No. 12-414

In the Supreme Court of the United States

SHERRY BURT, PETITIONER

v.

VONLEE TITLOW

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

REPLY BRIEF

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INTRODUCTION

Titlow's arguments against granting review in this case are unpersuasive.

First, Titlow claims there is no real circuit conflict presented, merely circuit decisions reaching different results based on different facts. Br. in Opp. 2–4. Not true. As the petition explains, the Sixth Circuit reaffirmed its precedent that a defendant's self-serving, post-conviction statements are enough to show that he would have accepted a plea deal. That holding is in direct conflict with five other circuits, which have correctly recognized that the courts should require objective evidence corroborating a defendant's pre-trial intent to accept a plea. Pet. 14–17. This issue is of substantial and nationwide significance following *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), which has inspired hundreds of habeas petitioners across the country to request rejected pleas after gambling and losing their criminal trials.

Second, Titlow asserts that this case presents a "poor vehicle" to address the questions presented. Br. in Opp. 4–6. Not so. This case presents an ideal vehicle to ensure that federal habeas courts appropriately defer to reasonable state-court decisions under AEDPA. Despite this Court's well-established rule that counsel is to be presumed competent, the Sixth Circuit here presumed just the opposite on the basis of a largely silent record, and it failed to defer to the reasonable findings of the state court. This case also presents an ideal vehicle to consider counsel's ethical duty to a client who maintains his innocence.

Third, Titlow argues that the Sixth Circuit did not improperly limit the discretion of the state courts under *Lafler*. Br. in Opp. 6. Not correct. In fact, Titlow fails to respond directly to Petitioner's arguments about the proper remedy under *Lafler*. This issue is of great importance because, as Petitioner and the *amici* states point out, *Lafler* does not restrict the state trial court's discretion in the manner outlined in the Sixth Circuit's ruling. As Sixth Circuit Chief Judge Batchelder explained in dissent, *Lafler* does not require the state trial court to resentence Titlow; the remedy is the government's reoffering of the original plea agreement, not a new sentence.

Certiorari is warranted.

ARGUMENT

I. This case presents a mature circuit conflict regarding the evidence needed to support a defendant's claim that he would have accepted a plea but for counsel's deficient advice.

Titlow first argues that there is no conflict between the Sixth Circuit's decision and other federal circuits, and that Petitioner merely disagrees with the Sixth Circuit's findings of fact. Br. in Opp. 2–4. But that is not so. Even accepting the Sixth Circuit's findings, they were insufficient to show that Titlow would have accepted the plea.

To show prejudice in the context of a rejected plea, a defendant must show a reasonable probability that he would have accepted the plea. *Lafler*, 132 S. Ct. at

1385. The question is what level of proof is needed to satisfy this requirement . The Sixth Circuit held that Titlow's self-serving, post-conviction statements that he would have kept his plea deal absent ineffective assistance was enough. Pet. 14–15. But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction testimony that he would have accepted a plea offer is not sufficient, and that objective evidence of the defendant's intent is required. Pet. 16 (citing, among others, *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); and *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991)). And the Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *Id*. (citing, among others, *United States* v. *Morris*, 106 Fed. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. Apr. 2, 1999)). Indeed, if objective evidence is not required, the only defendant that would be unable to assert that he would have accepted a plea deal would be a convicted defendant who is a true model of virtue, who values his integrity more than his freedom. *Lafler* did not directly address this issue, because that case involved objective evidence of the defendant's intent.

Titlow offers nothing in the way of objective evidence here. Further, Titlow does not cite to or even acknowledge in his brief in opposition the clear line of authority from the other circuits. Thus, contrary to Titlow's assertion, a fundamental conflict between the circuits on the issue of what level of proof is needed to show prejudice under *Lafler* is squarely before this

Court. And given the post-*Lafler* wave of habeas petitioners seeking to regain lost plea offers, the Court should not allow this mature circuit split to percolate any longer.

II. This case presents an ideal vehicle to ensure that federal habeas courts defer to reasonable state-court decisions, and to affirm that it is not ineffective for counsel to honor his client's desire to maintain innocence and to withdraw a plea.

Next, Titlow asserts that this case is a "poor vehicle" to address the issues presented, because the facts are unique and the Sixth Circuit's opinion will have limited jurisprudential impact. Titlow is quite mistaken.

Titlow says that this case does not involve counsel's ethical obligations regarding his client's claims of innocence, but instead involves an attorney who failed to adequately investigate and inform his client about the consequences of withdrawing a plea. While the Sixth Circuit panel majority may have made such findings, the Michigan Court of Appeals, on the record before it, found that Titlow's decision to withdraw his plea "was set in motion" not by the advice of his second attorney, Toca, but instead by Titlow's assertion of innocence. App. 101a; Pet. 10–15. The state court's finding was reasonable on the record before it. And under AEDPA, the panel majority failed to properly defer to the state-court findings.

As this Court has been forced to reemphasize repeatedly, habeas relief is an "extraordinary" remedy, *Bousley* v. *U.S.*, 523 U.S. 614, 621 (1998), and "[s]ection

2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) (internal quotation omitted). Titlow has not established that the state court misapplied this Court's precedent with respect to the law, or that the state court unreasonably applied the facts.

While the panel majority deemed Toca's performance deficient, there is no evidence to support the Sixth Circuit's finding that Toca was unfamiliar with the case or did not review the file. Pet. 12–13. Nor is there evidence that Toca did not adequately inform Titlow. Indeed, Titlow testified at his plea withdrawal hearing that he "fully under[stood] the consequences" of withdrawing his plea and did so "freely and voluntarily."[1] Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Harrington*, the panel majority should have presumed that counsel made an informed recommendation to Titlow; instead, it presumed the exact opposite.[2]

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[1] Titlow's understanding also came from the fact that, just a few weeks earlier, his first retained attorney had gone over all of the evidence with Titlow, advised Titlow of the elements necessary to secure a conviction, and thoroughly discussed the merits of the plea offer with Titlow. Pet. 12.

[2] This is all assuming that Toca recommended a plea withdrawal at all. Chief Judge Batchelder rightly pointed out that Titlow had not shown that his second retained attorney's advice was the reason he chose to withdraw his plea or a decisive factor in that decision. App. 26a. (Batchelder, C.J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." App. 26a. See also Pet. 11–12.

Titlow asserts that Toca's stated reason for Titlow's plea withdrawal was not innocence, but disagreement with the sentence bargained for by Lustig. But, as Chief Judge Batchelder observed, that statement was not inconsistent with the state-court fact findings regarding Titlow's motives and Toca's performance:

> [T]he record and Titlow's own arguments . . . support the Michigan court's conclusion because they demonstrate that she chose to obtain new counsel only after she had passed a polygraph test and Detective Ott advised her that she should not plead guilty if she was not guilty. *Any advice that Titlow may have received from Toca was the result of Titlow's wanting new counsel and no longer wanting to plead guilty*. The fact that at the hearing Toca asserted a separate reason for withdrawing the plea does not undermine this conclusion. [App. 28a (Batchelder, J. dissenting) (emphasis added).]

In sum, the panel majority failed to accord deference to the state court's findings or give the state court's application of *Strickland* the "doubly deferential" review this Court requires. *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011). As a result, this case presents the ideal vehicle to address AEDPA deference, as well as an attorney's ethical duty to a client who proclaims his innocence—an issue which, like the circuit split discussed above, takes on much greater significance post-*Lafler*.

III. *Lafler* does not restrict the state trial court's discretion in the manner outlined in the Sixth Circuit's ruling.

Finally, Titlow argues that the Sixth Circuit did not restrict the discretion of the state court under *Lafler*. Br. in Opp. 6. Again, Titlow is wrong.

In *Lafler*, this Court held that a state trial court has three options on remand: (1) vacate the convictions and resentence the defendant pursuant to the plea agreement; (2) vacate only some of the convictions and resentence accordingly; or (3) leave the convictions and sentence from trial undisturbed. *Lafler*, 132 S. Ct. at 1391; Pet. 17. As Petitioner previously argued, the Sixth Circuit here in two ways created an entirely new scheme for fashioning a *Lafler* remedy. Pet. 18–19.

First, the panel majority ordered the trial court to resentence. App. 25a (if the state reoffers and Titlow accepts the plea, "the state may then exercise its discretion to fashion a sentence"). But as Chief Judge Batchelder noted, "*Lafler* . . . does not require the trial court to resentence Titlow. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." App. 31a (Batchelder, C.J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).)

Second, the panel majority directed the state trial court to fashion its sentence so as to remedy "the violation of [Titlow's] constitutional right to the effective assistance of counsel." App. 25a. But "it is not

the trial court's responsibility, as the majority states, to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a (Batchelder, C.J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).)

To the extent that the panel majority directed the state trial court to consult the initial plea agreement as a baseline in crafting a new sentence, *Lafler* does not impose such a requirement. App. 31a (Batchelder, C.J., dissenting) ("*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement.") Nor does *Lafler* suggest that further federal review looms due to any departure from the terms of the original plea offer. App. 24a–25a ("[T]he remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence" and "[w]hat remedy Titlow might have in federal court if such occurs is an issue to be resolved another day.").

Titlow does not even respond to the panel majority's errors, which impinge on the state trial court's discretion. Instead, Titlow tries to distinguish this case from *Lafler* because, unlike the habeas petitioner in *Lafler*, Titlow accepted but then later withdrew his plea. That factual distinction makes no difference to the remedy analysis. And, as the *amici* states explain, the Sixth Circuit's erroneous analysis is of great significance to the bench and bar in resolving *Lafler* claims going forward. Certiorari is warranted so this Court can clarify the proper *Lafler* remedy after habeas relief is granted and a case remanded to the state-court system.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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