No. 12-924

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent does not address the need to reconcile lower courts' application of *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), and *Missouri v. Frye*, 132 S.Ct. 1399 (2012), with precedents embodied in cases like *United States v. Goodwin*, 457 U.S. 368 (1982), *Alabama v. Smith*, 490 U.S. 794 (1989), *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), *Frisbie v. Collins*, 342 U.S. 519 (1952), *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Williams v. New York*, 449 U.S. 361 (1981) (hereinafter, "the *Goodwin/Williams* cases"). These cases stand for the principle that the Constitution does not require outcomes that ignore the evidence of the crime or the offender's history -- even if by happenstance a defendant may have, at one time, been able to obtain such a result.[1]

The Connecticut court's analysis, like that of the Sixth Circuit in *Burt v. Titlow*, No. 12-414, 81 U.S.L.W. 3276 (October 2, 2012), measures prejudice using the lapsed plea agreement as a goalpost without regard to the principles set forth in these precedents.[2] To abandon these principles in lapsed

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[1] The Fourth Amendment's "exclusionary rule" presents an extraordinarily rare exception, permitting "[t]he criminal . . . to go free because the constable blundered." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quotation and citation omitted). In that case, public actors accountable to the people through the political process are thus deterred by the exclusionary rule. Nothing in *Lafler* and *Frye* puts them on level with *Mapp*. An attorney at error in a lapsed plea case is neither accountable to nor under the control of the people.

[2] Respondent seeks to distinguish this case from *Titlow*. Br. at 2 n. 2. Just as here, where the Connecticut Supreme Court stated that, if the petitioner is prejudiced from the loss of the plea, "it seems reasonably

plea cases means that *Lafler* and *Frye* have done what *Strickland v. Washington,* 466 U.S. 668 (1984), so flatly rejected -- they have made "the object of an ineffectiveness claim [to] grade counsel's performance," *Id.* at 697, and they have made "the purpose of the effective assistance guarantee . . . to improve the quality of legal representation." *Id.* at 689.

Lafler and *Frye* do not reach so far. They contemplate an "objective" prejudice test, considering intervening circumstances. *Frye*, supra, 132 S.Ct. at 1410. Their remedy considers "information concerning the crime that was discovered after the plea offer was made." If the prejudice and remedy determinations are fixed by the earlier plea agreement, these extra considerations would be unnecessary, and *Lafler*, at least, expressly disavows fixation on the earlier agreement. *Lafler*, supra, 132 S.Ct. at 1389 (cannot restore parties to prior positions because of "time continuum").

Nevertheless, the respondent contends *Lafler* and *Frye* have already decided that a defendant should get the terms of the plea agreement without considering whether the nature of the crime or the offender's history makes it unwise. Br. at 11-12. He cites the Court's statement that the issue in lapsed plea cases is the "fairness and regularity" of the pre-trial process that

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clear that the appropriate remedy is to impose that sentence," *Ebron v. Commissioner of Correction*, 307 Conn. 342, 356, 53 A.3d 983, 992 (2012), *Titlow* expresses a view that the Sixth Amendment aims to recapture the shorter sentence, lest "the remedy articulated in *Lafler* . . . become illusory." *Titlow v. Burt*, 680 F.3d 577, 592 (6th Cir. 2012).

"caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." Br. at 13 (quoting *Lafler*, supra, 132 S.Ct. at 1389).

But, it is precisely the point of this petition that the "ordinary course," as this Court has recognized, considers characteristics of both crime and criminal. That is so with respect to the prejudice determination; *see*, e.g., *Bordenkircher*, supra, 434 U.S. at 364 (no constitutional violation because conduct fit the crimes charged); as well as the remedy. *See Williams*, supra, 337 U.S. at 247 (recognizing the "highly relevant – if not essential" need to ensure that "punishment should fit the offender and not merely the crime"); *see also*, *Oregon v. Ice*, 555 U.S. 160, 163, 171 (2009) (similar). *Lafler* and *Frye* do not repudiate such considerations in lapsed plea cases.

The Connecticut Supreme Court, like the Sixth Circuit in *Titlow*, did not employ these principles. In this case, this failing resulted from the Connecticut court's basing of the prejudice determination on whether the deal "conditionally" would have been accepted. If conditional acceptance was likely, any information bearing on the appropriateness of the ultimate outcome "should be considered at the remedy stage, not when the habeas court is determining whether there was prejudice."[3]

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[3] The Connecticut Supreme Court perceived a conflict between *Lafler* and *Frye*. *Lafler* discusses consideration of "intervening circumstances" in the remedy application, while *Frye* discusses such consideration in the prejudice determination. That court found it "difficult to understand why the [sentencing] court should be permitted to consider such a

Ebron v. Commissioner of Correction, 307 Conn. 342, 360, 53 A.3d 983, 994 (2012).

The respondent casts this, what he calls, "reconfigured" inquiry; Br. at 6; as an insignificant departure from the *Lafler/Frye* test. It is merely "designed to conform to Connecticut practice and procedures." Br. at 2-3. According to the respondent, Connecticut's procedures are "[c]ritical to this Court's understanding of the Connecticut Supreme Court's decision." *Id.* at 8. *Lafler* and *Frye* "acknowledged that state procedures would shape the prejudice inquiry." Thus, he argues, no federal question is raised here. *Id.* at 2-3, 5.

This Court in *Frye* did state that "States have the discretion to add *procedural* protections under state law if they choose." *Frye*, supra, 132 S.Ct. at 1411 (emphasis added). Clearly, the Court was referring to protections akin to those it had earlier delineated: that states may require a documented negotiation process, written offers, and a formalized record. *Id.* at 1409. However, this language does not subject the *substantive* determination of prejudice to state *procedural* rules. It is novel to suggest that a

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circumstance *again* when it exercises its discretion to determine [the remedy]." *Ebron*, supra, 53 A.3d at 992 (emphasis in original).

These dual opportunities to consider information simply reflect this Court's intention, consistent with *Williams v. New York* and *Oregon v. Ice*, to leave open the opportunity for the sentencing court to consider events and data that arise right up until the time of sentencing, so that the judge has "unfettered discretion" to consider all information at that time. *Ice*, supra, 555 U.S. at 163, 171; *Williams*, supra, 337 U.S. at 247.

State's administrative system should shape the *substance* of a Sixth Amendment prejudice analysis.[4]

I. This case presents justiciable controversies

Respondent avers that the issues presented are not ripe, because the Connecticut Supreme Court has remanded the case for a "re-sentencing" that has not yet occurred. Br. at 2. Respondent ignores that the court also ordered that, if respondent can prove in one of three scenarios that Judge Alexander would have imposed the sentence embodied in the plea agreement, that sentence must be imposed on remand -- even if it does not serve penological goals. *Ebron*, supra, 307 Conn. at 362. Substantively, respondent incorrectly argues that a controversy does not arise from the court's order until it is executed. *See*, e.g., *Nashville C & St. L. Ry. v. Wallace*, 288 U.S. 249, 262-64 (1933).

Respondent also suggests that the Connecticut court's ruling (at least as to remedy) is fact-specific, affecting only this case. Br. at 18. He cites a footnote in the Connecticut court's opinion; *Id.* (citing *Ebron*, supra, 53 A.3d at 995 n. 16); emphasizing that the three scenarios of action by Judge Alexander which, if proven likely, will entitle

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[4] Respondent asserts that Connecticut judges "may mediate and actively participate in plea negotiations, and may even extend an offer that differs from the prosecutor's offer." Br. at 3. In fact, a judge's "active involvement' in plea negotiations is disapproved. *State v. Fullwood*, 194 Conn. 573, 580, 484 A.2d 435, 440 (1984). The respondent cites cases in which either a judge's participation was not at issue, or where it was challenged but found not to rise to an offensive level. *See*, e.g., *State v. Niblack*, 220 Conn. 270, 280, 596 A.2d 407, 412 (1991) (court's involvement did not rise to level of "active participation" such that plea was coerced).

the respondent to the plea terms, are specific to this case. But, the footnote does not negate the *general* precedent created by the Connecticut court's ruling that proof, in *any* case, that the court would have imposed the plea terms at the earlier time *obligates* the court to do so on remand. That general rule is inconsistent with *Lafler* and *Frye*, which, consistent with *Williams v. New York*, supra, 449 U.S. 361, do not usurp a sentencing judge's discretion – even on remand in lapsed-plea cases.[5]

II. This case presents an ideal vehicle to reconcile *Lafler* and *Frye* with the *Goodwin/Williams* cases

Respondent contends that *Lafler* and *Frye* have already concluded that the lapsed-plea prejudice determination should ignore the characteristics of the offense and offender. Indeed, *Lafler* did state:

> [P]rejudice *can* be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

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[5] In suggesting that the case has no precedent value, respondent ignores the discretionary nature of the Connecticut Supreme Court's review. The Court generally does not review fact-specific cases, much less limit its holdings in that way. "[W]hen our supreme court exercises its discretionary review authority, its *focus* is on matters of public policy and the supervision of our judicial system, rather than solely on the correction of a particular criminal conviction." *Gipson v. Commissioner of Correction*, 54 Conn. App. 400, 417-18, 735 A.2d 847, 857-58 (1999), *rev'd on other grounds*, 257 Conn. 632, 778 A.2d 121 (2001) (emphasis in original). In any event, footnote language is "not controlling." *See Wainwright v. Witt*, 469 U.S. 412, 422 (1985).

Lafler, 132, S.Ct. at 1387 (emphasis added). But, the overture to that statement is that:

> The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course.

Id. *Frye* provides a post-script: whether, in the "normal course" the plea disposition would have come about requires an "objective assessment." *Frye*, supra, 132 S.Ct. at 1410. But, although the cases provide this support (and more) for the contention that the prejudice analysis must consider the appropriateness of the outcome, they do not explicitly state that the "normal" or "ordinary course" to which they refer is one in which the principles set forth in the *Goodwin*/*Williams* cases continue to govern in the lapsed plea context. This case highlights a need reconcile *Lafler* and *Frye* with those precedents.

Respondent misperceives petitioner's prejudice argument. He states:

> [Petitioner's] apparent position that plea bargains are not "just" and do not constitute "appropriate" sentences is surprising and calls into question our whole criminal justice system in which plea bargains play a central and critical role.

Br. at 13. Petitioner has not argued that plea bargains are not "just" or "appropriate." Rather,

petitioner's argument is nothing more than what this Court recognized in *Goodwin*. The plea agreement *may* be just and appropriate. But, as here, "the prosecutor's assessment of the proper extent of prosecution may not have crystallized" at that time, and the plea may not "define the extent of the legitimate interest in prosecution" and "reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin*, supra, 457 U.S. at 380-82. Thus, the plea agreement should not act to "freeze future conduct." *Id.*[6]

This case calls out for a need to fit the principles of the *Goodwin/Williams* cases into the lapsed plea prejudice analysis.

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[6] Respondent asserts that petitioner misrepresents the Connecticut Supreme Court's analysis regarding the *subjective* showing that Judge Alexander would have conditionally accepted the plea agreement. Br. at 15. He argues that the Connecticut court found it to be an *objective* factual finding because there was no evidence that her practices deviated from the norm.

However, that factual finding derived from the prosecutor's testimony at the habeas trial that, based on his experience with Judge Alexander, he believed she would have accepted the agreement. Hence, the finding is inherently subjective, and the requirement that the State show it to be outside the norm of judicial practices is not found in *Lafler*, *Frye*, or even *Strickland*.

III. This case presents an ideal vehicle to expound *United States v. Morrison*'s "competing interest" principle and establish whether: (1) the States' interest in fitting sentences should be considered in the lapsed plea context; or (2) whether *Lafler* and *Frye* have created an exception to the need, recognized in *Williams*, for punishment that fits both crime and offender.

Respondent contends petitioner "would deny a remedy to habeas petitioners where the ultimate disposition is appropriate for the crime(s) and circumstances." Br. at 16. But, petitioner does not argue that the remedy court should be permitted to decline to adjust a sentence on remand –*Lafler* has already answered that it *can*. The question asked here is whether the "remedy court" ought to consider the competing State's interest in an appropriate sentence. *See United States v. Morrison*, 449 U.S. 361, 364 (1981).

Respondent insists that the remedy court should not consider his crime and background, because "[t]he Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel," Br. at 17 (quoting *Kimmelman v. Morrison*, supra, 477 U.S. 365, 379 (1986)). He overemploys *Kimmelman*. The Court was simply explaining that an exclusionary rule claim could be rendered non-cognizable in a habeas action because it is a judicially-created prophylactic which loses its

effect by the time of belated post-conviction proceedings. However, Ineffectiveness claims are core constitutional claims; hence, a *Kimmelman* claim *is cognizable* – the State must bear the *risk* of the claim by *answering* to it. But, *Kimmelman* did not obligate the State to bear an unwarranted loss *on the merits* of the claim, much less deprive the people of a right to hold defendants accountable, once proven guilty.[7]

IV. *Lafler* and *Frye* do not time-limit the information to be considered in determining prejudice

Finally, respondent argues that the prejudice determination should limit the scope of information to be considered. Br. at 14-15. In contrast, this petitioner has argued that the prejudice determination should not look only to that information available at a preliminary time – such as when the court "conditionally" accepted the plea – and ignore all information not then considered or available. To do so would ignore information that would have been available and considered "in the normal course" of the plea process.

If it is the respondent's contention that he would have "lucked out" if he had gone with the plea agreement because he perceives that Judge Alexander, unlike Judge Damiani, would not have

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[7] Respondent notes that the habeas court stated that the *State*, apparently possessing some burden, has not presented "equitable considerations" bearing against renewal and acceptance of the original offer. Br. at 17. In fact, the prosecutor testified at the habeas trial that he changed his position because of the unfavorable pre-sentence investigation report – clearly bearing against renewal and acceptance of the original offer.

ordered a pre-sentence investigation report and, thus, would not have considered its revelations, his analysis is legally incorrect. When determining prejudice, a defendant is not entitled to the "luck of a lawless decisionmaker." *Strickland*, supra, 466 U.S. at 695. Logically, then, he is not entitled to the luck of an uninformed one.

Fixing at a certain time that information which can be considered in determining prejudice is inconsistent with this Court's precedents. Such treatment would have precluded this Court from ruling as it did in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). Fretwell was convicted and sentenced to death in 1985 after a penalty phase of his trial during which his attorney failed to make a viable objection. *Id.* at 366. *Four years later*, the state of the law changed as a result of a ruling by this Court, and that objection no longer was viable. *Id.* at 368. Nonetheless, two years after that, the Court of Appeals upheld a district court decision vacating the death sentence. The Court of Appeals, like the district court, reasoned that Fretwell was entitled to the benefit of the law *as it existed at the time of his original sentencing*. A dissenting judge argued that:

> By focusing only on the probable effect of counsel's error *at the time of Fretwell's sentencing*, the majority misses the broader and more important point that his sentencing proceeding reached neither an unreliable nor an unfair result.

Fretwell, supra, 506 U.S. at 368 (citation omitted). This Court, citing *Strickland*, agreed. The Court

explained that, although *Strickland* fixes in time the information available to an attorney in considering the deficient performance prong, that approach is not justified in the prejudice inquiry, because *Strickland's* prejudice inquiry focuses on whether there is fundamental unfairness. *Id.* at 372. Accordingly, to fix in time the considerations attendant to the prejudice inquiry in lapsed plea cases would set those cases apart from *Strickland.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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