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No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, WARDEN, PETITIONER

v.

VONLEE NICOLE TITLOW

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a defendant's testimony that she would have accepted a plea offer but for her counsel's deficient advice is, standing alone, sufficient to demonstrate a reasonable probability that the defendant would have accepted the plea.

2. Whether *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), requires, as a remedy for a Sixth Amendment violation, the government to reoffer a previous plea agreement to the defendant and the sentencing court to resentence her, where the previous plea offer was conditioned upon cooperation that can no longer be provided.

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INTEREST OF THE UNITED STATES

Although this case arises on federal habeas review of a state conviction under 28 U.S.C. 2254, it raises two issues of general significance in analyzing ineffective-assistance-of-counsel claims in the plea negotiation context: whether a convicted defendant's statement that she would have accepted a plea offer but for her counsel's deficient advice is sufficient to establish a reasonable probability that she would have accepted the plea offer, and whether a court may abuse its discretion to remedy a Sixth Amendment violation by ordering the prosecution to reoffer a previously rejected plea agreement that was conditioned upon cooperation that the defendant can no longer provide. Because the Court's analysis of those questions will likely affect federal prisoners' ineffective-assistance claims under 28 U.S.C.

2255, the United States has a substantial interest in the resolution of this case.

STATEMENT

After respondent withdrew her plea of guilty in the Circuit Court of Oakland County, Michigan, to manslaughter, in violation of Mich. Comp. Laws Ann. § 750.321 (West 2004), pursuant to a plea agreement that provided for a sentence of 7 to 15 years of imprisonment, respondent was convicted by a jury of second-degree murder, in violation of Mich. Comp. Laws Ann. § 750.317 (West 2004). Pet. App. 2a-3a.[1] The trial court sentenced respondent to 20 to 40 years of imprisonment. *Id.* at 2a. Respondent's conviction and sentence were affirmed on direct appeal. *Id.* at 98a-119a. The Michigan Supreme Court denied leave to appeal. *Id.* at 120a.

After respondent was denied state postconviction relief, she filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. 2254, asserting that her former attorney had provided ineffective assistance by advising her to withdraw her guilty plea and proceed to trial. The district court denied relief. Pet. App. 34a-97a. The court of appeals reversed and conditionally granted a writ of habeas corpus, giving the State 90 days to either reoffer the original plea agreement or to release respondent. *Id.* at 1a-32a.

1. On August 12, 2000, Michigan police officers responded to a call at the home of Billie and Donald Rogers (respondent's aunt and uncle) and found Donald lying dead on the kitchen floor. Pet. App. 3a, 36a. Re-

[1] Respondent is a transgender person who was born as a male and identifies as a woman. Because respondent identifies herself as a woman (Br. in Opp. 1) and because the court of appeals referred to respondent using female pronouns, this brief uses female pronouns.

spondent and Billie told the officers that they had found Donald dead on the floor when they returned home from a casino. *Id.* at 3a. It was later determined that Donald had been smothered. *Id.* at 3a, 46a-47a.

On the same day Donald was killed, respondent called a friend whom she had been dating, Danny Chahine, and told Chahine about Donald's death. Pet. App. 4a, 99a. Chahine was immediately suspicious because respondent had previously talked about Billie's desire to pay for her husband's murder after Donald objected to Billie's gambling expenses, and Chahine asked respondent if she or Billie had done something to Donald. *Id.* at 4a, 40a-41a, 99a; 2:07-cv-13614 Docket entry No. (Docket entry No.) 15, at 15-16, 28-30 (E.D. Mich. Aug. 8, 2008). Respondent promised to explain everything to Chahine when they saw each other, and she later confided that she had helped kill Donald. Pet. App. 99a; J.A. 14-17. Respondent told Chahine that Donald was not dead when she and Billie returned home, that she and Billie took turns pouring vodka into Donald's mouth and nose and covering his mouth and nose, and that Billie then smothered him with a pillow. Pet. App. 4a, 42a, 53a; J.A. 6-17. Chahine reported the conversations to the police, and he later agreed to record a conversation with respondent in his car while they drove to dinner, during which he elicited further incriminating statements from her. Pet. App. 4a, 99a; J.A. 19, 22.

Billie was the sole beneficiary of Donald's estate. Shortly after Donald's death, Billie purchased new cars for herself and respondent, wrote a check to respondent for $70,260, and gave respondent gambling money. Pet. App. 4a, 48a-49a.

2. a. Respondent and Billie were charged with first-degree murder, in violation of Mich. Comp. Laws Ann.

§ 750.316 (West 2004). Pet. App. 4a-5a. Respondent, who was represented by counsel, Richard Lustig, pleaded guilty to manslaughter pursuant to a plea agreement that provided for a sentence of 7 to 15 years of imprisonment. *Id.* at 5a.[2] As a condition of the agreement, respondent was required to pass a polygraph examination confirming that Billie had smothered Donald; to testify against Billie; and not to challenge the prosecutor's recommended sentencing range on appeal. *Id.* at 5a, 99a; J.A. 300-301.

Respondent gave a statement to police and then took the polygraph examination. In the statement, respondent said that she and Billie, without a plan, poured vodka down Donald's throat, and Billie then suffocated Donald with a pillow. J.A. 38. Respondent denied killing Donald personally and denied that she planned the death. *Ibid.* The polygraph examiner concluded that respondent was being truthful when she stated that she was not lying about what happened to Donald, that she did not plan with Billie to kill him, that Billie was the one who smothered Donald with the pillow, and that she left the room when Billie smothered him. J.A. 39.

At a plea hearing held on October 29, 2001, respondent confirmed that she and Lustig had "gone over all of the evidence together over a long period of time" and had "discussed the fact that there are certain facts that could get [her] convicted of first degree murder"—namely, respondent's having received roughly $100,000 after her uncle's death to remain quiet about what had

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[2] Under Michigan law, manslaughter is punishable by a maximum sentence of 15 years of imprisonment, Mich. Comp. Laws Ann. § 750.321 (West 2004), and the trial court may not impose a minimum sentence that exceeds two-thirds of the maximum sentence, *id.* § 769.34(2)(b).

happened, and respondent's having poured alcohol down her uncle's throat shortly before Billie smothered him. J.A. 41, 43-44, 50-51. Respondent further stated that she understood that the proposed sentencing range in the plea agreement exceeded the standard guideline range for a manslaughter conviction in Michigan. Pet. App. 5a; J.A. 51-52. The trial court accepted the plea and scheduled a sentencing hearing. Pet. App. 5a.

b. Before sentencing, respondent told a deputy sheriff at the jail where she was housed that she was innocent. Pet. App. 100a. The deputy sheriff told respondent that she should not plead guilty if she was innocent and suggested that respondent speak to another attorney. *Id.* at 5a, 100a. The deputy referred respondent to his personal attorney, who referred her to Frederick Toca. J.A. 298. Respondent discharged Lustig and hired Toca. Pet. App. 5a. Three days later, she moved to withdraw her guilty plea. *Id.* at 6a; J.A. 64.

At a hearing on November 29, 2001, the State advised the trial court that respondent was refusing to testify against Billie, whose trial was scheduled to begin that day, unless the recommended sentencing range in the plea offer was reduced to 3 to 15 years of imprisonment. Pet. App. 6a, 29a; J.A. 63-64. The prosecutor stated that the State wished to withdraw from the plea agreement "on the basis that we had an agreement that the Defendant would be testifying in the trial of Billie Rogers." J.A. 63. Toca confirmed that he had informed the prosecutor that 7 to 15 years was "out of line" and that respondent was withdrawing her plea. J.A. 64. Respondent stated that she understood the first-degree murder charge would be reinstated if she withdrew her guilty plea. J.A. 69. The court allowed respondent to withdraw her plea, and respondent refused to testify at Bil-

lie's trial. Pet. App. 6a; J.A. 69. Billie was acquitted of first-degree murder. Pet. App. 24a.

Toca later moved to withdraw as respondent's counsel because of respondent's inability to pay for a transcript of Billie's trial. Pet. App. 6a-7a, 100a. The trial court granted the motion and appointed a new attorney to represent respondent at trial. *Id.* at 6a-7a. At the trial, Chahine testified that respondent had said that, when respondent and Billie arrived home and found Donald passed out from drinking, "Billie suggested that they do what they planned on doing before" and kill Donald, which contradicted respondent's polygraph statement. J.A. 146. Chahine also testified that respondent had told him that, when Donald did not die right away, Billie upped respondent's compensation for helping from $25,000 to $50,000 and retrieved a pillow from the living room, telling respondent that she would need to help hold Donald down. J.A. 147, 177-178.

Respondent testified and maintained her innocence. She testified that she "would never hurt anybody, ever." J.A. 257. She said she did not think Billie was trying to kill Donald and she thought Billie was joking with the pillow. J.A. 259, 270. She claimed that she told Billie to leave Donald alone. J.A. 261. And she testified that she told Billie she did not want her money. J.A. 268.

A jury convicted respondent of second-degree murder, and the trial court sentenced her to 20 to 40 years of imprisonment. Pet. App. 7a.[3] At sentencing, respondent stated, "I would have testified against Billie during her trial, had I not been persuaded to withdraw

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[3] Under Michigan law, second-degree murder is punishable "by imprisonment in the state prison for life, or any term of years, in the discretion of the [sentencing] court." Mich. Comp. Laws Ann. § 750.317 (West 2004).

my plea agreement and the chance to testify, because an attorney promised me he would represent me. * * * He told me he could take my case to trial and win. * * * He told me my previous attorney was not doing enough for me." J.A. 295; Pet. App. 8a.

c. The Michigan Court of Appeals affirmed respondent's conviction and sentence. Pet. App. 98a-119a. The court rejected respondent's argument that Toca had provided ineffective assistance of counsel. The court explained that Toca's advice that respondent should withdraw her guilty plea "was set in motion by [respondent's] statement to a sheriff's deputy that [s]he did not commit the offense." *Id.* at 101a. The court held that "[w]hen a defendant proclaims h[er] innocence, * * * it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." *Id.* at 102a. The court concluded that respondent had "failed to demonstrate that [Toca's] advice to withdraw h[er] plea fell below an objective standard of reasonableness." *Ibid.*

The Michigan Supreme Court denied leave to appeal. Pet. App. 120a.

d. Respondent filed a petition for state postconviction relief, which the state court denied. Docket entry No. 12-9, at 42 (June 20, 2008) (circuit court order); *id.* No. 34-1 (Mar. 4, 2011) (transcript of motion hearing). The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *Id.* No. 12-9, at 1; *People* v. *Titlow*, 738 N.W.2d 715 (Mich. 2007).

3. Respondent filed a federal habeas corpus petition pursuant to 28 U.S.C. 2254, renewing her claim that Toca had provided ineffective assistance of counsel when he advised respondent to withdraw her guilty plea. The district court denied the petition. Pet. App. 34a-97a.

The district court concluded that the state court's finding that Toca was not ineffective was "completely reasonable on the law and the facts." *Id.* at 64a. The court explained that respondent's desire to withdraw her plea predated Toca's involvement and that defense counsel cannot be ineffective for advising a client who claims to be innocent to go to trial. *Id.* at 64a-65a. The court further stated that respondent "chose to go to trial and to take her chances with a jury" and that, although "[s]he may now regret that choice, * * * it is not a basis for granting federal-habeas relief." *Id.* at 65a.

The district court explained that the state court had applied *Strickland* v. *Washington*, 466 U.S. 668 (1984), to the facts of respondent's case and that respondent's "mere disagreement with the state court's analysis is not sufficient to warrant habeas relief." Pet. App. 64a. Applying the deferential standard for habeas relief under 28 U.S.C. 2254, the court concluded that respondent "ha[d] not shown that the Michigan Court of Appeals's decision * * * [was] contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." Pet. App. 62a.

The district court granted a certificate of appealability. Pet. App. 95a-96a.

4. The court of appeals reversed. Pet. App. 1a-32a.

a. The court of appeals concluded that Toca's performance was deficient under the performance prong of *Strickland*. Pet. App. 18a-21a. The court explained that the state court's conclusion that Toca had not been ineffective for advising a client who maintained her innocence to withdraw her guilty plea was "undermined" by Toca's silence about any claim of innocence at the plea withdrawal hearing and his statement that respondent

was withdrawing the plea because the recommended sentence was above the guidelines range. *Id.* at 18a-19a. The court further noted that respondent's first lawyer had submitted an affidavit stating that Toca did not retrieve respondent's case file until after the plea withdrawal hearing and that Toca "had no way to adequately advise [respondent] on * * * the reasonableness of the plea offer without first examining the evidence that the State had against her." *Id.* at 19a-20a. The court noted that "[t]he State's evidence against [respondent] was strong" and "not inconsistent with a second-degree murder conviction," and that "Toca's timely discovery of the State's evidence against [respondent] likely would have (or at least should have) led him to change his recommendation as to withdrawing the plea." *Id.* at 23a. The court concluded that the state court "unreasonably determined" that Toca had not performed deficiently "in light of the evidence presented." *Ibid.* (citing 28 U.S.C. 2254(d)(2)).

The court of appeals further concluded that respondent had suffered prejudice under the second prong of *Strickland*. Pet. App. 22a-23a. The court explained that to establish prejudice in the context of a rejected plea offer, a defendant must show that but for ineffective assistance of counsel, "there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 15a (quoting *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012)). The court stated

that "unlike some circuits, this court does not require that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence." *Id.* at 17a (internal quotation marks and citation omitted).

The court of appeals concluded that "the facts speak for themselves" to establish prejudice. Pet. App. 22a. The court noted that the plea agreement had been accepted by the trial court and that respondent's sentence imposed after trial was more severe than the sentence she would have received under the plea agreement. *Ibid.* The court stated that respondent's claim that she would have accepted the plea agreement but for Toca's advice was "bolstered by the fact that she had actually accepted the plea" at the earlier hearing. *Ibid.*

Turning to the issue of remedy, the court of appeals stated that "[i]n the typical case where the sole injury suffered by the defendant [is] a higher sentence, 'the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence [s]he received at trial, or something in between.'" Pet. App. 23a-24a (quoting *Lafler*, 132 S. Ct. at 1389). The court explained that respondent's case was "not such a simple case" because respondent was convicted of second-degree murder, which is a more serious charge than the manslaughter charge to which she would have pleaded under the agreement, and also because the State had lost the major benefit it sought to gain from the agreement because Billie had already been tried and acquitted without respondent's testimony. *Id.* at 24a. In such a case, the court explained, "the proper exercise of [the state court's] discretion to remedy the constitutional injury may be to require the prosecution to reoffer the

plea proposal." *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). If respondent accepts the offer, the state court "would then have the discretion 'to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389).

The court of appeals stated that it was "concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate [respondent's] current sentence." Pet. App. 24a-25a. But the court explained that "the state court's discretion is not entirely unfettered" because under *Lafler* the state court must at least consult the initial plea agreement in determining a new sentence. *Id.* at 25a. The court stated that any federal-court remedy respondent might have if the state court "imposes a sentence greater than the initial plea agreement" is "to be resolved another day." *Ibid.*

The court of appeals conditionally granted the petition for a writ of habeas corpus, "giving the State 90 days to reoffer [respondent] the original plea agreement or, failing that, to release her." Pet. App. 25a. The court further stated that if the State chooses to reoffer the plea agreement and respondent accepts it, "the state court may then exercise its discretion to fashion a sentence for [respondent] that both remedies the violation of her constitutional right * * * and takes into account any concerns that the State might have regarding the loss of [respondent's] testimony against her aunt." *Ibid.*

b. Chief Judge Batchelder dissented. Pet. App. 26a-32a. She explained that "[t]he primary error in the majority's opinion lies in its basic premise—that [respondent] chose to withdraw her plea because of Toca's advice." *Id.* at 26a. According to Chief Judge Batchelder, "[t]he record shows that [respondent] wanted to with-

draw her plea before she ever enlisted Toca as counsel," and in fact "her desire to withdraw her plea * * * was the reason she sought new counsel." *Id.* at 26a-27a.

Chief Judge Batchelder further concluded that "[e]ven if Toca was the reason [respondent] chose to withdraw her plea, the record does not establish that his performance was deficient." Pet. App. 27a. She explained that "the record, and [respondent's] own arguments throughout her appeals, support the Michigan court's conclusion because they demonstrate that [respondent] chose to obtain new counsel only after she had passed a polygraph test and [the sheriff's deputy] advised her that she should not plead guilty if she was not guilty." *Id.* at 28a. In Chief Judge Batchelder's view, Toca's different reason for respondent withdrawing her guilty plea at the hearing did not undermine the conclusion that any advice respondent may have received from Toca "was the result of [respondent's] wanting new counsel and no longer wanting to plead guilty." *Ibid.*

Chief Judge Batchelder further concluded that even if Toca had not examined respondent's case file before moving to withdraw her guilty plea, "nothing in the record establish[es] that the case file would have undermined any advice that Toca may have given [respondent]." Pet. App. 29a. She noted that respondent had signed a fee agreement with Toca on November 26, 2001, and that the hearing on the motion to withdraw respondent's guilty plea was conducted three days later, on the day Billie's trial was scheduled to begin. *Ibid.* Accordingly, "[i]f [respondent] wanted to withdraw her plea, as the record suggests, then she needed to make a decision before she had to testify in [Billie's] trial," and Toca's decision to move quickly to withdraw the plea was reasonable. *Ibid.*

Chief Judge Batchelder also disagreed with the majority's description of *Lafler*'s requirements for the state trial court on remand. Pet. App. 31a. She explained that "*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement; it simply says that the 'baseline' of the original plea offer 'can be consulted in finding a remedy.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). She further explained that *Lafler* does not require the state trial court to resentence respondent. Instead, "once the prosecution reoffers the plea proposal, 'the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" *Ibid.* (quoting *Lafler*, 132 S. Ct. at 1389). Chief Judge Batchelder explained that it is not the state court's responsibility to fashion a sentence for respondent that remedies the violation of her constitutional right. Instead, "the remedy for the violation is the government's reoffering of the original plea agreement." *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

I. To establish prejudice under the second prong of *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984), a defendant asserting that she would have accepted a guilty plea but for deficient advice from counsel "must demonstrate a reasonable probability [she] would have accepted the earlier plea offer had [she] been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012). The prejudice requirement is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief.

That concern is acute in challenges based on alleged misadvice to reject or withdraw a guilty plea. When a

defendant who has rejected a plea offer is convicted by a jury, she will have every incentive to try and regain the benefits of the rejected plea. Courts have therefore required defendants who claim that they would have accepted a guilty plea but for counsel's deficient advice to provide some corroborating evidence of any self-serving post-trial statement to that effect. And if a court is going to rely on a defendant's subjective statement that the defendant would have pleaded guilty, that statement must at least be credible.

Assuming that Toca gave respondent deficient advice about whether to withdraw her guilty plea, respondent has failed to demonstrate a reasonable probability that she would not have withdrawn her guilty plea but for that advice. Her statement to that effect at her sentencing hearing was unsworn and had no marks of reliability. And the fact that respondent previously pleaded guilty does not corroborate her claim that the plea would have remained in place had she not received deficient advice. The objective evidence in the record shows that after entering the plea, respondent decided to maintain her innocence, sought new counsel because of that claim, and withdrew the plea with a full understanding of the consequences of that decision.

II. Even assuming that respondent's Sixth Amendment rights were violated by counsel's advice to withdraw her guilty plea, the court of appeals improperly interfered with the sentencing court's discretion to formulate a remedy. The Court stated in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), that the boundaries of a sentencing court's discretion to remedy a Sixth Amendment violation in the context of a rejected plea offer would be defined over time, and the Court did not hold that the government is always required to reoffer a prior plea

agreement as part of a remedy for any Sixth Amendment violation.

The plea agreement in this case was conditioned on respondent testifying against her aunt at trial. Respondent's plea withdrawal meant that the State went to trial against her aunt without respondent's testimony, and her aunt was acquitted. Respondent's promise to testify, therefore, can no longer be fulfilled. As a result, serious fairness and separation-of-powers issues flow from the order requiring the State to reoffer the agreement. There was also significant evidence that came to light after the plea offer about respondent's role in the murder. If the boundaries of a district court's discretion to formulate a remedy for a Sixth Amendment violation in this context are to be developed over time, then a federal post-conviction court should not categorically order the government to reoffer the plea agreement in circumstances that are different from those in *Lafler*. That decision should be left to the sentencing court, and the remedy that court imposes would be subject to review for abuse of discretion.

Finally, to the extent the court of appeals suggested that the sentencing court must accept the plea agreement or that it necessarily had to resentence respondent, it did not fully convey the range of the sentencing court's discretion. The sentencing court would have compelling reasons to reject any reoffered plea agreement on the facts presented here, and *Lafler* specifically leaves open the possibility that a sentencing court could, in its discretion, leave both the conviction and sentence from trial undisturbed.

ARGUMENT

I. TO ESTABLISH PREJUDICE IN SUPPORT OF AN INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM, A DEFENDANT MUST PROVIDE CREDIBLE EVIDENCE THAT SHE WOULD HAVE ACCEPTED A GUILTY PLEA IF PROPERLY ADVISED

A defendant making a claim of ineffective assistance of counsel must show both: (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) that the deficient performance prejudiced the defendant. *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984). To show prejudice in the context of a rejected plea offer, a defendant's unsworn, after-the-fact statement that she would have accepted the plea offer if she had been properly advised, standing alone, is insufficient to establish prejudice.[4]

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[4] The first question presented in the petition for a writ of certiorari is "[w]hether the [court of appeals] failed to give appropriate deference to a Michigan state court under [28 U.S.C. 2254(d)] in holding that defense counsel was constitutionally ineffective for allowing [r]espondent to maintain [her] claim of innocence." Pet. Br. i. Because the deferential standard set forth in Section 2254(d) applies only to federal habeas review of state convictions, the United States has not briefed that question. The United States agrees with petitioner, however, that respondent failed to establish any state-court record on what advice Toca gave her about her guilty plea. Without such evidence in the record, it is difficult to infer that Toca's advice caused respondent to withdraw her guilty plea. Nevertheless, the government assumes for the purpose of evaluating *Strickland*'s prejudice prong that counsel performed deficiently by overestimating respondent's chance of being acquitted at trial. See J.A. 295 ("He told me he could take my case to trial and win. * * * He told me my previous attorney was not doing enough for me.").

A. A Defendant Who Challenges Her Conviction Based On Alleged Deficient Advice To Reject A Plea Offer Must Establish That, With Correct Advice, She Would Have Accepted The Plea Offer

To demonstrate prejudice in the context of a rejected or withdrawn guilty plea, "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012); see also *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385 (2012).[5]

Where a defendant alleges that she would have *rejected* a guilty plea absent deficient advice, she must convince the court that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). When a defendant alleges that she would have *accepted* a guilty plea absent deficient advice, courts have required not only that such a decision be rational, but also that the particular defendant would have accepted the plea. See, *e.g.*, *Wanatee* v. *Ault*, 259 F.3d 700, 704 (8th Cir. 2001) ("[T]he inquiry into [whether the defendant] would have [accepted the plea] under different circumstances is necessarily subjective."); *Frye*, 132

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[5] "Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and they must show 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; see *Lafler*, 132 S. Ct. at 1385. Those additional requirements are satisfied here. The plea had previously been entered and accepted by the court, and respondent was convicted of a more severe charge at trial and sentenced to a prison term that exceeds the maximum punishment for manslaughter.

S. Ct. at 1410-1411 (discussing record evidence to determine whether Frye would have accepted a plea offer had he known about it).

The subjective component is necessary in these circumstances because the decision whether to plead guilty is personal to the defendant, who alone has the "ultimate authority" to decide to enter a plea. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (citation omitted); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Brady* v. *United States*, 397 U.S. 742, 748 (1970) (decision must be an "expression of [the defendant's] own choice)"). An attorney must therefore respect a client's personal desire to reject a plea offer and take a case to trial, even where that course is not advisable. *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); *Nixon*, 543 U.S. at 187.

B. A Defendant Must Provide Credible Evidence In Support Of Her Subjective Statement That She Would Have Pleaded Guilty But For Her Counsel's Advice

1. The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome of the adversarial process should be grounds for relief. *Strickland*, 466 U.S. at 691. That concern is significant in challenges based on alleged misadvice to reject or withdraw a guilty plea. When convicted after a jury trial, defendants will have every incentive to attempt to revert to a rejected plea offer that would have provided for less prison time. These defendants can easily allege, after the fact, that they would have pleaded guilty had they been given competent advice. If every such credited allegation established prejudice, the prejudice inquiry would fail to filter out cases in which counsel's deficiency did not actually affect the outcome of the proceeding. Cf. *id.* at 697 (ineffective assistance claim can be re-

solved by finding lack of prejudice without reaching adequacy of performance).

In hindsight, it is all too easy to exaggerate the impact of counsel's advice on the defendant's decision to reject a plea offer. See *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011) (cautioning against "the potential for the distortions and imbalance that can inhere in a hindsight perspective"). It is also tempting for a reviewing court, seeing the results of the trial, to accept a defendant's post hoc assertion that counsel's advice caused her to reject an advantageous plea offer.

2. Recognizing this reality, courts have required defendants who claim that they rejected a guilty plea because of deficient advice to provide some corroborating evidence of any post-trial claim that they would have pleaded guilty but for counsel's advice. See *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (defendant "must establish through objective evidence that there is a reasonable probability that, but for counsel's advice, he would have accepted the plea" and defendant's self-serving statement that he "would have * * * been insane" to reject a guilty plea if properly advised was by itself insufficient to establish prejudice), cert. denied, 505 U.S. 1223 (1992); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991) ("Given [defendant's] awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer."); *United States* v. *Gordon*, 156 F.3d 376, 380-381 (2d Cir. 1998) (per curiam) (stating that a "defendant's self-serving, post-conviction testimony regarding * * * intent with respect to a plea offer" was insufficient by itself to establish prejudice, but where counsel's deficient perfor-

mance was to grossly misadvise his client on sentencing exposure, "a great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines and the sentencing exposure represented by defendant's attorney" was "sufficient objective evidence" to establish prejudice).

The Court's disposition of *Frye* is consistent with that approach. In *Frye*, the Court did not rely on evidence that "Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer" to conclude that there was a reasonable probability that Frye would have accepted the plea absent his attorney's deficient performance. 132 S. Ct. at 1405. Instead, the Court evaluated the objective evidence in the record and reached that conclusion based on Frye's later decision to enter an open plea to a longer sentence, along with the absence of any "revelations between plea offers about the strength of the prosecution's case" that would have made a late decision to plead guilty "insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him." *Id.* at 1410-1411.[6]

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[6] *Lafler* is also consistent with a rule that requires corroboration of a defendant's subjective statement that he would have accepted a plea. The Court in *Lafler* summarily adopted the court of appeals' prejudice analysis. See 132 S. Ct. at 1391. The court of appeals did mention Lafler's after-the-fact statement that he would have accepted a plea offer but for his attorney's deficient advice. *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 571 (6th Cir. 2010). But the court of appeals also catalogued other evidence of Lafler's intent—testimony by counsel at a post-conviction hearing that Lafler had initially desired to plead guilty, and a letter sent by Lafler to the trial judge asking if he could plead guilty to a lesser offense. *Id.* at 566, 572.

Requiring some corroborating evidence ensures that the reviewing court will apply the prejudice prong rigorously. The court may consult the trial record and any indicia that the defendant desired to plead guilty. See, *e.g.*, *Frye*, 132 S. Ct. at 1409-1410 (highlighting defendant's decision to enter open plea). The court may consider testimony from the defendant and the attorney about their conversations. See, *e.g.*, *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 567 (6th Cir. 2010) (recounting defendant and attorney's testimony in state post-conviction hearing). Other witnesses who spoke with the defendant may also have relevant information. See, *e.g.*, *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998) (considering affidavits from defendant's parents). And a court may examine any contemporaneous notes, letters, or correspondence about the plea. *Lafler*, 376 Fed. Appx. at 566 (defendant sent a pro se letter proposing a plea). Finally, if a court is going to rely on a defendant's subjective statement that she would have pleaded guilty, it "must [at least] be credible." *Merzbacher* v. *Shearin*, 706 F.3d 356, 366-367 (4th Cir. 2013), petition for cert. pending, No. 12-9952 (filed Apr. 25, 2013).

C. Respondent Has Not Established Prejudice

Even assuming that Toca performed deficiently by overestimating respondent's chances for success at trial, see note 4, *supra*, respondent has failed to establish a reasonable probability that she would not have withdrawn her plea but for that advice. The court of appeals relied on respondent's statement during her sentencing hearing that, "I would have testified against Billie during her trial, had I not been persuaded to withdraw my plea agreement and the chance to testify." J.A. 295. That self-serving testimony cannot by itself support a

finding of prejudice. The statement was made as part of an unsworn plea for leniency during a sentencing hearing, after respondent had been convicted of second-degree murder by a jury. The statement lacked any indicia of reliability; it was not made under oath, the prosecutor had no opportunity to cross-examine it, and the state trial court made no credibility finding. "It is not for [appellate courts] * * * to determine the credibility of witnesses," see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), and the court of appeals erred in concluding that the statement by itself was sufficient to establish prejudice.

The court of appeals stated that the statement was "bolstered by the fact that [respondent] had actually accepted the plea" at an earlier plea hearing. Pet. App. 22a. But respondent's previous acceptance of the plea offer works against her. After stating during her plea hearing that she understood that there was evidence on which a jury could convict her of first-degree murder and sentence her to life imprisonment, J.A. 43-44, 50-51, respondent expressed dissatisfaction with her plea by telling a prison guard that she was innocent, she sought out new counsel, and she moved to withdraw her plea. That course of action, together with respondent's continued claims of innocence throughout her trial, undermines her claim that the plea would have remained in place but for advice from Toca.

To the extent respondent relies on Toca's statements in the plea withdrawal hearing that respondent was withdrawing the plea because the sentence was too high without mentioning her innocence, that fact may show that Toca took an aggressive position in renegotiating the plea, but it does not show that the plea would have otherwise remained in place. The objective evidence in

the record—respondent's averments of innocence to a prison guard, her affirmative efforts to get out of her plea, and her continued assertion of innocence during her trial—refutes her current claim that there is a reasonable probability that, absent counsel's allegedly deficient advice, respondent would have left the plea in place.

Finally, respondent cannot rely on a disparity between the sentence recommended in her plea agreement and the sentence she received after trial as objective evidence supporting her assertion that she would have accepted the plea offer but for counsel's deficient advice.[7] Although a significant sentencing disparity may support such an inference in a case where counsel's deficient performance was to misadvise the defendant about her sentencing exposure or not to relay a plea offer at all, see *Gordon*, 156 F.3d at 380, it cannot support such an inference where, as here, the defendant was aware of the plea offer and fully understood that she could be convicted of first-degree murder and sentenced to life imprisonment if she was convicted after a trial. *Lafler* and *Frye* already require a defendant to show 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" to establish prejudice. *Frye*, 132 S. Ct. at 1409; *Lafler*, 132 S. Ct. at 1385. In the circumstances presented here, that sentencing disparity does not further serve to corroborate

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[7] But see *Raysor* v. *United States*, 647 F.3d 491, 496 (2d Cir. 2011) (disparity between the sentence offered in the plea agreement and sentence imposed after trial, "[a]long with appellant's testimony, * * * may provide enough 'objective evidence' to support the inference appellant would have accepted the plea offer if properly advised").

respondent's subjective assertion that she would have accepted the plea offer but for counsel's deficient performance.

II. THE REMEDY FOR ANY SIXTH AMENDMENT VIOLATION IN THIS CASE, INCLUDING ANY REQUIREMENT THAT THE GOVERNMENT MUST REOFFER THE PLEA AGREEMENT, SHOULD BE LEFT TO THE SENTENCING COURT'S DISCRETION

Assuming *arguendo* that respondent's Sixth Amendment rights were violated by counsel's advice to withdraw her guilty plea and proceed to trial, the court of appeals' articulation of the proper remedy requires correction by this Court. In *Lafler*, the Court explained that Sixth Amendment remedies "should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" 132 S. Ct. at 1388 (quoting *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)). A remedy should "neutralize the taint of a constitutional violation" but at the same time it should "not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* at 1388-1389 (internal quotation marks and citation omitted).

In this case, the court of appeals ordered the State to reoffer the previous plea agreement to respondent or else release her within 90 days, and it further stated that if respondent accepts the agreement, "the state court may then exercise its discretion to fashion a sentence * * * that both remedies the violation of [respondent's] constitutional right * * * and takes into account any concerns that the State might have regarding the loss of [respondent's] testimony against her aunt." Pet. App. 25a. The court expressed its concern

that reinstatement of respondent's second-degree murder sentence would make the *Lafler* remedy "illusory" and that further federal-court review loomed if the state court "imposes a sentence greater than the initial plea agreement." *Id.* at 24a-25a.

In the circumstances presented here, where the plea agreement is premised not only on the government's avoidance of a trial but also on cooperation from the defendant that can no longer be provided, the court of appeals should not have ordered the State to reoffer the plea agreement. That decision should have been left to the sentencing court, and the remedy devised by that court would be subject to review for abuse of discretion. Furthermore, to the extent the court of appeals' decision requires the state court to resentence respondent, the Court should make clear that the trial court may in its discretion leave the conviction and sentence imposed at the conclusion of respondent's trial undisturbed.

A. The Government Should Not Necessarily Be Required To Reoffer A Plea Agreement That Was Conditioned Upon Cooperation From The Defendant That Can No Longer Be Provided

1. In *Lafler*, the Court explained that in circumstances where the defendant is convicted after a jury trial of the same offense to which she would have pleaded guilty under a plea agreement, the only advantage the defendant would have gained under the plea agreement absent ineffective assistance of counsel is a lesser sentence. 132 S. Ct. at 1389. In those circumstances, the sentencing court on remand "may exercise [its] discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence [s]he received at trial, or something in between." *Ibid.*

That course, however, becomes more complicated in other factual scenarios. For example, if a defendant is convicted of a more serious charge than the charge offered in the plea agreement, or if a mandatory sentence for the charge on which the defendant is convicted would eliminate the sentencing court's discretion to impose the sentence offered in the plea agreement, then resentencing based on the conviction at trial "may not suffice." *Lafler*, 132 S. Ct. at 1389. The Court stated that in those circumstances, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Ibid.* Once that occurs, "the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Ibid.*

The Court did not hold in *Lafler* that the government must always reoffer the previous plea agreement whenever the defendant is convicted of a more serious charge after a trial. The Court stated that this course "*may be*" "the proper exercise of discretion to remedy [a Sixth Amendment] injury" in certain circumstances, 132 S. Ct. at 1389 (emphasis added), and the Court concluded that ordering the State to reoffer the plea agreement was "[t]he correct remedy in [the] circumstances" presented in that case, where the previous plea offer required the defendant to do nothing more than to plead guilty. *Id.* at 1391; *id.* at 1383 (prosecution offered to dismiss two charges and recommend a sentence of 51 to 85 months "in exchange for a guilty plea"). But the Court made clear in *Lafler* that "the boundaries of [the sentencing court's] discretion" would be defined over time, *id.* at 1389, and Justice Alito suggested that requiring the prosecution to renew an old plea offer "would represent

an abuse of discretion in at least [some] circumstances"—for example, "when important new information * * * comes to light after the offer is rejected" and when "rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources." *Id.* at 1399 (Alito, J., dissenting).

2. If the boundaries of a sentencing court's discretion in fashioning a remedy for a Sixth Amendment violation are to be defined over time, then a federal post-conviction court should not categorically order the government to reoffer a plea agreement in situations that are different from those in *Lafler*. That decision should be left for the sentencing court, and the remedy that court imposes would be subject to review for abuse of discretion.

Unlike in *Lafler*, where the plea agreement required the defendant to do nothing more than to plead guilty, the State's plea offer in this case was conditioned upon respondent—an eyewitness to her uncle's murder—testifying against her aunt at trial. Pet. App. 5a, 99a. Respondent refused to do so, and without respondent's testimony, a jury acquitted her aunt. *Id.* at 24a. The State is thus being compelled to offer an agreement that it did not previously make, under which respondent—who was charged with first-degree murder—is offered an opportunity to plead guilty to manslaughter with a recommended sentence of 7 to 15 years of imprisonment, in exchange for nothing. Without respondent's agreement to testify, the State may not have offered her a plea agreement at all, or it may have only negotiated down to the second-degree murder charge of which respondent was ultimately convicted. Indeed, when respondent indicated that she was unwilling to testify against her aunt, the prosecutor stated that the State

"wishe[d] to withdraw from any kind of agreement that was reached with this witness, on the basis that we had an agreement that [respondent] would be testifying in the trial of Billie Rogers." J.A. 63. Requiring the government to reoffer the terms of a plea agreement in these circumstances creates serious problems, both legal and practical.

First, requiring the State to offer respondent a manslaughter plea is unfairly one-sided and contrary to the purpose of plea bargaining. As this Court has explained, the essence of plea-bargaining is "mutuality of advantage." *Brady*, 397 U.S. at 752. Requiring the State to reoffer the terms of a prior plea agreement that was conditioned upon cooperation the defendant subsequently refused to provide upsets that mutuality. After Billie was acquitted in a trial where respondent refused to testify, the benefit to the State under the agreement was gone. Respondent, on the other hand, gets an undeserved windfall—both a trial at which she had the chance to win an acquittal, and the benefits of a plea agreement that she never would have been offered without her agreement to testify.

Second, requiring the State to reoffer a plea agreement in these circumstances contravenes separation-of-powers principles.[8] In the federal system, the Executive Branch "retain[s] 'broad discretion' to enforce the Nation's criminal laws." *United States* v. *Armstrong*, 517

[8] Although a federal court reviewing a state conviction on habeas may not be bound by state separation-of-powers principles, it would be unusual for a federal court in enforcing the Sixth Amendment (which, in pertinent part, applies identically to federal and state governments) to order a remedy against a state government that would contravene the *federal* separation of powers if employed against the United States.

U.S. 456, 464 (1996) (citation omitted); *United States* v. *Cox*, 342 F.2d 167, 171-172 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); *id.* at 190-193 (Wisdom, J., concurring specially). Like the decisions whether to prosecute and what charges to bring, the decisions whether to engage in plea bargaining and the sort of deal to offer belong solely to the Executive. Although a trial court has authority to reject certain types of plea agreements, it cannot compel the prosecutor to plea-bargain nor dictate the terms of any deal. See, *e.g.*, *Government of the V.I.* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980); accord, *e.g.*, *People* v. *Heiler*, 262 N.W.2d 890, 895 (Mich. Ct. App. 1977) (same, under Michigan's "constitutional separation of powers") (citation omitted). Both federal and Michigan judges are barred from any role in plea negotiations. See Fed. R. Crim. P. 11(c)(1); *People* v. *Mathis*, 285 N.W.2d 414, 416 (Mich. Ct. App. 1979).

Requiring the State to reoffer the terms of its previous plea offer in the circumstances presented here violates those principles because it requires the prosecution to make a plea offer that it never previously made. That requirement "interfere[s] with [the prosecutor's] discretionary functions, *i.e.*, determining what he feels is fairest in light of the defendant's circumstances, the government's resources, and the statute involved." *Scotland*, 614 F.2d at 364. The court of appeals should have allowed the state court to determine whether requiring the State to reoffer the plea agreement is warranted on these facts, and any such requirement would be subject to review for abuse of discretion.

Furthermore, significant new evidence "[came] to light after the offer [was] rejected," *Lafler*, 132 S. Ct. at 1399 (Alito, J., dissenting), which further supports the

conclusion that requiring the State to reoffer the terms of its previous plea offer may be an inappropriate remedy in this case. See also *id.* at 1389 (stating that the sentencing court does not necessarily need to ignore "any information concerning the crime that was discovered after the plea offer was made"). Chahine testified at trial that respondent told him that she and Billie had previously formed a plan to kill Donald, contradicting respondent's polygraph testimony, and that Billie increased the amount of money she was willing to pay respondent if respondent would hold Donald down while Billie smothered him. J.A. 146-147, 177-178. Those facts are not only consistent with a second-degree murder conviction, as the court of appeals acknowledged (Pet. App. 23a), they are consistent with first-degree murder. See Mich. Comp. Laws Ann. § 750.316(1)(a) (West 2004) (first-degree murder is murder perpetrated by means of any "willful, deliberate, and premeditated killing").

Moreover, respondent's testimony at trial that she misunderstood what was happening and thought Billie was "joking" with the pillow, that she told Billie to leave Donald alone, and that she was in a different room when Billie smothered Donald, J.A. 259, 261, 270, 277, may be inconsistent with a guilty plea. See *People* v. *Carabell*, 161 N.W.2d 776, 779 (Mich. Ct. App. 1968) (manslaughter is the "unlawful killing of another without malice") (citation omitted). The sentencing court should have been afforded an opportunity to consider this additional evidence in determining whether it was appropriate to require the State to reoffer the terms of the previous plea agreement as part of a Sixth Amendment remedy in this case.

B. Even If The Government Can Properly Be Compelled To Reoffer A Prior Plea Agreement In These Circumstances, The Sentencing Court May In Its Discretion Reject The Agreement And Leave Respondent's Conviction And Sentence Undisturbed

Even if the court of appeals did not err in requiring the State to reoffer the plea agreement, the court of appeals was wrong to the extent it suggested that the sentencing court must accept the plea agreement or that it necessarily had to resentence respondent.

The state court would be firmly within its discretion to reject any reoffered plea agreement in this case. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971); *Lafler*, 132 S. Ct. at 1389 (sentencing court may "accept the plea or leave the conviction undisturbed"). The maximum penalty for manslaughter under Michigan law is 10 to 15 years of imprisonment. See Mich. Comp. Laws Ann. § 750.321 (West 2004) (maximum sentence for manslaughter conviction is 15 years); *id.* § 769.34(2)(b) (trial court may not impose a minimum sentence that exceeds two-thirds of the maximum sentence). That is only slightly more severe than the 7 to 15-year sentence offered in the plea agreement. If the state court accepted a reoffered plea agreement, it would thus have very little room to account for the very significant "competing interests" at stake, *Lafler*, 132 S. Ct. at 1388 (citation omitted)—*i.e.*, the State's loss of respondent's eyewitness testimony and the resources it invested in respondent's trial—and this remedy would thus result in a "windfall" to respondent, *id.* at 1388-1389. On the other hand, the state court may impose "any term of years" for a second-degree murder conviction. See Mich. Comp. Laws Ann. § 750.317 (West 2004). It would thus make far more sense in these circumstances for the

state court to leave respondent's second-degree murder conviction in place.

Furthermore, although the state court could, in its discretion, resentence respondent to a shorter term of imprisonment than it imposed at the conclusion of her trial, the Court specifically stated in *Lafler* that it is within the trial court's discretion to "leave the * * * sentence from trial undisturbed." 132 S. Ct. 1391. The court of appeals' insinuation that the state court must necessarily resentence respondent was therefore unwarranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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