No. _____

In The

Supreme Court Of The United States

LEO C. ARNONE,
CONNECTICUT COMMISSIONER OF CORRECTION,
Petitioner,

v.

AHMED KENYATTA EBRON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two questions involving this Court's ineffective assistance of counsel jurisprudence established in *Strickland v. Washington*, 466 U.S. 668 (1984), and expanded to claims of rejected plea offers by the Court's recent decisions in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012) ("the lapsed plea context").

The first question relates to the determination of constitutional prejudice. The latter focuses on the appropriate remedy, assuming prejudice is found to have emanated from counsel error.

1. When counsel error causes the lapse of a plea agreement more favorable to a criminal defendant than the outcome after subsequent disposition, can constitutional prejudice be shown if the later disposition was nonetheless fitting in light of the defendant's crime and criminal background?

2. If constitutional prejudice can be shown by the loss of a more favorable plea agreement even if the ultimate disposition was commensurate with the defendant's crime and background, is the State's interest in a punishment that fits the defendant's crime and character a "competing interest," pursuant to *United States v. Morrison*, 449 U.S. 361 (1981), that should be taken into account in determining a remedy?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the opinion of the Connecticut Supreme Court. The petitioner is Leo C. Arnone, Commissioner of the Connecticut Department of Correction (In earlier proceedings, the Connecticut Commissioner of Correction was Mr. Arnone's predecessor, Theresa C. Lantz). The respondent is Ahmed Kenyatta Ebron, who was, at the time this matter was instituted, an inmate, and who has since been released subject to conditions pending resolution of this appeal.

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JURISDICTION

The petitioner, Leo C. Arnone, Commissioner of Correction in Connecticut, invokes this Court's jurisdiction to grant the petition for a Writ of Certiorari to the Connecticut Supreme Court on the basis of 28 U.S.C. § 1257. The Connecticut Supreme Court issued its decision, which constitutes its judgment, on October 23, 2012. January 21, 2013 is the holiday in honor of Doctor Martin Luther King. Accordingly, the petition is timely pursuant to Supreme Court Rules 13.1 and 30.

CONSTITUTIONAL PROVISION INVOLVED

The questions presented implicate the Sixth Amendment to the United States Constitution, which states:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of an accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defence.

INTRODUCTION

This is an appeal from a Connecticut Supreme Court decision finding constitutional prejudice to exist where attorney error caused the lapse of a plea bargain more beneficial to the defendant than the result he ultimately received. The Connecticut Supreme Court held that constitutional prejudice is shown in the lapsed plea context where the trial court "conditionally" (pending review of complete information from which to determine if the sentence appropriately fits the defendant's crime and background) would have accepted the proposed plea disposition. Applying *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the Connecticut Supreme Court further ordered that, if the respondent can show that it is reasonably probable that the trial court would have imposed sentence in accordance with the lapsed plea agreement, the remedy is to order the State "to reissue the original plea offer and impose sentence accordingly." *Ebron v. Commissioner of Correction*, 307 Conn. 342, 53 A.3d 983 (2012)

The first issue is whether constitutional prejudice can be shown if the plea disposition afforded a "more favorable" outcome, but, based upon complete information garnered through the sentencing process, the ultimate outcome was appropriate for the defendant's crime and background. Put another way, has the defendant been granted a windfall to which the law does not entitle him if it is said he is prejudiced where counsel error prevents him from escaping the just consequences of his conduct? This Court's

precedents in *Strickland*, as well as *Lockhart v. Fretwell*, 506 U.S. 364 (1993), preclude a finding of prejudice.

The mechanics of the Connecticut Supreme Court's decision give rise to a subsidiary question: Is it appropriate to base a determination that a trial court would have accepted a plea offer upon the *subjective* likelihood that a particular judge would have done so? The Connecticut court held that evidence that a particular judge (here, The Honorable Joan Alexander) would have acted in a particular way was sufficient to impute her likely action to the entire judiciary, thus rendering the likelihood that she would have conditionally accepted the plea non-subjective. The test for prejudice in ineffective assistance of counsel cases, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is explicitly an *objective* one and expressly disavows an approach that considers the sentencing practices of a particular judge. Thus, to find prejudice upon a showing that a plea agreement would have been accepted by a particular judge, without examining objective indicia regarding the appropriateness of the outcome to determine whether *any* judge was likely to have accepted the plea (i.e., does the disposition fit the defendant's crime and character notwithstanding that a particular judge was likely to have accepted the disposition?), is at odds with *Strickland*, as well as other precedents from this Court.

The second issue assumes constitutional prejudice where counsel error causes the loss of an opportunity to escape the full consequences of criminal conduct. Here, it is asked whether the

State's interest in a punishment that fits the defendant's crime and background constitutes a "competing interest," as that term is used in *United States v. Morrison*, 449 U.S. 361 (1981), that should be taken into account in remedying the constitutional prejudice. This Court's decisions stressing the importance of fitting punishments dictate that, even if there is constitutional prejudice, the adequacy of the sentence and whether it serves penological goals should be considered in devising a remedy.

The Connecticut Supreme Court's decision gives rise to two subsidiary questions regarding the remedy. First, to what extent do *Lafler* and its companion case, *Missouri v. Frye*, 132 S.Ct. 1399 (2012), circumscribe a court's ability to impose a fitting sentence by limiting the parameters of information a court may consider? The Connecticut Supreme Court read *Lafler* and *Frye* to permit consideration of "intervening" events, but only to the extent they would have occurred and come to light prior to the time the trial court would have accepted the plea bargain had there been no ineffective assistance. *Lafler* and *Frye* do not delimit consideration in that manner, and explicitly recognize that the "time continuum" makes it impossible to place the State and the defendant into their earlier positions. *Lafler*, supra, 132 S.Ct. at 1389.

Second, must a defendant be granted the plea terms as the remedy for ineffective assistance of counsel in the lapsed plea context if he can show the trial court would have accepted the plea? The Connecticut Supreme Court ordered that a

defendant who shows that the trial court would have accepted the plea terms but for ineffective assistance must be granted those terms as his remedy. Consistent with this Court's precedents, *Lafler* and *Frye* leave entirely unfettered a sentencing judge's discretion to consider a defendant's crime and background when deciding whether to leave intact the sentence ultimately imposed, to impose sentence according to the terms of the lapsed agreement, or to impose any other sentence he or she deems appropriate.

For all of these reasons, certiorari is warranted.

STATEMENT OF THE CASE

In 2003, respondent was convicted of possession of narcotics with intent to sell.[1] In 2005, respondent was at liberty but on conditional discharge from the 2003 conviction when he was arrested and charged with two counts of attempted assault on a police officer, one count of possession of a dangerous weapon, and one count of disobeying the signal of an officer. These charges stemmed from an April 4, 2005, incident involving officers of the New Haven, Connecticut, police department and agents of the United States Drug Enforcement Agency. Respondent posted bond and was released. Respondent subsequently was charged in two separate incidents of two counts of assault in the third degree. Together with the revocation of the

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[1] Unless otherwise indicated, the facts set forth are a summary of those adopted by the Connecticut Supreme Court. *See Ebron v. Commissioner of Correction*, supra, 307 Conn. at 344 – 350.

conditional discharge from the 2003 conviction, all of these charges exposed the respondent to forty-one years and four months of incarceration.

The State offered a global resolution to all of the charges. Pursuant to the proposal, the respondent would plead guilty to one count of attempted assault on a police officer and admit to the conditional discharge violation. In exchange, respondent would effectively serve six years of incarceration. According to the prosecutor's testimony at a subsequent hearing on respondent's petition for post-conviction relief, he believed, based upon his experience with the pre-trial judge, the Honorable Joan Alexander, that she was likely to have accepted the plea deal.

Upon counsel's advice, the respondent did not accept the plea deal that would have been considered by Judge Alexander. Instead, he proceeded to a hearing on the violation of his conditional discharge before the Honorable Richard Damiani.[2] At that hearing, the respondent admitted the violation of conditional discharge, and, to resolve all of his cases, he pleaded guilty to two counts of assault in the third degree and one count of attempted assault on a police officer, without a recommendation from the State (an "open plea").[3]

Judge Damiani explained to the respondent that he could receive a total sentence of eighteen

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[2] Judge Damiani died while this case was on appeal to the Connecticut Supreme Court.

[3] Respondent's pleas were entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

years and four months, and substantial monetary fines. Judge Damiani also explained that he would order a pre-sentence investigation (PSI) for review along with victim statements and counsel arguments, in order to determine an appropriate sentence. Respondent confirmed that he understood Judge Damiani would consider all input. A-135 - 136.

The PSI report, prepared by the Office of Adult Probation, was not favorable to the respondent. The prosecutor changed his position regarding the disposition, agreeing with the PSI report which recommended a longer sentence. A-155 - 157. In addition to negative victim and witness input, the PSI report included a significant criminal history and recommended the maximum period of incarceration. *Ebron*, supra, 307 Conn. at 347 n. 3. Based upon the PSI and the petitioner's conduct during the April 4, 2005, incident, Judge Damiani determined respondent to be a "dangerous individual" who "deserves to be out of society for a period of time." Judge Damiani thus sentenced respondent to a total effective sentence of eleven years. A-161.

A. Review of respondent's sentence by Connecticut Judicial Branch's Sentence Review Division

Connecticut law provides that a person sentenced to confinement for three years or more may seek review of his sentence before a designated panel of judges constituting the Sentence Review Division. Conn. Gen. Stat. §51-194 et seq. The Division's role is to determine whether a sentence

> should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest and the deterrent, rehabilitative, isolative and denunciatory purposes for which the sentence was intended.

Connecticut Practice Book § 43-28. A-125.

On May 23, 2006, the respondent's application for sentence review was heard by the Division. A-149. Respondent acknowledged that he had been convicted "seven times of felonies dating back to [1991]." A-156. He argued, nonetheless, that Judge Damiani's eleven-year effective sentence was not justified. The Division concluded:

> Taking into consideration the criminal history of the petitioner and the nature of the present convictions, the sentence imposed is neither inappropriate nor disproportionate.

A-186.

B. Post-Conviction Proceedings

The respondent sought relief by filing a petition for a writ of habeas corpus, claiming a violation of the Sixth Amendment to the United

States Constitution.[4] Respondent claimed that he received ineffective assistance of counsel with respect to the decisions to reject the State's six-year offer and proceed instead to the "open plea" before Judge Damiani.

Evidence on respondent's habeas petition was heard by the Honorable Carl Schuman. Consistent with Judge Damiani's conclusions regarding respondent, Judge Schuman noted that the PSI was "damning," and characterized respondent as a "persistent", "defiant", "violent" and arguably "incorrigible" offender who did not present sufficient mitigation for his conduct. A-93. Judge Schuman reasoned, in relevant part, that counsel should have known of this "egregious" background, and that it would come to light in the PSI. A-94. Judge Schuman thus found that respondent's counsel performed deficiently because the nature of respondent's crimes and character made it unreasonable for counsel to conclude that the respondent could ultimately do better than the State's six-year offer. The longer sentence received by respondent constituted prejudice, and respondent thus proved his claim of ineffective assistance under *Strickland's* two-pronged test. Judge Schuman ordered the trial court to vacate respondent's guilty plea and allow him an opportunity to accept the State's six-year offer and, assuming that he did, re-sentence accordingly. A-103.

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[4] Habeas Corpus petitions claiming illegal incarceration resulting from a criminal conviction are not typically heard by the court of conviction. In Connecticut, there is a dedicated court that hears most petitions. *See* Connecticut General Statutes § 52-466(a)(2).

C. Appellate Proceedings

The Connecticut Appellate Court affirmed the habeas court's ruling. A-36. Subsequently, this Court released its decisions in *Lafler* and *Frye*.[5] Applying those cases, the Connecticut Supreme Court affirmed the finding that respondent was prejudiced by his counsel's error. However, the Connecticut Supreme Court reversed the remedy requiring imposition of the six-year sentence if respondent chooses to accept it. Instead, pursuant to *Lafler* and *Frye*, the court ordered that the case return to the trial court for a determination of whether respondent should receive the six-year term, the eleven-year term, or something in between. In doing so, the court ordered that respondent should get the six-year term if he can prove either: (1) Judge Alexander would not have ordered a PSI or received other unfavorable information before sentencing that would have provided a reason for her to reject the deal; (2) if Judge Alexander would have ordered a PSI or received unfavorable information, that such information would not have induced her to impose a sentence longer than six years; or, (3) absent a reasonable probability that Judge Alexander would have imposed the six years in light of a PSI or other unfavorable information, there is still a reasonable probability that she would

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[5] Upon issuance of the *Lafler* and *Frye* decisions, the Connecticut Supreme Court ordered the parties to file supplemental briefs addressing their effect on the issues presented in this case. This petitioner conceded that a lapsed plea claim is cognizable, but argued as he does here that prejudice and remedy must nonetheless take into account the appropriateness of the disposition. *See* Supplemental Brief of the Commissioner of Correction.

have imposed a sentence significantly less than that imposed by Judge Damiani. *Lafler*, supra, at 361-62.

D. Respondent's conditional release and violation of conditions

Appellate proceedings in this case were ongoing when the respondent had served six years of incarceration – the period contemplated by the lapsed plea. The respondent thus sought, and was granted, relief from the automatic stay, pending appeal, of Judge Schuman's ruling granting his petition for a writ of habeas corpus. Accordingly, the respondent was released subject to conditions under the supervision of the Office of Adult Probation. Subsequently, the Office of Adult Probation reported that the respondent violated his conditions when routine testing disclosed the use of an illegal drug. Further conditions were ordered, and the respondent remains under supervised release pending appellate resolution. A-185 – 198.

REASONS FOR GRANTING THE PETITION

This case presents issues critical to the administration of criminal justice. Its overarching question is whether penological goals must be sacrificed because an earlier plea bargain now known to fall short of those goals had been forfeited due to counsel error.

I. Introduction

The Connecticut Supreme Court's decision, much like that of the Sixth Circuit Court of Appeals in *Burt v. Titlow*, 81 U.S.L.W. 3276 (October 2, 2012)

(petition for a writ of certiorari pending, *see* No. 12-414), focuses on the chance that respondent could have received a result more favorable from his perspective. In short, if respondent was reasonably likely to have at one time received a better result, then he should get it now regardless of whether that result adequately serves the goals of the criminal justice system.

Inconsistent with *Strickland*, *Lafler* and *Frye*, the Connecticut court's inquiry focused primarily upon what Judge Alexander was likely to have done. As to prejudice: If Judge Alexander *conditionally* (without information typically used to determine an appropriate sentence) would have accepted the plea, then prejudice has been shown. As to the remedy for that prejudice: If Judge Alexander was likely to have *ultimately* imposed sentence in accordance with the plea deal, then respondent must now get that sentence.

The approach ignores consideration of whether the result fits the defendant's crime and character. In other words, the question of whether such a result constitutes the "just result" that *Strickland* sets as the target in ineffective assistance cases remains unanswered. Although the cases do not explicitly state, *Lafler* and *Frye* are consistent with *Strickland's* focus on a result that is appropriately just, rather than one to which a defendant has gained entitlement simply because he once *could have* received it. *Lafler* and *Frye* permit consideration of intervening circumstances in *objectively* determining prejudice and remedy. *See Frye*, supra, at 1410 (discussing *objective* prejudice assessment); *Lafler*, supra, at 1389 (ignorance of

subsequently discovered information not required in determining remedy). As the Court noted, the "time continuum" makes it impossible to restore the parties to their prior positions. *Lafler*, supra, 132 S.Ct. at 1389.

This case illustrates why it is necessary to consider – in both the prejudice and remedy determinations – whether the outcome is fitting in light of a defendant's crime and character. Although the finding of deficient performance is not challenged, it must be examined to understand how a failure to consider this respondent's crime and background in determining prejudice and remedy forms an *injustice*. Because *Lafler* and *Frye* have now found a "harsher sentence" by itself to be prejudicial, the failure to consider whether the disposition is appropriate conveys a windfall upon the respondent, and would actually treat a more deserving defendant "harsher."

Prior to *Lafler* and *Frye*, this Court had not said that a "harsher sentence" alone amounts to constitutional prejudice. Rather, what the Court had said was that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424 (1974). In the context of habeas corpus, the Court stated that:

> Sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of

> habeas corpus. It is not the duration or severity of this sentence that renders it constitutionally invalid.

Townsend v. Burke, 334 U.S. 736, 741 (1948). Finally, in *Glover v. United States*, 531 U.S. 198 (2001), the Court was confronted with a sentence that was outside the legal limits. Against the government's argument that the Constitution was not offended because the sentence was only *nominally* illegal (it was only two months above the legal range), the Court stated that any amount of jail time implicates the Sixth Amendment – in other words, there is no such thing as "only *a little* illegal." To be sure, though, the *Glover* sentence was not merely "harsher," it was illegal.

The new *Lafler* and *Frye* rule that a "harsher sentence" alone has constitutional implications means that prejudice in these lapsed plea cases is a given – the claim will always be that counsel error resulted in a more severe sentence.[6] As a result, disparate outcomes will turn on application of the deficient performance assessment. In this case, it was determined that respondent's counsel performed deficiently because respondent's criminal history should have clued counsel in to the fact that a sentence greater than the State's plea offer was warranted and, thus, respondent was unlikely to get a more favorable outcome. With prejudice as a given, a finding of ineffective assistance was made.

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[6] *Lafler* and *Frye* focus on formal agreements, as involved here. Thus, it is assumed that there is no dispute regarding the actual existence of the plea terms.

However, without further considering in the prejudice and remedy analyses whether the outcome fits the defendant's crime and history, the result is perverse. This respondent was "prejudiced" by the longer sentence, the appropriateness of which, relative to his crime and background, is not questioned. Moreover, he has been given the *shorter* sentence *specifically because* his crime and background warrants the *longer* sentence, solely by operation of the deficient performance finding (his attorney should have known a longer sentence was justified based on his background and, therefore, performed deficiently).

In contrast, a similarly situated defendant with one misstep and an otherwise clean background that justified his counsel's belief that he could get a better outcome would be unable to prove deficient performance under the analysis employed here (his attorney would have had no reason to think a longer sentence was justified, and, therefore, would not have been deficient). Thus, a defendant whose history perhaps justifies a shorter sentence will nonetheless be stuck with the longer one because he cannot meet *Strickland's* two-pronged test.

This petition should be granted because this case perfectly illustrates that a failure to consider – in both the prejudice and remedy determinations – whether an outcome fits the defendant's crime and character contravenes *Strickland;* it leads to an *unjust* result. Accordingly, the questions raised by the petition are important to the administration of criminal justice. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (granting certiorari because

case "raise[d] a question important to the administration of criminal justice.").

II. The Connecticut Supreme Court erred in finding that the respondent was constitutionally prejudiced by a result that fits his crime and background

Constitutional prejudice in ineffective assistance cases is measured by an objective standard. The "benchmark," the Court has said, is a "just result." *Strickland*, supra, 466 U.S. at 686. A just result is one that takes into account the legitimate bounds of prosecution and punishment, not one that considers whether a *subjective* option available to the defendant at some time during the proceedings would have allowed him to escape full accountability. Hence, to objectively determine the outcome or result that is the benchmark from which *Strickland* prejudice is measured, it is necessary to consider whether that result is fitting in light of the convicted criminal and his character.

By failing to consider whether the outcome in this case was appropriate regardless of counsel's deficient performance, the Connecticut Supreme Court failed to use as its benchmark for prejudice the "just result" set forth in *Strickland*.

A. The Connecticut Supreme Court's analysis employs the wrong "benchmark" for determining prejudice

Consistent with *Strickland's* "just result" focus, prejudice in the "lapsed plea" context asks whether "the *end result* of the criminal process

would have been more favorable by reason of a plea." *Frye*, 132 S.Ct. at 1409 (emphasis added). The Connecticut court did not ask whether *any* result or outcome was likely to have been more favorable. Rather, to establish prejudice, the court asked only whether Judge Alexander would have *conditionally* accepted the plea. Assuming it was certain that Judge Alexander ultimately would have rejected the arrangement, the respondent's claimed constitutional violation would be defeated by *Lafler* and *Frye*. Those cases require a showing that the court would have accepted the plea in order to establish prejudice. Yet, the Connecticut court would still recognize a Sixth Amendment violation by virtue of the fact that Judge Alexander would nonetheless earlier have *conditionally* accepted the deal before later *finally* rejecting it (after obtaining additional information about respondent's crime and background).

Thus, the "benchmark" of prejudice used by the Connecticut court was neither *Strickland's* "just result" or even *Lafler's* "end result." Instead, the "benchmark" of that court's prejudice determination was an interim step in the proceeding – *conditional* acceptance of the plea offer. Conditional acceptance is never an *end result*, or an *outcome*, of plea bargaining. It is a preliminary assessment that awaits the very thing that must be considered in determining whether constitutional prejudice actually arose because what was delivered fell short of the "benchmark" result – information necessary to determine whether the plea fits the defendant's crime and character.

B. The "benchmark" in ineffective assistance cases is a "just result" measured by an objective standard.

> The 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*.

Strickland, supra, at 685 (emphasis added). Accordingly, in determining whether constitutional prejudice has resulted from counsel's deficient performance, the Court has said:

> 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*.

Id. at 686 (emphasis added).

A just result is one that emanates from proceedings that are fair to the accused. However, a just result must also balance the State's ability to call the defendant, once convicted, to account for the full consequences of his actions, which consequences are established by legislatures representing the people. *See,* e.g., *Ewing v. California*, 538 U.S. 11, 28 (2003) (deferring to legislatively enacted criminal sentencing schemes). As the Court has stated:

> Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), overruled in part, on other grounds, *Malloy v. Hogan*, 378 U.S. 1 (1964). *See also*, *Rumery*, supra, 480 U.S. at 400 (O'Connor, J., concurring) ("The public has an interest in seeing its laws faithfully executed."). Accordingly, this Court has recognized that:

> There is nothing in the Constitution that requires a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Frisbie v. Collins, 342 U.S. 519, 522 (1952).

Thus, in the lapsed plea context, where it is now recognized that constitutional prejudice may stem from "[h]aving to stand trial, not choosing to waive it"; *Lafler*, supra, 132 S.Ct. at 1385; that prejudice must be measured by the objective "just result" set forth in *Strickland*. Otherwise, a person "rightfully convicted" may indeed "escape justice" – that is, he may avoid the full legal consequences of his actions – merely because he was brought to trial when he would have chosen to waive it (or, as here, agreed to a different disposition).

The notion that the Constitution views as the benchmark for prejudice the *appropriate* – rather than discounted – outcome is not novel. It underlies

many of this Court's cases. For example, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), involved a claimed due process violation when a greater charge was brought following the rejection of a plea deal. The Court rejected the claim because the defendant's conduct clearly exposed him to legitimate prosecution for the greater charges. *Id.* at 364 ("It is not disputed here that Hayes was properly chargeable under [the enhanced statute]"). As the Court later explained, in *Bordenkircher*, "[i]t was not disputed that the additional charge was *justified by the evidence*." *United States v. Goodwin*, 457 U.S. 368, 377 (1982) (emphasis added).

Similarly, the *Goodwin* defendant claimed that the prosecutor's enhancement of charges after he declined plea dealings and elected a jury trial gave rise to an impermissible appearance of retaliation. The Court rejected the claim because the petitioner's conduct legitimately exposed him to prosecution for the greater charges. The Court stated: "An initial indictment from which the prosecutor embarks on a course of plea negotiation does not necessarily define the extent of the legitimate interest in prosecution." *Id* at 380. The Court elaborated:

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's

> assessment of the proper extent of prosecution may not have crystallized.

Id. at 381.

In *Alabama v. Smith*, 490 U.S. 794 (1989), the Court rejected a claim that a *judge* acted presumptively vindictive when, after a defendant's guilty plea was vacated, the judge sentenced the defendant more harshly following trial. The Court stated:

> As this case demonstrates . . . in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation.

Id. at 801. In other words, a "harsher" punishment does not have constitutional implications if it nonetheless fits the person's crime and character. In fact, aside from cases of prosecutorial or judicial vindictiveness, which the Court has recognized ought to play no part in our judicial system, the Court has routinely rebuffed complaints that a defendant ultimately suffered consequences greater than those contemplated at earlier junctures. *See*, e.g., *Blackledge v. Perry*, 417 U.S. 21, 27 (1974):

> (The lesson that emerges from [the Court's earlier cases] is that the Due Process Clause is not offended by all possibilities of increased punishment

> upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness").

This is true, of course, as long as those consequences were legitimately prescribed by the law and fitting to a defendant's crime and character.

Constitutional prejudice in lapsed plea cases should not be measured differently. Rather, the Court's historical jurisprudence illustrates that it is necessary to consider a defendant's crime and character in the assessment of whether he has been *constitutionally* prejudiced. In an ineffective assistance case, a result that serendipitously gives to a defendant a more lenient outcome than that which is commensurate with his crime and background gives him the very "windfall" to which this Court has said he is not entitled. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70.

C. *Lafler* and *Frye* did not upend the "just result" benchmark set forth in *Strickland*

Lafler and *Frye* embody, rather than retreat from, this Court's earlier cases – including *Strickland* itself – that seek *objectively* to match the outcome with the legitimate boundaries of prosecution and appropriate punishment. *See*, e.g., *Frye*, 132 S.Ct. at 1411 (decidedly following *Strickland*). The two "lapsed plea" cases do not take a "snap shot" approach to the prejudice determination – fixing as the "result" against which *Strickland* prejudice is measured that which, *subjectively*, would have occurred at the interim step of "conditional" plea acceptance.

Nor do those cases require ignorance of things normally considered in reaching a result appropriate to a person's crime and background – even if they did arise after the time the plea was rejected. The wisdom of *Lafler* and *Frye* is that they set forth a prejudice analysis that considers whether the "end result" is an *appropriate* one. Indeed, the Court explicitly contemplated a prejudice determination that makes an "*objective assessment* as to whether or not a particular fact or intervening circumstance would suffice . . . to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Frye*, supra, at 1410 (emphasis added).

D. The Connecticut Supreme Court's decision abandons *Strickland's* "just result" benchmark because it fails to consider whether the outcome is appropriate in light of the respondent's crime and character.

The Connecticut Supreme Court did not consider whether the result in this case was appropriate in light of the respondent's crime and character.

In proceedings leading to this appeal, the appropriateness of Judge Damiani's eleven-year sentence – relative to the nature of the crimes and the respondent's background – has either been affirmed or, at the very least, gone undisputed. Further, if Judge Damiani's prescience that the six-year pre-PSI sentence – offered by the prosecutor at a time when his "assessment of the proper extent of prosecution may not have crystallized"; *Goodwin*,

supra, at 381; – was insufficient, the respondent's violation of the conditions of his release after he was incarcerated for the six-year term further suggests that the six-year sentence did not afford sufficient rehabilitation.

Indeed, the very basis upon which it is said counsel performed deficiently is that counsel should have known a longer sentence was justified. Counsel is thus blamed for failing to advise the respondent to accept a plea offer that would have obviated the need for pre-sentence investigation and kept the sentencing court in the dark about his past. Such gamesmanship cannot be the constitutional goal that it becomes by failing to consider whether an outcome, albeit not the most favorable a defendant *could have* received, is nonetheless the one the defendant *should have* received.

This is, however, the result that emanates from an abandonment of *Strickland's* "just result" benchmark. That benchmark has been abandoned here in two distinct ways. First, as previously described, the Connecticut court's rule that the likelihood of conditional acceptance can establish prejudice sets *that interim step* as the "benchmark" of prejudice, rather than the result. That means that a prejudice determination will not encompass information about the nature of the crime or the perpetrator's background that would normally come to light thereafter. Second, the court based its prejudice analysis *subjectively* on whether Judge Alexander would have accepted the plea offer based upon information then before her, without considering whether, objectively, a judge of the court would deem the result appropriate.

In *Lafler* and *Frye*, this Court did establish as a test for prejudice a determination whether the trial court would have accepted the plea arrangement. However, *Strickland's* prejudice test, adopted in *Lafler* and *Frye*, dictates that the inquiry is not whether a *particular judge*, acting subjectively upon only that information known at the time of initial presentment, would have accepted the plea arrangement, but whether, *objectively*, a judge would have accepted the plea arrangement because it represented an appropriate disposition given *all* information. In other words, to remain true to *Strickland's* objective focus, the question is not simply whether Judge Alexander would have accepted the plea arrangement, but whether a judge was likely to have accepted the plea arrangement *given the information later available to Judge Damiani*. Such an approach would allow an "objective assessment" as to whether there would ultimately have been "judicial nonapproval of a plea agreement." *Frye*, supra, at 1410.

Strickland disapproves of an approach that considers a particular judge's subjective practices:

> [E]vidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, *a particular judge's sentencing practices*, should not be considered in the prejudice determination.

Strickland, supra, 466 U.S. at 695. Moreover, *Strickland* suggests that, even if Judge Alexander

were to testify or attest to what she would have done, it would not bear on the question of whether the respondent was prejudiced. In *Strickland* itself, the trial judge did testify. But, this Court stated:

> Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. . . . [T]hat testimony is irrelevant to the prejudice inquiry.

Id. at 700.[7]

In addition, problems of proof compound the difficulties of an inquiry into whether a particular judge would have acted a certain way. Judges' deliberative processes are typically not subject to exploration. *See*, e.g., *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Statewide Grievance Committee v. Burton*, 299 Conn. 405, 415 (2011). Further, as Judge Damiani's untimely death illustrates, it will not always be possible to inquire

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[7] The Connecticut Supreme Court sought to reconcile its inquiry into whether Judge Alexander would have accepted the plea agreement with *Strickland's* prohibition against such a judge-specific examination, by reasoning that consistency in sentencing is a goal with which all trial judges are familiar. Accordingly, Judge Alexander's action is probative of what any reasonable judge would have done in the same situation. However, as *Strickland's* admonition against considering the sentencing practices of a particular judge and Connecticut's sentence review statutes inherently recognize, such consistency, while a worthy goal, does not always exist in practice.

into a judge's intentions, even if it were appropriate to do so.

As stated in *Lafler* and *Frye*, those cases affirmatively adhere to *Strickland*. Thus, the *Lafler/Frye* inquiry into whether a trial court would have accepted the plea arrangement must be an objective one; the respondent ought to show that the trial court was likely have accepted the plea arrangement because it represented an appropriate "end result" of his case.

The Connecticut Supreme Court failed to base its prejudice determination upon an objective assessment of what the final result would have been, but for the attorney's error. Accordingly, the court abandoned the benchmark for prejudice set forth in *Strickland*, as well as in the *Lafler/Frye* cases.

E. Conclusion

A finding of prejudice that fails objectively to consider whether the result is "just" in light of the nature of the defendant's crime and criminal history contravenes this Court's precedents.

III. The Connecticut Supreme Court erred in crafting a remedy that fails to take account of the State's "competing interest" in a punishment that fits the defendant's crime and background.

The Connecticut Supreme Court, having found a constitutional violation, ordered, pursuant to *Lafler* and *Frye*, that the case be returned to the trial court to determine whether the respondent

"should receive the term of imprisonment the government offered in the plea, the sentence he received, or something in between." *Ebron*, supra, 307 Conn. at 361 (A-30) (citing *Lafler*, supra, 132 S.Ct. at 1389.

The Connecticut court did not stop there, however. The court observed that:

> If the [defendant] was prejudiced because it is reasonably probable that the sentence embodied in the plea agreement would have been imposed if not for the deficient performance of counsel . . . it seems reasonably clear that the appropriate remedy is to impose that sentence.

Ebron, supra, 307 Conn. at 356.

The court then issued directives not found in *Lafler* and *Frye*. Specifically, the court ordered that if the respondent can prove under one of three scenarios that Judge Alexander would have ultimately accepted the plea, "the trial court should order the state to reissue the original plea offer and impose sentence accordingly." *Ebron*, supra, 307 Conn. at 362 (A-31). In so doing, the court constrained the trial court's discretion – the trial court must focus on how Judge Alexander would have acted based upon the information available to her at the time of the original plea. *see Id.* at 357, nn. 8 and 9 (A-22 – 23) (restricting information that can be considered to that which would have been available at the time the plea offer originally would

have been accepted).[8] The Connecticut Supreme Court thus failed to tailor the remedy to the constitutional injury while taking account of the State's interest in a fitting punishment. Further, its remedy strips the sentencing judge, ultimately, of the discretion that *Lafler* and *Frye* afford him or her in determining the sentence the respondent should receive.

A. The Connecticut Supreme Court failed to tailor the remedy to the constitutional injury while taking account of the State's interest in a fitting punishment

The *Lafler* remedy does not require a court to ignore relevant sentencing considerations in order to give to a defendant an outcome he once could have had, but which no longer makes sense. In *Lafler*, this Court reiterated the rule set out in *United States v. Morrison*, 449 U.S. 361, 364 (1981):

> Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and *should not unnecessarily infringe on competing interests*."

Lafler, supra, 132 S.Ct. at 1388 (quoting *Morrison*, supra, 449 U.S. at 364)(emphasis added). Thus, although the remedy should seek to "neutralize the taint," it should not "grant a windfall to the defendant . . . ." *Lafler*, supra, at 1388.

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[8] Such an approach, for example, will prevent the ultimate sentencing court from considering that this respondent violated the conditions of his release pending appeal.

The remedy here is not tailored to the constitutional violation nor does it give consideration to the State's competing interest in an appropriate sentence.[9] Instead, the Connecticut court tailored its remedy to what Judge Alexander's action would have been, in view of then extant information.

The principle that "competing interests" ought to be considered in remedying a violation of the right to the effective assistance of counsel is not a new one. It is a principle adopted by the Court at least three decades ago in the *Morrison* decision. However, the Court has not expounded the principle or identified specific interests that should be taken into account in crafting a remedy for ineffective assistance. The need for dispositions in criminal cases that serve penological goals by imposing punishment that fits the crime and the criminal is so deeply recognized that it *must* constitute a competing interest to be taken into account in remedying lapsed pleas.

The imposition of punishment is the very purpose of virtually all criminal proceedings. *Goodwin*, supra, 457 U.S. at 372. Accordingly, punishments that fit a defendant's conduct and character have generally withstood constitutional challenge. *See,* e.g., *Bordenkircher*, supra, 434 U.S. at 364; *Goodwin*, supra, 457 U.S. 368. A fitting

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[9] The court's erroneous prejudice determination – based upon whether Judge Alexander *conditionally* would have accepted the plea bargain – likely contributed to the design and scope of the violation to which the court viewed a remedy was required to be tailored.

punishment is one that serves the penal goals of retribution, deterrence, incapacitation, and rehabilitation. *See Tapia v. United States*, 131 S.Ct. 2382, 2387 (2011); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Moreover, there is no question that the State has great interest in pursuing these legitimate goals. *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States.").

This Court has recognized that a sentencing judge with unrestricted discretion and armed with all relevant information is in the best position to devise a fitting sentence:

> Highly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. . . . Undoubtedly, the [sentencing statutes at issue in this case] emphasize a prevalent modern philosophy of penology that *the punishment should fit the offender and not merely the crime.*

Williams v. New York, 337 U.S. 241, 247 (1940) (emphasis added). *See also*, *Oregon v. Ice*, 555 U.S. 160, 163, 171 (2009) (recognizing continuing common law tradition of entrusting trial judges with "unfettered discretion" to consider the offense or the defendant's character at sentencing). Thus, a sentence based upon less than full information, such as that information included in pre-sentence investigation reports, is not required by the

Constitution in addressing constitutional claims. *Williams*, supra, 337 U.S. at 247-48.

This Court has time and again reaffirmed the principle that the delivery of constitutional protections ought not to sacrifice the goal of achieving punishment befitting the criminal and his conduct. *See Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (emphasis in original)

> ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.").

Rita v. United States, 551 U.S. 338 (2007), provides another recent example. There, the Court adhered to the principle that sentencing judges are best positioned to devise punishments that consider the offense and the offender's characteristics in light of punitive goals. Examining federal sentencing guidelines, the Court recognized an "appellate review" presumption that sentences within the guidelines range are reasonable. *Id.* at 350-51.

Obviously, the need for criminal case dispositions that adequately address penological goals and suit a defendant's crime and history

inspired the Court's holdings in *Goodwin* and the related cases discussed above; *see*, ante, 21-22; declining to remedy "harsher sentences" that nonetheless legitimately corresponded to a criminal defendant and his behavior. Indeed, in *Goodwin*, the Court explicitly stated that a prosecutor's initial decision at the plea offer stage "should not freeze future conduct," and that the system ought to be free to impose greater punishments as the discovery of information unfolds.

At times, it is not the unfolding of additional information that warrants a greater punishment than that contemplated by the plea offer. It may be, instead, that the bases upon which a prosecutor was willing to offer a discount no longer exist. Such is the case, for example, when a prosecutor makes a compromise offer in light of a sexual assault victim's reticence to relive her ordeal and testify at trial, or when parents of a minor victim of sexual assault wish not to subject their child to greater trauma. *See*, e.g., *Rumery*, supra, 480 U.S. at 390 (recognizing prosecution's desire to protect sexual assault victim "from the trauma she would suffer if she were forced to testify" as motive for agreeing to disposition; *see also*, *Id.* at 403 (O'Connor, J., concurring) (victim's "emotional distress," among other things, supported prosecutor's judgment regarding disposition). In this kind of case, the plea offer does not reflect the severity of the crime, but, rather, seeks to address some of the goals of sentencing while respecting victim concerns and acknowledging the reality that strong evidence is not always accompanied by strong witnesses. If the plea offer is rejected (regardless of the reason) and the victim then marshals the courage to testify and a

conviction results, the punishment meted out after trial represents the true value of the crime, even if the plea offer contained a discount.

These cases illustrate that the State has not forfeited its interest in appropriate sentencing merely because it once offered a disposition that may have discounted that interest. More importantly, *Lafler* does not require such a forfeiture.

B. The *Lafler/Frye* remedy in "lapsed plea" cases recognizes the need to take account of the State's interest in an appropriate punishment and does not in any way strip the trial court of the discretion to do so

The *Lafler* remedy does not overturn, but in fact fully embraces, the principle that the vindication of constitutional rights allows for the consideration of appropriate sentencing. The Court stopped short of requiring a remedy that imposes the "lapsed plea" terms, recognizing its earlier observation that consideration of "competing interests" may lead to the conclusion that the plea terms do not "reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin*, supra, at 382. Indeed, consistent with *Goodwin*, the Court in *Lafler* prescribed that, in determining remedy, a "lapsed plea" court may take account of "information concerning the crime that was discovered after the plea offer was made." *Lafler*, supra, 132 S.Ct. at 1389.

In addition, contrary to the Connecticut court's holding, this Court did not pre-empt consideration of relevant sentencing information

that arises after *any* particular time. Rather, the Court recognized that "[T]he 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." *Id.*

Here, for example, the Connecticut court's decision will preclude a court, exercising its discretion to devise a "lapsed plea" remedy, from considering the respondent's violation of conditions during his release pending final resolution of this appeal. *Lafler* and *Frye* do not require a court to close its eyes to such events. In fact, this Court has recognized the appropriateness of considering that very type of information, retroactively, in vindicating constitutional rights.

In *Puckett v. United States*, 566 U.S. 129 (2009), the defendant engaged in criminal conduct after entering into a plea agreement, but before sentencing. Discussing the government's obligation under the plea agreement to agree to a sentence reduction for acceptance of responsibility, the Court stated:

> Given that [the defendant] obviously did not cease his life of crime, receipt of a sentencing reduction for acceptance of responsibility would have been so ludicrous as itself to compromise the public reputation of judicial proceedings.

Id. at 143 (emphasis removed). There is no reason why late developments should be treated differently here, merely because there was involved counsel

error; the trial court in the lapsed plea context should not be forced to ignore the respondent's conduct regardless of when it occurred.

In sum, as this Court's cases recognize, the fulfillment of penological goals is an important governmental interest, and one that ought to compete, as contemplated in *Morrison*, in the fashioning of a remedy tailored to the violation in the "lapsed plea" setting. *Lafler's* remedy, with its broad grant of discretion to the trial judge, thus permits that court to consider the plethora of information necessary to devise a sentence fitting both the crime and the perpetrator. The Connecticut court's decision, failing to consider as a "competing interest" the State's interest in fitting punishment, and constraining the trial court's discretion to impose fitting punishment, contravenes this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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