No. 10-209

In The
Supreme Court of the United States

BLAINE LAFLER
Petitioner,

v.

ANTHONY COOPER
Respondent.

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

REPLY BRIEF

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INTRODUCTION

In his brief in opposition, Respondent raises two basic arguments about why this Court should deny the petition for certiorari: (1) that this Court has provided clear guidance on this issue; and (2) that this case does not present a good vehicle in which to examine the question presented (whether a criminal defendant in habeas is entitled to relief under the Constitution for deficient advice on a plea offer where he is then convicted at a fair trial). Respondent is wrong on both points.

First, this Court has not provided an answer to the question presented here. The seminal cases in this area, *Strickland v. Washington*,[1] and *Hill v. Lockhart*,[2] are predicated on ensuring that the proceeding from which a criminal defendant was convicted was fair and reliable. Neither addresses the circumstance where deficient advice results in a conviction from a fair trial. Nor does *Padilla v. Kentucky*.[3] It is the State of Michigan's position that the Sixth Amendment right to counsel protects a defendant's right to a fair trial – there is no constitutional right to a plea bargain. A criminal defendant is not entitled to any relief where he has been convicted at a fair trial. This reasoning is consonant with this Court's analysis in *Mabry v. Johnson*,[4] and *Weatherford v. Bursey*,[5] two cases that

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Hill v. Lockhart*, 474 U.S. 52 (1985).

[3] *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

[4] *Mabry v. Johnson*, 467 U.S. 504 (1984), abrogated on other grounds by *Puckett v. United States*, 129 S.Ct. 1423 (2009).

[5] *Weatherford v. Bursey*, 429 U.S. 545 (1977).

Respondent fails to address – or even cite – in his brief in opposition.

Second, this petition provides a proper vehicle to address this question. The U.S. Court of Appeals for the Sixth Circuit expressly addressed and rejected the argument presented here, squarely raising the issue for this Court's review. Also, the fact that the issue arises from a habeas corpus proceeding does not undermine the ability of the Court to resolve the question. In fact, this Court invited the same basic question in a habeas case, *Arave v. Hoffman*.[6] And even if this Court determined that the State court determination here was not entitled to deference, the question presented would enable this Court to examine the issue de novo.

[6] *Arave v. Hoffman*, 552 U.S. 1008 (2007).

ARGUMENT

I. This Court has not previously resolved the issue whether a criminal defendant is entitled to relief where he is convicted at a fair trial but only after receiving deficient advice and rejecting a plea offer.

Respondent contends that this Court's prior precedent clearly resolves this question, in that Respondent was "prejudiced" under the Sixth Amendment because his counsel provided deficient advice causing him to reject the plea offer. Res. Br. 14-16, 19-22. This conclusion is not established by this Court's precedent.

A. The question presented is a new one for this Court.

This Court has not answered the question about what should result where a criminal defendant rejects a plea offer based on deficient advice and then is convicted at a fair trial. The issue is whether the criminal defendant was "prejudiced" by the failure to be able to avail himself of the plea offer. That is a novel question for this Court.

This conclusion is confirmed by the fact that this Court invited the following question in *Arave v. Hoffman* in 2007:

> In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "What, *if any*, remedy should be provided for ineffective assistance of counsel

> during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"[7]

By including the phrase "if any," this question presumes that there might not be any remedy for the ineffective assistance counsel during plea negotiations where there is a subsequent fair trial.

The case law demonstrates that this is an open question. The general standard from *Strickland v. Washington* makes clear that the Sixth Amendment right to effective counsel is predicated on the protection of the "fundamental right to a fair trial."[8] The criminal defendant must prove both deficient performance and prejudice.[9] The focus from *Strickland* is the guarantee that the adversarial process produce a "just result."[10] In specific, the prejudice prong of *Strickland* examines whether the reliability of the outcome of the proceeding has been undermined because of "a breakdown in the adversarial process[.]"[11]

There is no dispute that the *Strickland* standard applies to the representation of counsel during the negotiations for a plea bargain and that these negotiations represent a critical stage in the criminal process. The issue is not whether a criminal defendant is entitled to the effective representation of counsel during plea negotiation, but rather whether he is

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[7] *Arave*, 552 U.S. at 1008 (emphasis added).

[8] *Strickland*, 466 U.S. 684-85.

[9] *Strickland*, 466 U.S. at 687.

[10] *Strickland*, 466 U.S. at 685.

[11] *Strickland*, 466 U.S. at 696.

entitled to relief where he is convicted after a fair trial – a trial that only occurred because he was given deficient advice causing him not to take a plea offer.

This Court's prior decisions do not resolve this issue. In applying *Strickland* and evaluating the effective assistance of counsel for plea negotiations, this Court's decision in *Hill v. Lockhart* was predicated on the criminal defendant pleading guilty and waiving his right to trial.[12]

In *Hill*, this Court was examining whether the petitioner's plea was involuntary based on the ineffective assistance of counsel where his counsel misinformed him about his parole eligibility date.[13] The Court noted that the two-part *Strickland* test applies to guilty-plea cases and clarified that the defendant carried the burden of demonstrating that "there is a reasonable probability" that he would have otherwise gone to trial.[14]

Respondent isolates a specific sentence from *Hill* to suggest that *Hill* resolves the question here, but further context makes clear that *Hill* only answers the issue of prejudice where the criminal defendant has pled guilty:

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the

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[12] *Hill*, 474 U.S. at 52.

[13] *Hill*, 474 U.S. at 54-55.

[14] *Hill*, 474 U.S. at 59.

> plea process. *In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*[15]

Respondent contends that the first sentence from this block quote is dispositive to the question here, because the deficient advice in this case affected the outcome of the plea process, i.e., Respondent did not plead guilty. Res. Br. 15, 15, 19. This analysis from *Hill*, however, is further explained by the next sentence that the criminal defendant must prove that he would not have pled guilty but for the deficient advice. *Hill* does not answer the question whether a criminal defendant is entitled to relief where the deficient advice caused the criminal defendant *to refuse to plead guilty*.

This Court's analysis in *Padilla v. Kentucky* is likewise predicated on the fact the criminal defendant pled guilty rather than went to trial.[16] This Court noted that a defendant is entitled to the effective assistance of counsel before deciding whether to plead guilty, but did not address the circumstance that would occur where an attorney provided deficient advice on an immigration matter and the criminal defendant went to trial.[17]

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[15] *Hill*, 474 U.S. at 59 (emphasis added).

[16] *Padilla*, 130 S.Ct. at 1483-84. *See also McMann v. Richardson*, 397 U.S. 759, 771 (1970).

[17] *Padilla*, 130 S.Ct. 1480-1481.

B. Respondent fails to address this Court's decisions in *Mabry* and *Weatherford*, which suggest that there should be no relief here.

Respondent's failure to recognize the importance of the distinction between pleading guilty and refusing the plea based on deficient advice is predicated on two errors.

First, Respondent suggests that there is no basis for the "asymmetry" of granting relief for deficient advice that results in a plea, but not for such advice that leads to trial. Res. Br. 19-20. But the distinction between these outcomes is rooted in the nature of a plea. A criminal defendant who pleads guilty waives his right to a trial and other important rights.[18] By contrast, a criminal defendant who is convicted at a fair trial and receives a just sentence has received the protection envisioned by this Court under *Strickland*.

Second, Respondent's claim is predicated ultimately on the idea that a criminal defendant has a constitutional right to take advantage of the prosecution's plea offer. But this Court has expressly rejected such a claim. As this Court stated in *Weatherford*, "there is no constitutional right to a plea bargain."[19] And therefore a plea bargain – standing alone – does not implicate the constitutionally-protected interests of the criminal defendant. This Court in *Mabry* explained this point:

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[18] *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

[19] *Weatherford*, 429 U.S. at 561.

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.[20]

Thus, the language from this Court in *Lockhart v. Fretwell* is applicable: "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[21] There was no such right implicated here.

The *Mabry* case bears this point out. In *Mabry*, the Court held that there was no cognizable constitutional injury under Due Process when the prosecution withdrew a plea offer that the criminal defendant had already accepted. The criminal defendant later pled guilty and received a harsher sentence.[22] This Court held that the criminal defendant's "inability to enforce the prosecutor's offer is without constitutional significance."[23] The key to the Court's analysis was that the criminal defendant's liberty was not taken away from him "in any fundamentally unfair way."[24]

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[20] *Mabry*, 467 U.S. at 507-508 (footnotes omitted).

[21] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[22] *Mabry*, 467 U.S. at 506.

[23] *Mabry*, 467 U.S. at 510.

[24] *Mabry*, 467 U.S. at 511.

The same is true here. Respondent's loss of liberty did not arise from his failure to plead guilty but from his trial-based conviction. There was nothing constitutionally infirm about his trial. The loss of his ability to plead guilty is the loss of a claim for which he has no entitlement in law. In the same way, the prosecution under *Mabry* could have reneged on the offer regardless whether the prosecution was "negligent or otherwise culpable" in withdrawing the offer.[25]

Respondent also suggests that because the federal circuits are generally unified on this issue that the question is not appropriate for certiorari. Res. Br. 23-25. But Respondent does not contest the point that several State courts have reached contrary results, which creates a conflict between the federal courts and some State courts under Supreme Court Rule 10. Pet. 14-15.[26]

C. The question presented raises the right issue.

Respondent also contends that the question presented here is distinct from the question that this Court requested be addressed in *Arave*. Specifically, Respondent asserts that the issue whether there is a "remedy" available for a violation of the Sixth Amendment is different from whether Respondent is entitled to relief. Res. Br. 16-18. These questions raise the same issue in this factual setting – what results

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[25] *Mabry*, 467 U.S. at 511.

[26] *See State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000).

from a claim of a Sixth Amendment violation where the criminal defendant has received a fair trial.

The paramount issue is whether the criminal defendant has received the protection that the Sixth Amendment right to counsel is intended to safeguard – a fair trial. In this circumstance, the issue about whether there is a remedy for ineffective assistance of counsel raises the same issue as whether there is any constitutional prejudice for the inaccurate legal advice. The question in each is whether the intervening event of the fair trial extinguishes any claim of error.

The State of Michigan argues here that there is no prejudice under *Strickland* for deficient performance because there is no constitutional right to a plea bargain. The factual prejudice of missing out on a plea bargain is not a cognizable harm under the Sixth Amendment, because the right to counsel under the Sixth Amendment is based on the right to secure a fair trial.

This reasoning is consistent with the analysis from the Utah Supreme Court on the question in *State v. Greuber* in which it rejected the claim of ineffective assistance of counsel (failure to investigate evidence that may have supported a plea) under the Sixth Amendment where the defendant was convicted at a fair trial.

> Thus, while Greuber did possess the right to effective assistance of counsel during the plea process, he could not ultimately have been prejudiced in this case because he received a trial that was fair – the

> fundamental right that the Sixth Amendment is designed to protect. Nothing in counsels' pretrial conduct suggests "that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.[27]

This analysis equally applies here.[28]

II. There are no vehicle problems with this petition for certiorari.

Respondent argues that there are vehicle problems that recommend that this Court not grant the writ of certiorari. Res. Br. 10, 25-28. The State shall address these claims individually.

A. The Sixth Circuit specifically addressed the question presented and rejected the claim that the State of Michigan is advancing here.

Respondent contends that because this claim was not advanced in the district court that it somehow hinders the ability of this Court to review the claim here. Res. Br. 10, 27-28. This is wrong.

The Sixth Circuit squarely addressed the argument raised here. The Sixth Circuit noted that the State raised the argument – "[the State] nevertheless contends that there is no prejudice because petitioner

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[27] *Greuber*, 165 P.3d at 1189.

[28] The Utah Supreme Court declined to address the circumstance in which – as here – the defense counsel provided affirmatively erroneous advice. *Greuber*, 165 P.3d at 1189 n. 4.

received a fair trial, which is all that the Sixth Amendment is meant to preserve." Pet. App. 18a.

The Sixth Circuit then rejected this claim, addressing it directly:

> To say that there is no prejudice because the petitioner ultimately received a fair trial is to understate the value of plea bargaining – not just to the state, but also to defendants.
>
> * * *
>
> [Respondent] lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel. Thus, he has established prejudice. [Pet. App. 18a-19a (footnote omitted).]

The issue, therefore, is properly framed for the Court.

B. The fact that this question arises from a habeas case does not present a vehicle problem.

Respondent also contends that this petition is a poor vehicle because the case arises in a habeas context under the Antiterrorism and Effective Death Penalty Act (AEDPA), Res. Br. 10, 25-27, and because the State court did not provide the "fair trial" explanation as the basis of denying Respondent relief on appeal. Res. Br. 10, 13-14.

The fact that the issue is presented in habeas corpus review does not create any impediment for this Court's ability to respond to the question presented. In fact, one of the cases on which Respondent relies most heavily in support of his position, *Hill v. Lockhart*,[29] *see* Res. Br. 14, 15, 19, was a habeas case. Also, the case in which this Court invited briefing on the same basic claim was also a habeas case, *Arave v. Hoffman.*[30]

Likewise, the fact that the State court did not explain that it was relying on the "fair trial" justification in denying Respondent relief is not a vehicle problem. This Court may accept the State's argument that the summary decision is entitled to deference under AEDPA, *see* Pet. 8-9,[31] or determine that the decision should be subject to de novo review.[32] In either event, the question presented is broad enough to fairly include the analysis for either conclusion under Supreme Court Rule 14.1(a).[33]

C. There are no factual questions at issue that undermine the question presented.

Finally, Respondent asserts that there are outstanding questions about whether Respondent was convicted at a fair trial. Res. Br. 28. There has been no

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[29] *Hill*, 474 U.S. at 55.

[30] *Arave*, 552 U.S. at 1008.

[31] *See Harrington v. Richter*, 130 S.Ct. 1506 (2010)(granting certiorari on the issue whether a summary order is entitled to AEDPA deference), argued on October 12, 2010.

[32] *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

[33] *See Berghuis v. Smith*, 130 S.Ct. 1382, 1392 n. 3 (2010).

claim challenging the fairness of the trial in federal court.

The only issue raised in the petition filed in federal district court on March 13, 2006, p. 9, was the following:

> I. Trial counsel rendered incompetent advice during the plea bargaining process which denied Mr. Cooper the effective assistance of counsel.

Respondent also did not contest the fairness of his trial-based conviction in the Sixth Circuit. *See* Respondent's appellee's brief, filed July 8, 2009, p. 26.

Consequently, the question presented here directly frames the issue and there are no unresolved factual controversies.[34]

[34] Respondent also suggests that the record does not indicate why the final plea offer tendered on the trial date was rejected could "complicate" the issue. Res. Br. 27. This claim is without merit. The State is no longer contesting the factual point that Respondent's counsel provided deficient advice when the first plea offer was made to him.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted,

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