After reviewing the medical report, your Honor, I believe that the Prosecution does not have the evidence to try to [sic] this case. We're willing to go to trial, but in the interest of Justice and due to the fact that [prosecutor] Mr. Skywalker is not trying the case, I would like to discuss this matter with the attorney who has will [sic] make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.
>
> I am fully prepared to prove that they do not have sufficient evidence at trial. I think the medical evidence will show that at trial.

Before trial, petitioner sent a letter to the presiding judge, expressing his desire to plead guilty to felonious assault, which carried a lower guidelines sentence than that offered to him by the prosecution. In the letter, he asserted that Mundy had a gun, and that he had shot her because he believed that she was going to harm another person. The trial judge, lacking authority to compel the prosecution to offer a plea deal, took no action. McClain was not aware of the letter until later.

On the first day of trial, the prosecution offered a significantly less favorable plea deal. The state would have allowed petitioner to plead guilty to assault with intent to commit murder, and agree to dismiss the other charges, including the habitual offender enhancement. This offer included a minimum sentence range of 126 to 210 months imprisonment. Petitioner rejected this plea agreement.

The case proceeded to trial. At trial, the prosecution's evidence was substantially similar to the evidence presented at the preliminary examination hearing. The most significant difference was the introduction at trial of Mundy's medical records and the testimony of a treating physician at the emergency room. The defense did not dispute petitioner's involvement in the shooting. Petitioner did not testify. Instead, the defense brought out testimony that there had been a previous, never identified conflict between Mundy and one of petitioner's companions. Based on this testimony, the defense cast Mundy as the person responsible for the confrontation by lying in wait, and then running towards the petitioner's vehicle when it arrived. The defense also advanced the theory that the location of Mundy's injuries suggested that there was no intent to kill.

The jury found petitioner guilty of all crimes as charged, and he was sentenced to 185 to 360 months

imprisonment. He did not file a direct appeal. However, in a post-conviction proceeding before the state trial court, petitioner raised several claims of ineffective assistance of counsel, and the state trial court held a hearing to assess his claim that counsel provided erroneous advice that led him to reject a favorable plea bargain. At the hearing, both McClain and petitioner testified about their conversation preceding the July 17 pre-trial conference. Following the hearing, the state trial court found that "[i]t was Mr. Cooper's belief based on his having counsel over in the jail, his being familiar with the hierarchy of charges, that at the absolute most . . . that he should only be found guilty of a felonious assault." Both petitioner and his attorney, the state trial court found, "were convinced that [conviction of assault with the intent to murder] couldn't occur." At another time, the state trial court described what happened as "[McClain] made an assessment based on his years as a criminal lawyer as to what he thought the People could or couldn't prove and what the medical evidence could or could not support and he made a recommendation to Mr. Cooper." However, the state trial judge ruled against petitioner's claim, finding that "Mr. Cooper made his own choices."

Petitioner appealed from the denial of the motion, and the Michigan Court of Appeals rejected his claim of ineffective assistance of counsel. *People v. Cooper*, No. 250583, 2005 WL 599740 (Mich. Ct. App. Mar. 15, 2005). The court reasoned:

> [T]he record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim

> of self-defense and because he did not obtain a more favorable plea bargain for defendant.

Id. at *1. The Michigan Supreme Court denied leave to appeal. *People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (Mich. Oct. 31, 2005) (table).

Petitioner then filed this petition in United States District Court seeking relief under 28 U.S.C. § 2254, alleging that his trial counsel provided ineffective assistance of counsel during the plea process. The district court conditionally granted the writ, holding that the state appellate courts unreasonably applied the Supreme Court's standards governing ineffective assistance claims, and that petitioner's trial counsel had provided ineffective assistance when he advised petitioner that the circumstances failed to satisfy the elements of assault with intent to commit murder and that he could negotiate a better plea deal later on. *Cooper v. Lafler*, 2009 WL 817712 (E.D. Mich. 2009). The district court concluded that "specific performance" of the plea deal that petitioner would have taken but for his attorney's ineffectiveness was warranted. It conditionally granted a writ, requiring the state to offer petitioner a sentence agreement of 51 to 85 months or release petitioner. The state timely appealed, arguing that counsel provided competent advice, there was no prejudice because petitioner received a fair trial, and the remedy ordered by the district court is unlawful.

STANDARD OF REVIEW

We review de novo the district court's decision to grant habeas relief. *Robinson v. Mills*, 592 F.3d 730, 734 (6th Cir. 2010).

The federal courts may grant habeas relief to a petitioner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we may not grant habeas relief on a claim adjudicated on the merits by the state courts unless the state court's adjudication of a petitioner's claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1). Each of the clauses in subsection (1) carries independent meaning. *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

"Contrary to" means "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id*. A state court decision can be "contrary to" federal law in two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme

> Court precedent and arrives at a result opposite to ours.

Id.

"A decision is an unreasonable application of clearly established federal law, on the other hand, if 'the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.'" *Smith v. Mitchell*, 567 F.3d 246, 255 (6th Cir. 2009) (quoting *Taylor*, 529 U.S. at 407).

Here, the Michigan Court of Appeals, "the last state court to issue a reasoned opinion on the issue," *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)), failed to appreciate the nature of petitioner's claim. Rather than addressing petitioner's argument that he received legally erroneous advice from his counsel, the court of appeals rejected entirely different – and considerably weaker – claims of ineffective assistance of counsel. *See Cooper*, 2005 WL 599740, at *1. To the extent that petitioner's claim was addressed, it is not clear from the court's abbreviated discussion (only two sentences of the opinion is even arguably responsive to petitioner's claim) what the court decided, or even whether the correct legal rule was identified. Equally unclear is whether we review such a claim de novo, *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (stating that deference was inappropriate when the state court applies a legal rule that contradicts governing Supreme Court law); *Van v. Jones*, 475 F.3d 292, 293 (6th Cir. 2007) (applying de novo review when state court did not address claim); *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (applying de novo review when state court applied a legal rule contradicting governing Supreme Court law), or under some form of deferential review,

Holder v. Palmer, 588 F.3d 328, 341 (6th Cir. 2009) (extending deference when state court's analysis was "flawed"); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (extending deference when state court denied claim without articulating reasoning); *see also Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc), *cert. granted, Harrington v. Richter*, --- S. Ct. ----, 2010 WL 596530 (2010). However, we need not decide how much deference the terse analysis provided by state court of appeals is entitled to here, because "[w]ith or without such deference, our conclusion is the same." *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010). Even full deference under AEDPA cannot salvage the state court's decision.

DISCUSSION

Petitioner's claim is that he was denied the effective assistance of counsel during pretrial proceedings when his counsel provided him erroneous advice. A petitioner must establish two elements to prevail on an ineffective assistance of counsel claim: deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel rendered deficient performance when he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. We consider "whether counsel's assistance was reasonable considering all the circumstances." *Id*. at 688. When assessing deficiency, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689.

If counsel provided ineffective assistance, we must then determine whether the petitioner was prejudiced. Petitioner need not show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693. However, he must show 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.

The *Strickland* framework for evaluating counsel ineffectiveness applies to advice regarding whether to plead guilty. *Padilla v. Kentucky*, --- S. Ct. ----, 2010 WL 1222274 (2010); *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). The deficiency portion of the test remains unchanged. Instead of focusing on the fairness of the trial, the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59. If petitioner pleaded guilty, then petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* If petitioner chooses to reject a plea offer, on the other hand, he must show a "*reasonable probability* that, but for his counsel's erroneous advice . . . he would have accepted the state's plea offer." *Magana v. Hofbauer*, 263 F.3d 542, 551 (6th Cir. 2001). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

1. Deficient Performance

First, petitioner's attorney provided deficient performance. Counsel advised petitioner that he could not be convicted of assault with intent to commit murder because the bullets entered the victim's body below the waist. "The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v. Brown*, 267 Mich. App. 141, 147, 703 N.W.2d 230,

236 (2005) (quotations and footnote omitted). Thus, "in order to find a defendant guilty of this crime, it is necessary to find that there was an actual intent to kill." *People v. Taylor*, 422 Mich. 554, 567, 375 N.W.2d 1, 7 (1985) (citations omitted). Petitioner's counsel advised him that because the victim was injured below the waist, the prosecution could not establish the element of intent.

Counsel was wrong. The nature of the victim's wounds are not a dispositive consideration in determining whether the accused possessed an intent to kill. *See People v. Brown*, 159 Mich. App. 428, 432, 407 N.W.2d 21, 23 (1987) (rejecting defendant's argument that no rational jury could have inferred his intent to kill because he only inflicted a "superficial wound" onto the victim's neck, and noting that "[a] corpse is not necessary to establish the requisite intent"); *People v. Cochran*, 155 Mich. App. 191, 194, 399 N.W.2d 44, 45 (1986) (holding that defendant could be found guilty of assault with intent to murder when he fired one shot into the air). Instead,

> the jury 'may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.' And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.

Taylor, 422 Mich. at 568, 375 N.W.2d at 8.

Here, the evidence introduced during the preliminary examination (at which petitioner was represented by McClain) indicated that petitioner used a gun, from short-range, and fired multiple shots at the victim as she was fleeing. The evidence introduced at trial was substantially similar to the testimony from the preliminary examination. The most significant change to the evidence introduced at the preliminary examination was the addition of Mundy's medical records. But the medical evidence supported, rather than refuted, an inference of intent to kill. A wound to the body just below the waist jeopardizes many life-sustaining organs, and Mundy's emergency room physician noted that her injuries were life threatening. As seen from the result in petitioner's trial, this evidence was in fact legally sufficient to convict a defendant of assault with intent to commit murder.

Thus it is clear that counsel informed petitioner of an incorrect legal rule. Further, counsel focused on that incorrect legal rule in advising petitioner not to accept the state's plea offer. Providing such erroneous advice in the face of settled Michigan law is obviously deficient performance. *See Padilla*, --- S. Ct ----, 2010 WL 1222274, at *9 (noting that *Strickland's* application to affirmative misadvice is settled); *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (finding an attorney rendered deficient performance when he provided advice that was "flatly incorrect"); *Maples v. Stegall*, 340 F.3d 433, 439 (6th Cir. 2003) (holding that providing "patently erroneous" legal advice is deficient performance); *Magana*, 263 F.3d at 550 (holding that counsel's "complete ignorance of the relevant law under which his client was charged, and his consequent gross misadvice to his client regarding the client's potential prison sentence, certainly fell below an

objective standard of reasonableness under prevailing professional norms"); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) ("Mr. Girard's recitation of the law . . . was clearly wrong . . . and cannot be said to constitute reasonable strategy."); *see also McAdoo v. Elo*, 365 F.3d 487, 499 (6th Cir. 2004) (stating that if counsel incorrectly advised petitioner about maximum prison sentence before a guilty plea, a petitioner's "argument that his counsel's performance was deficient may have merit"). The state court's conclusion to the contrary is unreasonable.

It is important to note that this is not a case where petitioner's counsel merely offered a prediction about the outcome of the trial, which is how respondent attempts to frame the issue on appeal. In the evidentiary hearing before the state trial court, both petitioner and his counsel testified – and the state trial court found, see 28 U.S.C. § 2254(e)(1) – that counsel informed petitioner that a conviction for assault with intent to commit murder "could not" occur given the medical evidence. At the post-trial hearing, McClain testified that the assault with intent to commit murder charge "could not be supported by the evidence," (R. 20, Tr. at 15), petitioner testified that he was told that a jury "couldn't find [him] guilty of the charge [of assault with intent to commit murder] because the woman was shot below the waist," (*id*. at 31), and the trial court concluded that petitioner and his counsel "were convinced that [conviction of assault with the intent to murder] couldn't occur." (*id*. at 74.) If something "could" happen, then it is possible, however unlikely; if it "could not," it is impossible. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that a conviction may stand only if "*any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt" (first emphasis in original)). Counsel here advised petitioner that a conviction was not possible, even though it was. As the district court held, this erroneous advice

was objectively unreasonable, and was indisputably so. The state court's decision to the contrary unreasonably applied *Strickland* and *Hill*.

2. Prejudice

Moreover, petitioner was prejudiced by his counsel's deficient performance. He testified that, had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the state's offer. Nevertheless, although this evidence is uncontradicted, the state suggests that petitioner cannot show prejudice with his "own self-serving statement." Appellant's Br. at 27. There is no legal basis for us to impose a requirement that habeas petitioners provide additional evidence, and we have declined to create this rule in the past. *Magana*, 263 F.3d at 547 n.1; *see also Dedvukovic v. Martin*, 36 F. App'x 795, 798 (6th Cir. 2002). To do so would contradict the Supreme Court's holdings that petitioner need only establish a "reasonable probability" that the result would have been different. *See Hill*, 474 U.S. at 59. Moreover, even if we were to require independent corroboration, McClain confirmed that petitioner was open to pleading guilty, and the significant disparity between the prison sentence under the plea offer and exposure after trial lends credence to petitioner's claims. *See Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003) (collecting cases for the proposition that "the disparity between the plea offer and the potential sentence exposure as strong evidence of a reasonable probability that a properly advised defendant would have accepted a guilty plea offer"). In fact, the plea offer of 51 to 85 months was lower than petitioner would receive on the felon in possession of a firearm charge alone.

Respondent points to two facts that it believes casts doubt on petitioner's claim that he would have pleaded

guilty but for counsel's advice. First, respondent points to petitioner's indication in a letter a desire to plead guilty to a lesser charge, and his assertion that he did not intend to kill Mundy. Petitioner's hope for a still more favorable plea deal (and attempt to negotiate one) does not mean he would never accept a higher offer. To the contrary, his interest in negotiating a plea shows that he was not set on going to trial. Petitioner's denial at one point in time that he intended to kill the victim does not mean he could not later recant and admit his guilt to the court. Nor does it mean, as respondent contended during oral argument, that his plea could not be accepted by the court unless he admitted his intent to kill. Under Michigan law, the trial court could accept petitioner's plea to assault with intent to commit murder even were he to continue to disclaim an intent to kill. *People v. Haack*, 396 Mich. 367, 376-77, 240 N.W.2d 704, 709 (1976) (rejecting defendant's argument that his denial of an intent to kill precluded his conviction pursuant to his guilty plea to assault with intent to commit murder, stating "[d]isclaimers by the defendant during the plea taking . . . of intent to kill . . . do not preclude acceptance of a plea since on defendant's own recital a jury could properly infer the requisite participation or intent").

Respondent also argues that the fact that petitioner did not assert his desire to plead guilty at the pretrial conference belies his post-conviction claim that he would have accepted the plea but for his attorney's bad advice. This argument is wholly without merit. Petitioner does not contend that he wanted to accept the plea offer *despite* counsel's advice. He contends instead that he did not plead because his attorney misinformed him of the applicable law.

Despite the clear and uncontroverted evidence indicating that petitioner would have pleaded guilty and

received a lower sentence but for his attorney's poor advice, respondent nevertheless contends that there is no prejudice because petitioner received a fair trial, which is all that the Sixth Amendment is meant to preserve. "No federal circuit case so holds," *Williams v. Jones*, 571 F.3d 1086, 1093 (10th Cir. 2009), and this circuit has consistently rejected such a myopic view of prejudice from a deprivation of the right to counsel. *United States v. Morris*, 470 F.3d 596, 600 (6th Cir. 2006); *Magana*, 263 F.3d at 547; *Turner v. State of Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reaffirmed*, 940 F.2d 1000 (6th Cir. 1991).

The Supreme Court has "recognize[d] the importance of counsel during plea negotiations," *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (citing *Brady v. United States*, 397 U.S. 742, 758 (1970)), and therefore the accused has the right to be represented by counsel during this "critical stage." *King v. Bobby*, 433 F.3d 483, 490 (6th Cir. 2006). In this case, petitioner was denied this right. As a result, he received a prison sentence four times greater than that promised by the plea deal. *See Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991) ("In this case, it is clear what injury [petitioner] suffered. Instead of being sentenced for 15 to 25 years of incarceration, he received a sentence of life imprisonment without parole."). To say that there is no prejudice because the petitioner ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants. As the Supreme Court has recognized:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced

> idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971). Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel. Thus, he has established prejudice. And, to the extent that the state court reached the question of prejudice,[4] its rejection of his *Strickland* claim represents an unreasonable application of clearly established Constitutional law, as established by the Supreme Court.

3. Remedy

Finally, respondent contends that, even if petitioner has established a valid ineffective assistance of counsel claim, there is no clearly established Supreme Court law

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[4] We note again that it is highly unlikely that anything in either cursory ruling of the trial court or appellate court could be construed as addressing the prejudice prong of petitioner's ineffective assistance claim. In these situations, de novo review by federal courts is appropriate. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim de novo.").

supporting the district court's remedy, and the remedy "violates separation of powers, federalism principles, and basic fairness principles."

The absence of clearly established law by the Supreme Court is not relevant when fashioning a habeas remedy. We have already concluded that petitioner is in custody in violation of the Constitution of the United States, *see* 28 U.S.C. § 2254(a), and the state court's conclusion to the contrary represents an unreasonable application of clearly established Federal law, as determined by the Supreme Court, *see* 28 U.S.C. § 2254(d)(1). We must now decide whether the district court's remedy for petitioner's unlawful custody is appropriate.

"[F]ederal courts have wide latitude in structuring the terms of habeas relief." *Demis v. Sniezek*, 558 F.3d 508, 515 (6th Cir. 2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)); *see also* 28 U.S.C. § 2243 (providing that the federal court "shall . . . dispose of the matter as law and justice require"); *Glenn v. Dallman*, 686 F.2d 418, 423 (6th Cir. 1982) (noting that federal courts in habeas cases are "to fashion relief as justice requires"). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Therefore, "'a federal district court . . . should give careful consideration to the appropriate demands of comity in effectuating its habeas corpus decree.'" *Gentry v. Deuth*, 456 F.3d 687, 697 (6th Cir. 2006) (quoting *Parisi v. Davidson*, 405 U.S. 34, 46 (1972)). We review the district court's remedy for an abuse of discretion. *Id.*

The district court did not abuse its discretion. The relief chosen by the district court remedies the constitutional violation without unduly infringing upon the state's interests. The deprivation of effective assistance from counsel caused petitioner to reject a plea deal. Allowing petitioner an opportunity to assess and accept the plea deal, with the competent assistance of counsel, remedies this wrong. *See Lewandowski*, 949 F.2d at 889 ("The only way to effectively repair the constitutional deprivation [petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred; namely, serving a sentence for 15 to 25 years."). A new trial does not. *Turner*, 858 F.2d at 1207 ("[A] new trial cannot remedy the specific deprivation suffered.").

While respondent does not identify any state interests offended by the relief ordered, there are such interests to be taken into account. Nevertheless, the district court's relief treads quite lightly upon these. The district court did nothing more than hold the state to a deal the state had previously offered.[5] In fact, the remedy chosen by the district court is the same remedy that the state courts employ in such cases. *People v. McCauley*, --- N.W.2d ----, 2010 WL 173597 (Mich. Ct. App. 2010); *People v. Carter*, 190 Mich. App. 459, 463, 476 N.W.2d 436, 438-39 (1991), *vacated on other grounds by* 440 Mich. 870, 486

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[5] Although the district court indicates at one point that it is ordering "specific performance" of the plea deal, it later clarifies that it is simply granting a conditional writ, giving the state an opportunity to offer a plea deal or release the petitioner from custody. Thus, the prosecution has a choice: it need not offer petitioner the plea deal, but if it chooses not to, it may not continue to detain petitioner pursuant to a void judgment. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 368-69 (6th Cir. 2006).

N.W.2d 740 (1992). Significantly, respondent does not identify an alternative remedy that it would prefer, apparently content to leave the constitutional violation unremedied. That option does not even attempt to balance the competing interests, assigning no weight to the constitutional rights of the accused. And even assuming that respondent's suggested "balance" of interests is a reasonable one, it hardly demonstrates that the district court's decision constitutes an abuse of discretion. To the contrary, we have repeatedly concluded that this relief is appropriate under such circumstances. *Satterlee*, 453 F.3d at 368-69; *Morris*, 470 F.3d at 600; *United States v. Allen*, 53 F. App'x 367, 373-74 (6th Cir. 2002); *Lewandowski*, 949 F.2d at 889.[6] We find no error in the remedy ordered by the district court.

CONCLUSION

Accordingly, we AFFIRM the district court's grant of habeas relief.

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[6] It is true that some of our cases permit the prosecution an opportunity to offer a plea different from the one previously offered. *Magana*, 263 F.3d at 553; *Turner*, 858 F.2d at 1208-09. In these cases, if the prosecution offers a plea deal in excess of its previous offer (or refuses to offer any plea deal), it must rebut a presumption of prosecutorial vindictiveness during a hearing before the district court. Respondent does not argue that this remedy would be preferable to the district court's election, so we do not consider this possibility further.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY COOPER,
Petitioner, Case No. 06-11068
Honorable Denise Page Hood

v.

BLAINE LAFLER,
Respondent.
_____/

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus Under 28 U.S.C. §2254 [**Docket No. 1**], and in accordance with the Opinion and Order Granting Petition for Writ of Habeas Corpus entered on March 26, 2009,

IT IS HEREBY ORDERED that the "Petition for Writ of Habeas Corpus" [**Docket No. 1 filed March 13, 2006**] is **GRANTED**.

DAVID WEAVER
CLERK OF THE COURT
APPROVED: BY: s/ Wm. F. LEWIS
DEPUTY CLERK

s/ DENISE PAGE HOOD
HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT COURT

Dated: March 26, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY COOPER,
Petitioner, Case No. 06-11068
Honorable Denise Page Hood

v.

BLAINE LAFLER,
Respondent.
_____/

OPINION AND ORDER
CONDITIONALLY GRANTING
PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner Anthony Cooper ("Petitioner"), a state inmate currently imprisoned at the Oaks Correctional Facility in Manistee, Michigan, through counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is being held in violation of his constitutional rights. Petitioner was convicted of (1) assault with intent to murder, MICH.COMP.LAWS § 750.83, (2) possession of a firearm by a felon, MICH.COMP.LAWS § 750.224f, (3) felony firearm, MICH.COMP.LAWS § 750.227b, and, (4) possession of marijuana, MICH.COMP.LAWS § 333.7403(2)(d). Following his convictions, Petitioner was sentenced by the trial court to (1) 185 to 360 months imprisonment for the assault-with-intent-to-murder conviction, (2) one to five years imprisonment for the felon-in-possession conviction, and, (3) two years imprisonment for the felony-firearm conviction. Petitioner received a suspended sentence for the marijuana conviction. For the reasons stated below,

the Court conditionally grants Petitioner's petition for writ of habeas corpus.

II. STATEMENT OF FACTS

This case arises out of an incident that occurred on March 25, 2003, in Detroit, Michigan. On that particular day, at about 7:00 p.m., Kali Mundy drove to an apartment building on the corner of Schoolcraft and Glastonbury Streets in Detroit, Michigan. Ms. Mundy went to that apartment building in order to visit Robert Smith, a man whom she knew as "Pumpkin." Ms. Mundy wanted to ask Mr. Smith about some problems that had occurred earlier that day at a McDonalds' franchise in Dearborn, Michigan. Ms. Mundy previously suggested that Mr. Smith apply for a job at that McDonalds, but subsequently discovered that he had an altercation with a cashier and a manager. According to Ms. Mundy's testimony, she was informed by the employees that the altercation almost became a pushing match, so much so that they were contemplating calling the police but did not.

As a result, Ms. Mundy decided to go to Mr. Smith's apartment to find out what had actually occurred. According to Ms. Mundy's testimony, when she knocked on his door, it was his girlfriend, not Mr. Smith, who came to the door. Following a quick conversation with the girlfriend, Ms. Mundy left and went outside to use a payphone. After using the phone, Ms. Mundy went to her car, but as she was getting into her car, she saw a red Ford Explorer pull up to the complex. Ms. Mundy believed that Mr. Smith was in the car.

As Ms. Mundy was getting out of her car, she saw Petitioner, whom she recognized from the neighborhood, get out of the Explorer. Ms. Mundy said that as he was

walking toward her, she saw him pull out a gun. It was her testimony that he just started "shooting at me." (Trial Tr. Vol. II, p. 142.) According to Ms. Mundy's testimony, she then ran to a neighbor's house, knocked on the door, and asked the neighbor to call the police. Ms. Mundy had been shot in the abdomen and the back.

Officer Aubrey Sargent was first to arrive at the scene. Officer Sargent testified that, when she arrived at the scene, she found that Ms. Mundy had been shot in the stomach and the back. Officer Sargent said that Ms. Mundy gave her a description of the man who shot her.

Police Officer Randell Coleman, who was in the area securing the scene of an unrelated shooting, testified that, around 7:00 p.m. that evening, he heard some screams and some gunshots. He said that he saw a man in a dark-hooded jacket running toward Schoolcraft Street. Officer Coleman testified that he saw a muzzle flash from the handgun that the man carried.

Officer Lori Dillon and, her partner, Officer Demetrius Brown were also in the area. They heard the gunshots and received a radio call from Officer Coleman, who indicated to them that the alleged suspect was running through an alley in which they were located. Officer Dillon testified that she then pulled into the alley in front of the running man, whom she later identified as Petitioner. Officer Dillon conducted a search of Petitioner and found two packets of marijuana on his person. At the time of Petitioner's arrest, Officer Dillon testified that he was wearing a dark-hooded sweatshirt. Officer Dillon also testified that she found four shell casings from an automatic weapon in the area around the apartment building; however, the gun was not found.

Dr. Ilan Rubenstein, the surgeon who treated Ms. Mundy testified that Ms. Mundy spent almost three weeks in the hospital for the treatment of her gunshot wounds. It was also his testimony that she suffered potentially fatal injuries from the four gunshot wounds in her abdominal cavity; she sustained two bullets holes in her right buttock, one to the hip, and one to the right side of her abdomen. As a result of those injuries, Ms. Mundy sustained major damage to her small and large intestines, which had to be surgically repaired. Although Ms. Mundy claimed that she suffered a miscarriage from the injuries that she received, the medical records did not demonstrate that she was pregnant at the time of the shooting.

Tava Simon, a witness for the defense, testified that Mr. Smith called her on the day in question and asked her if she could take him to a job interview. Mr. Smith was at Petitioner's house at the time, which was down the street from where Ms. Simon worked. Mr. Smith walked down to meet Ms. Simon and, according to her testimony, she took him, along with Petitioner and his friend Yolanda, to the McDonalds, where he was going for the interview. While there, she became aware of a confrontation that occurred inside the McDonalds, between Mr. Smith and one of the female workers. According to Ms. Simon, the female employee was threatening to strike Mr. Smith. It was Ms. Simon's testimony that they subsequently left McDonalds to go to Mr. Smith's apartment.

According to Noel Pettawana, Mr. Smith's fiancé, Ms. Mundy came to her apartment, looking for him. She testified that she ordered Ms. Mundy to leave the apartment; "[b]ecause of her intentions. What I felt her intentions were. I had children in the house." (Trial Tr. Vol. IV, p. 206.) Subsequently, Ms. Pettawana called Ms. Simon, who was driving Mr. Smith, Petitioner, and

Yolanda, and told her what had transpired at the apartment with Ms. Mundy.

A gunshot residue test was performed on Petitioner by Officer Eugene Fitzhugh of the Crime Scene Unit at the Sixth Police Precinct in Detroit, Michigan. Petitioner's hands and face were analyzed. Prior to performing the test, Officer Fitzhugh asked Petitioner some questions. In response, Petitioner denied that he had possessed or had been in the vicinity of a fired gun. Petitioner answered those questions at the police station following his arrest and placement in handcuffs. Officer Fitzhugh did not testify to any waiver of *Miranda* rights prior to the questioning.

William Steiner, a forensic chemist at the Detroit Crime Lab, tested the samples taken from Petitioner; all three samples tested positive for gunshot residue. Mr. Steiner testified that the residue remains for a few hours after a shooting and signifies that an individual either fired a gun, stood in close proximity to a fired gun, or handled a recently fired gun.

Petitioner did not testify.

At a pretrial conference held on May 16, 2003, the assistant prosecuting attorney offered a plea agreement to Petitioner regarding his assault-with-intent-to-murder conviction and his felony-firearm conviction, agreeing to dismiss the other two charges. Defense counsel requested a trial date, while he and the prosecutor agreed to continue negotiations.

At the final pretrial conference on July 17, 2003, the prosecutor offered another plea agreement of fifty-one to eighty-five months for the assault-with-intent-to-murder conviction, despite the fact that the guidelines called for

eighty-one to one-hundred-and-thirty-five months. Defense counsel rejected the offer because he thought that the prosecutor could not prove assault-with-intent-to-murder at trial. In response, the prosecutor withdrew the offer. At the conclusion of the hearing, defense counsel stated that he had talked with Petitioner and that they were rejecting the offer; "I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer." (Pre-trial Conference Tr., p. 5.)

Then, prior to jury selection, on the day of trial, a new prosecuting attorney extended another plea agreement regarding the assault-with-intent-to-murder charge, which was within the guidelines of 126 to 210 months, with an additional two years for the felony-firearm charge. The agreement was such that the felon-in-possession and possession-of-marijuana charges, and the habitual offender, second, would be dismissed. Defense counsel rejected the plea. The case went to trial, and, the jury convicted Petitioner as charged.

Subsequently, Petitioner filed his appeal as of right in the Michigan Court of Appeals raising the following three issues:

> I. Defense counsel rendered ineffective assistance, under the state and federal constitutions, where he failed to convey the sentencing benefits of the plea offer to [Petitioner] and ignored his desire to plea guilty.
>
> II. Defense counsel rendered ineffective assistance, under the state and federal constitutions by failing to present a proper defense.

> III. Where no *Miranda* rights were provided, defense counsel's failure to move to suppress [Petitioner's] statement constituted ineffective assistance of counsel.

While his appeal was pending, in April 2004, Petitioner filed a motion for a new trial, and an evidentiary hearing was held in Wayne County Circuit Court, regarding defense counsel's effectiveness. The hearing addressed the plea-bargaining stage of Petitioner's defense.

At the hearing, defense counsel testified to the following: Defense counsel said that he received Ms. Mundy's medical records in this case prior to the pre-trial conference that was held on July 17, 2003. He said that, based on his review of those records, he felt that the information in the records could not support the claims of the complainant, nor did that information support the charge of assault-with-intent-to-murder, based on the nature of Ms. Mundy's injuries. According to defense counsel's testimony, he said that he expressed his view to Petitioner and advised him that he "could successfully negotiate a plea under the amended charge of [assault with- intent-to-do-great-bodily-harm-less-than-murder]." (*Ginther* Hearing Tr., p. 7.) Accordingly, defense counsel informed the trial court that Petitioner would not be pleading guilty to assault-with-intent-to-murder for fifty-one to eighty-five months.

During the *Ginther* hearing, defense counsel acknowledged that Petitioner did in fact express an interest in a plea agreement. However, it was defense counsel's opinion that he could get Petitioner "a more reasonable offer," later in the proceedings, from a different prosecuting attorney. Defense counsel did not request time

to discuss that matter with Petitioner, rather, it was his testimony that he wanted to explore a plea offer after he reviewed the medical records more thoroughly.

Petitioner rejected the plea offer after defense counsel told him that he could get a better offer for the lesser charge of assault-with-intent-to-cause-great-bodily-harm. Defense counsel told Petitioner that he did not believe that the assault-with-intent-to-murder charge was colorable, in light of the medical records. At the hearing, defense counsel admitted that, in his experience, an offer at trial generally would not improve over a pre-trial offer. Defense counsel acknowledged that he discussed a self-defense claim with Petitioner but advised him that, given the facts, self-defense was not a meritorious claim.

At the *Ginther* hearing, Petitioner expressed, in two letters written to the trial judge, that he intended to plead guilty. However, he said that he rejected the offer of fifty-one to eighty-five months on the basis of defense counsel's advise; "[m]y lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist." (*Ginther* hearing Tr., p. 31.) Rather, Petitioner testified that defense counsel told him that he could get a plea agreement for great-bodily harm with guidelines of eighteen to eighty-four months.

It is Petitioner's position that defense counsel never informed him that a jury might find him guilty of assault-with-intent-to-murder, and that he could face two to three times the plea offered by the prosecution. Rather, Petitioner testified at the *Ginther* hearing that "[h]e told me that the prosecution couldn't prove his case because the person was shot below the waist and that's not attempted murder. It was [great-bodily] harm and that he was going to get me a plea bargain." (*Ginther* hearing Tr., p. 33.) It is Petitioner's position that he would have

accepted the fifty-one to eighty-five months' offer, if counsel had explained that a jury would likely find him guilty of the assault-with-intent-to-murder charge. Petitioner said that he rejected the fifty-one to eighty-five-month offer because he came to court on the final pre-trial conference date, expecting the prosecution to offer him a plea bargain that would include eighteen to eighty-four months imprisonment.

Following arguments on the motion for a new trial, and the *Ginther* hearing on Petitioner's ineffective assistance of counsel claim, the trial court denied the motion.

On March 15, 2005, the Michigan Court of Appeals issued an unpublished *per curiam* opinion affirming Petitioner's convictions. *People v. Cooper*, No. 250583, 2005 WL 599740, 2005 Mich. App. Lexis 679 (Mich. Ct. App. Mar. 15, 2005) (*per curiam*). Petitioner then filed an application for leave to appeal that decision in the Michigan Supreme Court. The Michigan Supreme Court denied Petitioner's application on October 31, 2005. *People v. Cooper*, 474 Mich. 905, 705 N.W.2d 118 (2005) (table).

On March 13, 2006, Petitioner, through counsel, filed the pending petition for a writ of habeas corpus, asserting that his constitutional rights were violated. Petitioner states the following:

> I. Trial counsel rendered incompetent advice during the plea bargaining process which denied [Petitioner] the effective assistance of counsel.

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this Court's habeas corpus review of state court decisions. Specifically, 28 U.S.C. § 2254(d) states in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under (d)(1), a federal court may grant a writ of habeas corpus under two different clauses, both of which provide two bases for relief. Under the "contrary to" clause, a federal court may grant habeas relief if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has decided on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The words "contrary to" should

be construed to mean "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id*.

Under the "unreasonable application" clause, a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts. *Id*. at 407-08. Relief is also available under this clause if the state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. *Id*. at 407; *Arnett v. Jackson*, 393 F.3d 681, 686 (6th Cir. 2005). The proper inquiry for the "unreasonable application" analysis is whether the state court decision was "objectively unreasonable" and not simply erroneous or incorrect. *Williams*, 529 U.S. at 407; *Lordi v. Ishee*, 384 F.3d 189, 195 (6th Cir. 2004).

In analyzing whether a state court decision is "contrary to" or an "unreasonable application" of clearly established Supreme Court precedent, a federal court may only look to the holdings, as opposed to dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Williams*, 529 U.S. at 412.

IV. ANALYSIS

A. Ineffective Assistance of Counsel Claim

Petitioner contends that he is entitled to habeas relief because trial counsel was ineffective. Specifically, Petitioner argues that counsel was constitutionally deficient during the plea-bargaining process. Petitioner claims that his attorney erroneously advised him to reject the State's offer of fifty-one to eighty-five-months sentence

on the assault-with-intent-to-murder charge, and that he relied on that recommendation and rejected the offer without competent advise from his attorney. Petitioner claims that trial counsel failed to fully inform him and that his rejection of the offer was not knowing or intelligent. Petitioner therefore is seeking specific performance of the plea offer.

To establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

With respect to the performance prong of the *Strickland* test, a petitioner must identify acts that were "outside the wide range of professionally competent assistance," in order to prove deficient performance. *Strickland*, 466 U.S. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id*. at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is 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. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302,

1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686).

In a guilty plea context, while the performance prong of the *Strickland* test remains the same, to establish prejudice the petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Similarly, where counsel gives erroneous advice that results in the petitioner going to trial, the issue is whether there is a reasonable probability that the petitioner would have pleaded guilty. *Magana v. Hofbauer*, 263 F.3d 542, 551-53 (6th Cir. 2001); *see also Guerrero v. United States*, 383 F.3d 409, 416-17 (6th Cir. 2004) (prejudice established by defendant's demonstrating a reasonable probability that if he had been notified of a plea offer, he would have accepted it). Counsel's failure to provide professional guidance to a defendant regarding his sentence exposure prior to rejecting a plea offer may satisfy both the performance and prejudice prongs of the *Strickland* test. *Smith v. United States*, 348 F.3d 545, 553-54 (6th Cir. 2003).

The Michigan Court of Appeals, the last court to issue a reasoned decision regarding this claim in this case, stated in pertinent part:

> Defendant raises several claims of ineffective assistance of counsel. The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v. LeBlanc*, 465 Mich 575, 578; 640 NW2d 246

(2002). To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v. Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v. Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant challenges the trial court's finding after a *Ginther* hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. *However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial.* The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.

Cooper, No. 250583, 2005 WL 599740, slip op. at 1-2 (Emphasis added) (Footnote omitted.)

In this case, the Court finds that the Michigan Court of Appeals' decision unreasonably applied the standards set forth in *Strickland* and *Hill, supra*. First, the Michigan Court of Appeals mis-characterized the proper analytical framework by scrutinizing Petitioner's conduct as opposed to examining trial counsel's omissions. It stated: "*defendant knowingly and intelligently rejected two plea offers and chose to go to trial*." *Cooper*, No. 250583, 2005 WL 599740, slip op. at 2 (Emphasis added). It then dismissed Petitioner's claim in a two-sentence analysis, without addressing the issue.

Rather, the question before the Michigan Court of Appeals was not the legitimacy of Petitioner's plea decision but the validity of trial counsel's underlying advice and whether that advice was objectively reasonable. The Michigan Court of Appeals made Petitioner's plea decision the centerpiece of its analysis. In so doing, the Michigan Court of Appeals unreasonably applied clearly established federal precedent. *Strickland*, 466 U.S. at 690 ("a court deciding an . . . ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case"); *Hill*, 474 U.S. at 56 ("[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'").

Second, the Michigan Court of Appeals failed to consider any evidence from the postconviction hearing on the question of counsel's ineffectiveness. The records demonstrates that defense counsel stuck to a one-sided

view of the case; he professed many times in open court that the state could not prove its case. At the preliminary hearing, defense counsel stated, on three different occasions, "the evidence will show that there is insufficient evidence," "I believe that the Prosecution does not have the evidence to try to (sic) this case," and "I am fully prepared to prove that they do not have sufficient evidence." (Preliminary Hearing Tr., p. 3; *Ginther* Hearing Tr., pp. 6-7, 10.)

According to defense counsel's testimony at the *Ginther* hearing, he told the trial judge that he believed that the prosecutor had no case because the victim's injuries simply did not support an assault-with-intent-to-murder charge. (*Ginther* Hearing Tr., pp. 6, 13.) That testimony corroborated Petitioner's statement that "my lawyer told me that they couldn't find me guilty . . . because the woman was shot below the waist." (*Ginther* Hearing Tr., p. 31.)

During the *Ginther* hearing, defense counsel acknowledged that Petitioner was open to considering plea offers by the prosecution. (*Ginther* Hearing Tr., p. 7.) However, it was defense counsel's position that Petitioner should reject the plea for the following reasons: (1) the victim's injuries did not satisfy the necessary elements for the charge of assault-with-intent-to-murder; (2) the prosecutor's offer was unreasonable; and (3) defense counsel believed that he could negotiate a better plea to a lesser charge. (*Ginther* Hearing Tr., pp. 6-8, 13-14.) None of those bases for counsel's advice withstands reason.

First, a jury could, and, in fact, did, in this case, believe that Ms. Mundy's potentially fatal injuries could support a charge of assault-with-intent-to-murder; the testimony revealed that Ms. Mundy was shot from behind–the bullets punctured her bowels, for which she

had to have surgery and a hospital stay of about three weeks. Second, the prosecutor's offer of four to seven years was not unreasonable when compared with the possibility that Petitioner could have been sentenced to life imprisonment. And, finally, defense counsel's belief that he could negotiate a lesser charge was unreasonable in light of the facts that defense counsel himself admitted– "only in the rare case does the prosecutor's offer improve between the final conference and the start of trial." (*Ginther* Hearing Tr., pp. 18-19.) The Michigan Court of Appeals failed to take into account the foregoing evidence. That failure was an erroneous application of clearly established federal law. Therefore, this Court finds that habeas relief is warranted on Petitioner's claim of ineffective assistance of counsel.

Now, the question becomes what is the appropriate habeas remedy in this case. A federal habeas court has broad discretion in conditioning a judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). 28 U.S.C. § 2243 authorizes federal courts to dispose of habeas matters "as law and justice require." In certain circumstances, federal courts have conditioned the issuance of a writ on the state's conducting proceedings narrower than a full retrial. *See Henderson v. Frank*, 155 F.3d 159, 168 (3d Cir. 1998). Such cases make clear that conditional writs must be tailored to ensure that all constitutional defects will be cured by the satisfaction of that condition. *Id.* Cases involving deprivations of the Sixth Amendment right to the assistance of counsel are likewise 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. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).

Several federal courts have granted specific performance where ineffective assistance of counsel deprived a defendant of an opportunity to accept a plea offer. *See e.g., United States v. Blaylock*, 20 F.3d 1458, 1468-69 (9th Cir. 1994) (requiring reinstatement of plea offer as the remedy to restore defendant to his original position before the Sixth Amendment violation occurred); *Lewandowski v. Makel*, 949 F.2d 884, 887, 889 (6th Cir. 1991) (upholding district court's decision to grant specific performance of plea agreement and upholding original sentence imposed pursuant to plea bargain); *Satterlee v. Wolfenbarger*, 374 F.Supp.2d 562, 569 (E.D. Mich. 2005) (allowing specific performance where counsel was ineffective for failing to communicate government's offer to defendant).

Consequently, the Court finds that Petitioner's counsel relied on a misapprehension of the law and facts in advising him to reject the plea, and, in reviewing Petitioner's ineffective assistance of counsel claim, the Michigan Court of Appeals unreasonably applied federal precedent. Therefore, pursuant to the aforementioned cases, the Court finds that the most appropriate remedy is to grant a writ of habeas corpus ordering specific performance of Petitioner's original plea agreement, for a minimum sentence in the range of fifty-one to eighty five months, the plea Petitioner would have accepted if counsel had been competent.

V. CONCLUSION

For the reasons stated above, this Court concludes that Petitioner is entitled to federal habeas relief on the claim of ineffective assistance of counsel.

VI. ORDER

IT IS HEREBY ORDERED that Petitioner's application for writ of habeas corpus is conditionally granted, unless the State takes action to offer Petitioner a plea offer with a sentence agreement of fifty-one to eighty-five months, within sixty (60) days from the date of this opinion. Petitioner may apply for a writ ordering Respondent to release him from custody if the state fails to act or after all appeals are final.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: March 26, 2009

Order **Michigan Supreme Court**
Lansing, Michigan

October 31, 2005

128650

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 128650
COA: 250583
Wayne CC: 03-004617-01

ANTHONY GLADNEY COOPER,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the March 15, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 31, 2005 Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 15, 2005

v

No. 250583
Wayne Circuit Court
LC No. 03-004617-01

ANTHONY GLADNEY COOPER,
Defendant-Appellant.

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224(f); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to prison terms of 185 to 360 months for the assault conviction, one to five years for the felon in possession conviction, and two years for the felony firearm conviction. Defendant received a suspended sentence for the marijuana conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting of Kali Mundy outside of an apartment building in Detroit. Mundy was shot twice in the buttocks and suffered internal injuries requiring surgery.

Defendant raises several claims of ineffective assistance of counsel. The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant challenges the trial court's finding after a *Ginther*[1] hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.

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[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Review of defendant's remaining claims of ineffective assistance is limited to mistakes apparent on the record because no *Ginther* hearing was held with regard to these claims. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant first asserts that defense counsel's trial strategy was unsound because counsel was unsuccessful in getting testimony admitted into evidence regarding conflicts between Mundy and the defense witnesses. Defendant cannot overcome the presumption of sound trial strategy, however, because the record is insufficient to verify this allegation of ineffective assistance. *Williams*, *supra* at 414.

Defendant also contends that defense counsel failed to impeach Mundy's testimony that the shooting caused her to suffer a miscarriage with evidence from her medical records indicating that she was not pregnant when she was shot. The decision to call or question witnesses is presumed to be a matter of trial strategy, and the failure to do so constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). In light of the medical testimony that Mundy did not suffer any ovary or uterine injuries any failure to impeach Mundy regarding this issue was not outcome determinative.

Defendant further contends that defense counsel failed to establish that Mundy had a motive to fabricate her testimony based on defendant's assertion that she possessed a gun in violation of her probation. Because the

record is insufficient to support this claim, defendant has not carried his burden and established his claim. *Williams, supra* at 414.

Defendant also maintains that defense counsel failed to move to suppress defendant's answers to questions asked before the performance of a gunshot residue test. The record is silent with regard to whether defendant was advised of his *Miranda*[2] rights before he was questioned. Therefore, the record is insufficient to verify this allegation of ineffective assistance of counsel. *Williams, supra* at 414.

Finally, because defendant has not established any errors prejudicing his trial, his claim of cumulative error must also fail. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694, reh den sub nom *California v Stewart*, 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

STATE OF MICHIGAN
IN THE CIRCUIT COURT OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

vs Case No. 03-4617

ANTHONY GLADNEY COOPER /

PRETRIAL

PROCEEDINGS held and testimony given in the above-entitled matter before the Honorable BRUCE U. MORROW, Judge of the Third Circuit Court, Courtroom 404, Frank Murphy Hall of Justice, 1441 St. Antonie, Detroit, Michigan 48226, on July 17, 2003.

* * *

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JULY 17, 2003
FRANK MURPHY HALL OF JUSTICE
DETROIT, MICHIGAN
PROCEEDINGS

-

THE COURT: This is the People of the State of Michigan versus Anthony Cooper, docket number 03-4617. Appearances please.

MR. SKYWALKER: Good morning, your Honor, Luke Skywalker appearing on behalf of the People of the State of Michigan.

MR. McCLAIN: Good morning, your Honor, Brian McClain on behalf of Mr. Cooper. Mr. Skywalker and I met a couple of days ago to discuss a plea offer. Mr. Cooper is reading the agreement and I wanted to put that on the record.

MR. SKYWALKER: This offer is for today only.

MR. McCLAIN: Your Honor, it's not a reasonable offer really.

MR. SKYWALKER: He's charged with a habitual offense and he was a felon in possession of a firearm. We agreeing that the guidelines would be substantially higher. For the felon in possession it would be 81 to 135 instead of 51 to 85.

MR. McCLAIN: Would you allow me to speak and not ,- interrupt-me. Your, Honor if I may continue. Mr. Skywalker

[Page 3]
contention is that he's not going to try this case. I think the evidence will show that there is insufficient evidence. I just got the memo. By the way we have rescheduled these dates and I just got the medicals, and I have reviewed the nature of the injuries of the person.

After reviewing the medical report, your Honor, I believe that the Prosecution does not have the evidence to try to this case. We're willing to go to trial, but in the interest of Justice and due to the fact that Mr. Skywalker is not trying the case, I would like to discuss this matter with the attorney who will has will make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial.

I am fully prepared to prove that they do not have sufficient evidence at trial. I think the medical evidence will show that at trial. I'm sure that Mr. Skywalker doesn't care if I take it or not. He's not making the case

next Wednesday. But the person that will have to make the case next Wednesday will take a more serious look at this and give us a more reasonable offer.

MR. SKYWALKER: It was reasonable when we talked. If you don't like it now, then that's your problem.

MR. McCLAIN: You can address yourself to the Court and not me.

MR. SKYWALKER: This offer is being withdrawn and

[Page 4]
we will tell you whose trying it on the trial date. There will be no offer on trial date because that's policy. I withdraw this offer.

MR. McCLAIN: I am fully prepared to try this case, your Honor, but I know the Court is interested in a possibility for us to resolve this matter. I think it could be resolved.

THE COURT: Resolution is not a plea or a trial. I have no history in obtaining pleas for the purpose of expediency or anything else for that matter. I truly think it's best to have that, but if you think his best defense to go to trial, whether or not he's guilty and they can prove it beyond a reasonable doubt, then so be it. If that is what the young man wants, then that is what the young man will get.

You don't call it a reduced plea. They call it a reduced plea. If they're dismissing something, well then we can go through that. You have to respect the guidelines, then some would think that whatever

ridiculous terms that are used will be beneficial. So, if there's a benefit, then what does it matter if we go to trial.

MR. McCLAIN: You hit the nail on the head. The guidelines are affected by the principal charge not remaining in fact. The guidelines are significantly different from AWIM (Assault With Intent to Murder) to a GBH (Great Bodily Harm). So, that's our principal position on that. So, it is

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significant.

THE COURT: Last but not least, Mr. McClain, you know once this is over, nobody will get that case a day or two days beforehand. Mr. Skywalker is busy on that day or he's simply assigned already. Because the trial prosecutors are the ones that basically convey offers in somebody else's food, I don't think it's Mr. Skywalker's problem. How long the offer stays open, he can control that. As much as you might want, you're not going to offset that.

MR. McCLAIN: That's fine, your Honor. I have little control over what anybody does except for me and my client. I understand that. I'm just putting my position on the record. He can do what he has to do, and what he will do. I look forward to the opportunity to prove my position.

I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer.

THE COURT: See everybody back on that day.
(Whereupon proceedings concluded)

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN

vs Case No. 03-04617

ANTHONY COOPER
Defendant /

MOTION

PROCEEDINGS had and testimony taken before the HONORABLE BRUCE U. MORROW, Circuit Court Judge, Frank Murphy Hall of Justice, Detroit, Michigan on Friday, May 28, 2004.

* * *

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* * *

THE COURT: There's a thin line between giving advice and forcing somebody to comply with your advice. I remember my first year of being a criminal defense lawyer, somebody pulled me aside and said, Bruce, the key is that you don't need them to take your advice because if that's your goal you're going to be sorely disappointed all the time. Your responsibility is to give them your advice and then let people make their own decisions. So you know whether it's -- you know and then sometimes I would second guess myself. As I got more experienced I would think that perhaps the reason they didn't take my advice was because I didn't communicate well enough in a way that could let them know that it wasn't just my advice. That it was based on my years of experience and then I would think about

that and I say, well, juries always come back different than what I think. So I didn't have any real basis to say that my opinion was what was going to happen. It was just simply my opinion. At some point you get to that. Where you say, listen, my assessment

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of how things will be played out, I don't think that that's been true more than 50 percent of the time. I just don't know. There are some things that I would hedge my bet on that it couldn't come back, but it's obvious that Mr. Cooper and Mr. McClain didn't believe that the facts as presented in the Preliminary Examination, as in the evidence -- I'm sorry, as in the investigators, as in any of it would support a finding of assault with the intent to murder. Both were convinced that that couldn't occur. It was Mr. Cooper's belief based on his having counsel over in the jail, his being familiar at least with the hierarchy of charges, that at the absolute most if his self-defense claim did not work, that he should only be found guilty of a felonious assault. Everybody in this particular case was interested in a plea bargain. That's what pre-trial conferences are for. To see if there's a lesser included offense, see what it is, see if a person wants to give up any claims of defenses that they might have and decide that it is in their best behalf to go with the plea agreement as opposed to go to trial and based on the conversations that Mr. McClain and Mr. Cooper had, whether you want to call them extensive, non-extensive, I think that there was an understanding between the parties of what

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Mr. Cooper would find acceptable. Now, it might have been based on the representations of Mr. McClain and on hindsight sometimes they would say, you know, that was an out there kind of claim, but any time self-defense

is invoked, the People can say that that's an out there claim. Every legitimate self-defense claim that a defense attorney thinks doesn't result in a not guilty plea. Too many self-defense claims the jury comes back and says, oh, I don't think so and so there's no way to assess I think a self-defense claim until you actually hear it. Both Mr. McClain and Mr. Cooper said that they didn't know if he was going to take the witness stand, but it's plain and it's consistent through Mr. Cooper's -- what he said to Mr. McClain based on Mr. McClain's questions to Preliminary Exam that Mr. Cooper was alleging that Miss Mundy had a weapon and so there was always the claim of self-defense out there that was being explored by Mr. McClain as a result of conversations with Mr. Cooper. Who wouldn't want to plea to something that's the most minimal of situations and there's no question about it. I think the record is straight that they were trying to work out a plea. There's a point where a plea becomes unacceptable and people decide to go to trial and that's what I think that happened in this case. I

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think that that's supported by what Mr. McClain has said and I'm not going to find that there was ineffective assistance of counsel based on this record. Mr. Cooper made his own choices.

MS. NEWMAN: Thank you, Your Honor.

MR. BERNACKI: Thank you, Your Honor.

MS. NEWMAN: Do you want me to submit an order or do you have a court order?

THE COURT: I'm signing the order now.

MS. NEWMAN: Can we have the record transcribed for appellate purposes?

THE COURT: I will so order.

MS. NEWMAN: Thank you.