No. 12-924

In the Supreme Court of the United States

LEO C. ARNONE, PETITIONER

v.

AHMED KENYATTA EBRON

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 7 OTHER STATES FOR PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General
Department of Attorney General

Attorneys for *Amicus Curiae*
State of Michigan

Joseph R. Biden, III
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

Janet T. Mills
Attorney General
State of Maine
Six State House Station
Augusta, ME 04333

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

Michael A. Delaney
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301

David M. Louie
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Rob McKenna
Attorney General
State of Washington
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98504

Jack Conway
Attorney General
Commonwealth of
Kentucky
700 Capital Ave.
Ste. 118
Frankfort, KY 40601

QUESTIONS PRESENTED

1. Whether a criminal defendant has proven prejudice under *Missouri* v. *Frye*, 132 S. Ct. 1399 (2012), and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), by demonstrating that the trial court would have "conditionally" accepted the plea agreement where there is more damaging evidence at sentencing of the offender's background than what was presented at the plea hearing that may have caused the trial court to reject the plea agreement at sentencing.

2. Whether *Frye* and *Lafler* require an appellate court to allow the criminal defendant to obtain a new trial as an appropriate remedy for ineffective assistance of counsel at the plea stage if the trial court on remand allows the original conviction to stand or decides to impose a more severe sentence than the original plea offer.

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INTEREST OF *AMICI CURIAE*

The Attorneys General are the chief law enforcement officers of their States and have a duty to ensure that those criminal offenders who violate the law are punished consistent with the principles of justice. The vast majority of criminal defendants who are charged with a crime plead guilty and are sentenced to some kind of punishment. The standards that govern challenges to such convictions are applied everyday by the trial courts throughout the country.

This Court in *Missouri* v. *Frye*, 132 S. Ct. 1399 (2012), and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), established both (1) the standards for determining whether ineffective assistance of counsel at the plea stage resulted in prejudice, and (2) how the appropriate remedies should operate for a criminal defendant who has proven prejudice. The proper application of these standards is vital for the criminal justice system.

The mistakes present in the Connecticut Supreme Court decision here—both with respect to the proofs of prejudice and remedy—demonstrate the need for this Court's review to clarify both issues for the bench and bar. These errors relate to this Court's analysis in *Frye* and *Lafler*. On each issue, there has been some confusion in the lower courts about how to apply these standards.[1] This Court's guidance is necessary.

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[1] Consistent with Rule 37.1, more than 10 days in advance of filing, counsel for the *amici* States contacted attorneys for Connecticut and for respondent to inform them of the intent to file.

INTRODUCTION

The Connecticut Supreme Court's decision below reflects some of the confusion the lower courts have had in applying the standards this Court established in *Frye* and *Lafler*. Given the central importance of these standards, clarity is essential. And this case would enable this Court to address two points that are jurisprudentially significant for the bench and bar.

The first relates to prejudice. Below, the Connecticut Supreme Court determined that Respondent Ebron established prejudice on his claim of ineffective assistance of counsel by demonstrating that the trial court would have "conditionally" accepted his plea. Pet. App. A–23. This fact alone, of course, should not establish prejudice unless the trial court would have accepted the plea *at sentencing*.

That issue presents a threshold question rather than an issue about remedy. Yet, there is language in *Frye* that led the Connecticut Supreme Court to determine that this issue should be resolved as one of remedy. The court determined that the "conditional" acceptance was adequate for proof of prejudice "to avoid potentially conflicting findings at the prejudice and remedy stages." Pet. App. A–23.

This is a significant issue because "[w]hat exactly *Frye* and *Lafler* require of a petitioner to demonstrate prejudice is not clear at this time." *Merzbacher* v. *Shearin*, ___ F.3d ___; 2013 WL 285706, *9 (4th Cir. Jan. 25, 2013). The fact that the trial court would have accepted the plea is an essential threshold to the prejudice standard.

The second issue does relate to remedy. The Connecticut Supreme Court determined that if the trial court decided to allow the original conviction to stand or impose a harsher sentence than in the original plea offer, the proper remedy would be to "provide [Ebron] the opportunity to withdraw his original plea and to be tried." Pet. App. A–32. But *Lafler* appears to have foreclosed this option. See *Lafler*, 132 S. Ct. at 1389 ("not require the prosecution to incur the expense of conducting a new trial").

The question of remedy where the trial court wishes to impose a more substantial sentence has troubled other lower courts. E.g., *Titlow* v. *Burt*, 680 F.3d 577, 592 (6th Cir. 2012) ("We remain concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence."), cert. pending *Burt* v. *Titlow* (No. 12-414). This appellate effort to circumscribe the trial court's authority at resentencing contradicts the discretion this Court invested in the trial court. It is critical that this Court vindicate the trial court's authority to reject the plea and allow the original sentence to remain, or to vacate some of the convictions and sentence the criminal defendant accordingly. The Connecticut Supreme Court's curtailing of this authority here, and by courts elsewhere, is a significant problem. This Court should clarify that the *Lafler* remedies apply equally to *Frye* cases.

Ordinarily, these issues should be given more time to "percolate" further. But given their central importance to the operation of the criminal justice system, this Court's clarification is necessary now.

ARGUMENT

I. Based on "tension" between *Frye* and *Lafler*, the Connecticut Supreme Court concluded that Ebron proved prejudice regardless whether the trial court would have imposed the sentence from the original plea offer.

The decision here is significant because the Connecticut Supreme Court rested on its view of a conflict in standards between this Court's decisions in *Frye* and *Lafler* regarding whether the trial court would have imposed this sentence. Additional information gained between the time of the plea offer and the time of the sentencing is relevant both to the issue of prejudice and remedy.

This case would allow this Court to resolve the confusion in this area and clarify the role of trial courts in responding to such claims. The requirement that the criminal defendant prove that the trial court would have imposed the agreed-upon sentence is necessary to establish prejudice. And in making this decision, the trial court may consider other information that was uncovered after the plea.

A. *Lafler*/*Frye* prejudice requires proof that the trial court would have imposed the sentence from the original plea offer.

In the context of a rejected plea, *Strickland*'s prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In *Frye*, this Court determined that a criminal defendant must prove three things to demonstrate prejudice for ineffective assistance of

counsel for a plea that lapsed or was rejected. The second part of the test is broken into two subparts:

> [1] defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel[;]
>
> [2] [d]efendants must also demonstrate a reasonable probability
>
> > [a] the plea would have been entered without the prosecution canceling it or
> >
> > [b] [without] the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] [and]
>
> [3] [t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 132 S. Ct. at 1409. Similarly, in *Lafler*, this Court articulated a three-part test for this proof. A defendant must show "a reasonable probability

> [1] that the plea offer would have been presented to the court (i.e.,
>
> > [a] that the defendant would have accepted the plea and

> [b] the prosecution would not have withdrawn it in light of intervening circumstances),
>
> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced.

Lafler, 132 S. Ct. at 1385. The two tests focus on the same factors. The question here is what proof satisfies the question whether the trial court would have accepted the plea and imposed the sentence from that plea.

Once prejudice is proven, *Lafler* says that a state trial court has three options on remand: (1) "vacate the convictions and resentence respondent pursuant to the plea agreement"; (2) "vacate only some of the convictions and resentence respondent accordingly"; or (3) "leave the convictions and sentence from trial undisturbed." *Lafler*, 132 S. Ct. at 1391. In implementing a remedy, the Court did not define the boundaries of a state trial court's discretion but instead left "open to the trial court" how best to exercise its discretion. *Id*. This Court identified two considerations of relevance: the defendant's earlier willingness to accept responsibility for his actions, and information discovered post plea. *Id*. at 1389.

In response to this legal framework, the Connecticut Supreme Court separated the question whether the trial court would have accepted the plea from whether it would have imposed the agreed-upon

sentence on the criminal defendant. The basis for this distinction is the "possible tension" between *Frye* and *Lafler*. Pet. App. A–19. In *Frye*, this Court explained that an "intervening circumstance" was a relevant consideration for prejudice and might cause the trial court to refuse to accept the plea. *Frye*, 132 S. Ct at 1410. Whereas in *Lafler*, this Court provided that the sentencing trial court need not "[disregard] any information concerning the crime that was discovered after the plea offer was made." *Lafler*, 132 S. Ct. at 1389.

In other words, the supposed "tension" the Connecticut Supreme Court identified was whether this intervening circumstance, or additional information concerning the crime, was relevant for prejudice or remedy. Pet. App. A–20, 21 ("If the habeas court already has determined, however, that the petitioner was prejudiced because it is reasonably probable that the trial court would have imposed the sentence embodied in the plea offer even in light of an intervening circumstance, such as the court's review of a PSI [presentence investigation] report or a victim impact statement, it is difficult to understand why the court should be permitted to consider such a circumstance *again* when it exercises its discretion to determine whether the imposition of that sentence is the appropriate remedy."). The point, of course, is whether the trial court should be able to consider the same information at the remedy stage when it has already determined that it would have imposed the agreed-upon sentence. *Id.*

From this tension, to avoid "potentially conflicting findings," the Connecticut court then determined that

the fact that the trial court would have "conditionally accepted" the plea agreement was sufficient to establish prejudice. Pet. App. A–23 ("in order to avoid potentially conflicting findings at the prejudice and remedy stages of a habeas proceeding in a lapsed plea case, we conclude that, to establish prejudice, a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court."). The court then placed the question whether the sentencing court would have, in fact, imposed this sentence as one of the remedy considerations. Pet. App. A–30 ("prove that there is a reasonable probability that [the sentencing trial court] would have imposed the sentence embodied in the plea agreement").[2]

Given this confusion about the proper application and interplay of the *Frye* and *Lafler* standards, this Court should grant leave and provide the proper resolution. Where more than 90% of all convictions arise from pleas, it is not a tenable option to leave open

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[2] The Connecticut Supreme Court acknowledged that it had "lower[ed]" the burden of establishing prejudice, but explained that this change was not significant because the criminal defendant "ultimately cannot obtain relief" unless he demonstrates that the trial court would have imposed the sentence from the plea agreement. Pet. App. A–26, n.11. But this acknowledgement does not cure the error because the court here provides "relief" even where the trial court would *not* have imposed the sentence embodied in the plea agreement, allowing the criminal defendant to withdraw the plea and stand for trial. See Issue II.

the question regarding what a criminal defendant must prove under *Frye* and *Lafler*.

B. The acceptance of a "conditional" plea should not satisfy the prejudice prong of the *Frye* and *Lafler* test.

The inquiry whether a criminal defendant has proven prejudice is distinct from deciding which of the three *Lafler* remedies is the proper one. *Lafler*, 132 S. Ct. at 1391. Presumably, once the criminal defendant has proven prejudice, the same range of remedy options exist in the circumstance in which there is a subsequent conviction by plea as here and *Frye*, or as in *Lafler*, where there was a subsequent conviction from trial. That is, the sentencing court may impose the original plea offer, vacate some of the convictions (from the subsequent, accepted plea) and modify the sentence, or allow the subsequent plea and sentence to remain. Accord *Lafler*, 132 S. Ct. at 1391.

The situation in which the sentencing court learns additional information about either the offender or the circumstances of the crime from the time of the plea to sentencing is a common one. Cf., e.g., *United States* v. *Lopez*, 385 F.3d 245, 249 (2d Cir. 2004) ("In the usual course, the court will accept a defendant's guilty plea as soon as it is entered, but will defer acceptance of the plea agreement until it has reviewed the pre-sentence report"); Fed. R. Crim. P. 11(c)(3)(A). For prejudice, it is a threshold obligation to prove that there is a "reasonable probability" that the trial court would have gone forward with the original plea terms and imposed the sentence. *Frye*, 132 S. Ct. at 1409. There is no real tension or conflict between weighing the considerations

of additional information in determining prejudice and in addressing the issue of remedy.

There are cases, of course, where the trial court *would have* imposed the sentence from the plea offer but circumstances have changed. Consider the example of a plea offer that is contingent upon the cooperation of the criminal defendant to testify against a codefendant. See, e.g., *People* v. *Siebert*, 537 N.W.2d 891, 893 (Mich. 1995) (plea to lesser offense with sentence agreement of 20-to-30 with promise to "cooperate" and "testify truthfully"). The criminal defendant might reject that plea offer based on some form of ineffective assistance of counsel and then plead guilty to a crime without a contingency, but accepting a more severe sentence. The trial court may legitimately conclude that it would have imposed the sentence as offered by the original plea, but conclude in determining the proper remedy that it would be inappropriate to give the criminal defendant the benefit of the bargain where he did not provide testimony against the codefendant.

This Court should address the interplay of the two decisions and make clear that there is no conflict between them. The prejudice standard need not be modified to bring these decisions into unison.

II. *Frye* did not address the issue about whether the remedies in *Lafler* were available.

The Connecticut Supreme Court determined that the only possible way to place the criminal defendant in the same position would be to allow him to withdraw his plea and obtain a new trial if the trial court was inclined to allow the sentence from the original

conviction to stand or impose a more severe sentence that the original plea offer contemplated. Pet. App. A–32 ("If the trial court concludes that, in light of the information contained in the PSI report, there is no reasonable probability that [the original judge] would have imposed the sentence embodied in the plea agreement or a significantly less severe sentence than the one [the judge who imposed the sentence] actually imposed, the court should provide the petitioner with the opportunity to withdraw his original plea and to be tried."). As noted already, this is wrong as a matter of prejudice.

But this is also wrong as a matter of remedy, at least if the *Lafler* remedies are controlling in cases postured like that of *Frye*. They should be.

A. *Lafler* unequivocally excluded a new trial as one of the possible remedies.

This Court in *Lafler* addressed the circumstance in which a criminal defendant was convicted at a fair trial after ineffective assistance caused him to reject a favorable plea offer. If the defendant can prove that he would have accepted the plea but for ineffective assistance, and the trial court would have accepted the plea with the sentence agreement, then the trial court has three options:

> [1] to vacate the convictions and resentence respondent pursuant to the plea agreement,
>
> [2] to vacate only some of the convictions and resentence respondent accordingly, or

> [3] to leave the convictions and sentence from trial undisturbed.

Lafler, 132 S. Ct. at 1391.

Everyone—including Lafler—agreed that the one remedy which made no sense was to grant a new trial to a defendant who had already received a fair trial:

> JUSTICE ALITO: The remedy of giving a new trial when the person has already had a fair trial makes zero sense.
>
> MS. NEWMAN [Counsel for habeas petitioner]: That's correct.

Transcript, p. 45. See also p. 53 (Kennedy, J., "You're saying it was unfair to have a fair trial?"). For this reason, this Court in *Lafler* foreclosed this possible remedy. *Lafler*, 132 S. Ct. at 1389 ("The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy *that does not require the prosecution to incur the expense of conducting a new trial*.") (emphasis added).

Frye did not reach the issue of remedy. Once the Court identified the proper standard for determining prejudice, the Court remanded without providing further guidance. 13 S. Ct. at 1411.

Rather than considering the three possible remedies *Lafler* identified, the Connecticut Supreme Court chose the more amorphous remedy of placing the criminal defendant "in the position that he would have

been in if there had been no violation." Pet. App. A–33. Inexplicably, the court said that "*Lafler* and *Frye* did not expressly indicate what should happen under these circumstances." *Id*. Not so; *Lafler* indicated three possible outcomes and foreclosed the new-trial remedy. Accordingly, summary reversal is warranted. And if a new-trial door does somehow remain open, this Court should close it. Immediately.

B. This Court should clarify that there is no right to a trial after a constitutionally valid plea.

The circumstance in which there has been a constitutionally valid plea is analogous to the one in which there has been a constitutionally fair trial. Both are critical stages at which jeopardy is extinguished. See *Hill* v. *Lockhart*, 474 U.S. 52, 57 (1985).

As a consequence, the same considerations that foreclose a court from ordering trial after a constitutionally fair trial apply to a defendant who entered a constitutionally valid plea. See *Lafler*, 132 S. Ct. at 1389. The decision to allow the criminal defendant to withdraw his plea and go to trial undermines the trial court's discretion to elect either of the two *Lafler* options of (1) vacating some of the convictions and sentencing accordingly or (2) leaving the conviction and the more severe sentence in place.

This Court's decision in *Lafler* was intended to "leave[] open to the trial court how best to exercise that discretion in all the circumstances of the case." *Lafler*, 132 S. Ct. at 1391. But the Connecticut Supreme Court's solution reduces these options to only one. Give

the criminal defendant the sentence from the original plea offer or let him go to trial. This range of options contradicts the *Lafler* scheme and defeats the significance of the later, constitutionally proper plea.

This case is not the only post-*Lafler* decision to cause havoc by reimagining appropriate remedies. In another recent decision, the Sixth Circuit indicated that it was "concerned" that allowing the sentence from an original conviction to stand would make the remedy "illusory," *Titlow*, 680 F.3d at 592, even though allowing the original sentence to stand was clearly one of the appropriate remedies this Court outlined in *Lafler*. 132 S. Ct. at 1391.

As the Sixth Circuit's decision in *Titlow* and the Connecticut Supreme Court's decision here demonstrate, the confusion flows equally from the lower courts' dissatisfaction with the menu of remedies this Court provided in *Lafler*. Since it remains the case that the remedy for a *Lafler* violation is to direct the prosecutor to reoffer the plea, *Lafler*, 132 S. Ct. at 1389, this Court should grant the petition and clarify that trial courts have the full range of remedy options that *Lafler* specifies, but trial courts have no authority to grant a new trial.

CONCLUSION

This Court should grant the State of Connecticut's petition for certiorari.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General
Department of Attorney General

Attorneys for *Amicus Curiae*
State of Michigan

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