No. _____

In the Supreme Court of the United States

SHERRY L. BURT, PETITIONER

v.

VONLEE TITLOW

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents three questions involving AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996), and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), this Court's recent decision expanding ineffective-assistance-of-counsel claims to include rejected plea offers:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the opinion. The Petitioner is Sherry Burt, Warden of a Michigan correctional facility. The Respondent is Vonlee Titlow, an inmate.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–32a, is reported at 680 F.3d 577. The opinion of the District Court, App. 34a–97a, is not reported but is available at 2010 WL 4115410. The opinion of the Michigan Court of Appeals, App. 98a–119a, is not reported but is available at 2003 WL 22928815.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on May 22, 2012. App. 33a. A petition for rehearing was denied on August 2, 2012. App. 121a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

This is an appeal of a Sixth Circuit habeas decision holding that trial counsel is constitutionally ineffective for honoring a client's desire to maintain his innocence.

A jury convicted Respondent Vonlee Titlow of second-degree murder. Titlow now says that his trial counsel was ineffective for allowing Titlow to withdraw a manslaughter plea and maintain his innocence, despite the fact that Titlow hired his trial counsel to do just that. A Sixth Circuit panel majority held that the Michigan Court of Appeals unreasonably denied Titlow's ineffective-assistance claim. Accordingly, the panel majority ordered the state to reoffer the plea Titlow had previously accepted and withdrawn. That decision raises three issues warranting review.

The first issue is whether the Sixth Circuit gave appropriate AEDPA deference to the state-court decision. The state court's factual findings were not objectively unreasonable, and its holding was consistent with this Court's admonition that the defendant retains "the ultimate authority" whether to plead guilty. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004).

The second issue is whether a defendant can satisfy the prejudice component of an ineffective-assistance claim based solely on his own, post-conviction testimony that he would have accepted a plea offer but for counsel's deficient advice. The Sixth Circuit again says yes. *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003). But at least five other circuits require some objective evidence that the defendant would have accepted the plea. This Court should grant the petition and resolve the circuit split.

The third issue involves the proper remedy under *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), when a defendant claims that deficient advice led him to reject a favorable plea offer. The Sixth Circuit panel majority here ordered the state trial court on remand to fashion a sentence that remedies the violation of Titlow's right to effective assistance. But as Sixth Circuit Chief Judge Batchelder explained in dissent, *Lafler* does not require the state trial court to resentence; the remedy is the government's reoffering of the original plea agreement, not a new sentence.

For all of these reasons, certiorari is warranted.

STATEMENT OF THE CASE

A. Donald Rogers' murder

Vonlee Titlow's conviction stemmed from his role in the murder by smothering of Titlow's elderly, wealthy uncle, Donald Rogers. Titlow agreed to help his aunt, Billie Rogers, kill Donald so that Billie could inherit Donald's large estate. Titlow, a transgender male, planned to use some of the money he earned from this plot to pay for a sex-change operation. Following Donald's murder, Billie purchased new cars for herself and Titlow. Billie also wrote Titlow a check for over $70,000 and gave him additional money for gambling. Titlow did not carry out the sex-change operation before his arrest.[1]

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[1] Titlow is a transgender person who is housed in an all-male prison facility. The lower court opinions use a combination of male and female pronouns when referring to Titlow, but for consistency, this Petition will use male pronouns.

Danny Chahine befriended Titlow in June 2000 when Titlow was living with Donald and Billie. On August 12, 2000, Titlow called Chahine and told him that Donald had been found dead on the kitchen floor. Chahine was immediately suspicious, because Titlow had previously talked about Billie's desire to pay for her husband's murder after he objected to Billie incurring credit card debt to gamble. When Chahine asked Titlow if he or his aunt had done something to Donald, Titlow said he would explain everything later.

Titlow later confided that he had helped kill Donald. Thereafter, Chahine secretly wore a wire and elicited incriminating statements from Titlow. Based on this and other evidence, the state charged Titlow and Billie with first-degree premeditated murder.

B. Titlow first accepts, then withdraws, a plea bargain

Titlow initially pled guilty to manslaughter with a sentence agreement of 7-to-15 years. In exchange, Titlow would testify against Billie and not appeal his conviction or sentence. During his plea, Titlow confirmed that he and his then-attorney, Richard Lustig,[2] had "gone over all of the evidence together

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[2] Titlow was represented by three attorneys in succession. His first retained attorney, Richard Lustig, negotiated and recommended the plea agreement. Titlow later discharged Lustig and enlisted attorney Frederick Toca to move for Titlow's plea withdrawal. Toca later withdrew as counsel based on Titlow's inability to pay for the Billie Rogers trial transcript. In granting Toca's motion to withdraw as counsel, the trial court learned that Titlow had agreed to pay Toca jewelry and to assign Toca a "book deal." App. 100a. That fact is irrelevant to this appeal. Williams Cataldo, a court-appointed attorney, represented Titlow at trial.

over a long period of time," and that Lustig had advised him about the elements necessary for the prosecution to secure a conviction. Titlow said he understood that "although he didn't participate in what appear[ed] to be a smothering," a jury could find him guilty of first-degree murder, second-degree murder, manslaughter, or nothing at all. Titlow was satisfied with Lustig's advice, and the state trial court accepted Titlow's plea.

Before sentencing, Titlow spoke with a sheriff's deputy at the jail, maintaining his innocence. The deputy suggested that Titlow not plead guilty if he was innocent of Donald's murder and suggested that Titlow talk to another attorney. He put Titlow in touch with an attorney, who, in turn, recommended that Titlow speak with another attorney, Frederick Toca.

Titlow then discharged his first attorney, Lustig, and enlisted Toca as new counsel for the purpose of withdrawing the guilty plea. Three days later, Toca moved to withdraw Titlow's plea. At the hearing, Titlow acknowledged that he "fully under[stood] the consequences" of withdrawing his plea to manslaughter, and that withdrawing the plea would reinstate the first-degree murder charge and subject him to a potential life sentence. Titlow affirmed he was withdrawing his plea "freely and voluntarily." The trial court granted the motion. The state then proceeded to try Billie without Titlow's testimony and was unable to obtain a conviction. Billie died several months later.

Titlow's gamble did not pay off. A jury convicted him of second-degree murder, and he was sentenced to 20-to-40 years. Titlow then accused Toca of being ineffective for allowing Titlow to withdraw the plea.

C. State court proceedings

The state trial court rejected Titlow's ineffective-assistance claim, and the Michigan Court of Appeals affirmed. "When a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty – no matter how 'good' the deal may appear." App. 102a. "On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness." App. 102a.

D. Federal habeas corpus proceedings

The District Court denied Titlow habeas relief, because Titlow could not satisfy AEDPA's exacting standard for setting aside a state-court conviction: Titlow "has not shown that the Michigan Court of Appeals's decision regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." App. 62a. Specifically, Titlow could not prevail on the deficient-performance component of his ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). First, Titlow's "desire to withdraw her plea (which itself was motivated by a belief in innocence) pre-dated interim counsel's involvement." App. 64a. Second, "how can a criminal defendant's counsel be ineffective for advising her to go to trial when she (the criminal defendant) claims to be innocent of the crime?" App. 64a–65a.

A Sixth Circuit panel majority then granted Titlow habeas relief. The panel majority first held that the

Michigan Court of Appeals had unreasonably determined the facts when it concluded that Toca's advice was based on Titlow's proclamations of innocence. App. 18a–19a. The majority opined that "the record contain[ed] no evidence" that Titlow's new attorney fulfilled his obligation to provide sufficient advice to Titlow. App. 19a. In particular, because the new attorney relied on Titlow's protestations of innocence and did not pick up discovery materials from or discuss the case with Titlow's previous attorney until after Titlow's plea withdrawal, the majority assumed that the new attorney could not adequately advise Titlow on his sentencing exposure or the reasonableness of the plea offer and therefore provided deficient performance. App. 19a–20a. The majority also held that Titlow established prejudice based on the fact that Titlow accepted the plea before he withdrew it, the sentencing disparity, and Titlow's subjective testimony that he would not have withdrawn his plea but for counsel's ineffective advice. App. 22a.

The panel majority directed the state to reoffer Titlow the original plea agreement, App. 25a, even though the state had already lost the major benefit of the bargain: Titlow's testimony. The majority also ordered the state trial court to fashion a sentence on remand that "remedied" the violation of Titlow's right to effective assistance. *Id.*

Sixth Circuit Chief Judge Batchelder rejected each of these holdings. First, the panel majority failed to give appropriate AEDPA deference to the Michigan Court of Appeals' factual findings. The "record does not establish that [trial counsel]'s advice was the decisive factor in Titlow's decision to withdraw her plea." App.

26a (Batchelder, J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted [her new attorney] as counsel." *Id*. "Titlow has not presented any evidence indicating that [counsel] advised her to withdraw her plea or that he was otherwise a decisive factor in her decision to go to trial. Instead, the record indicates that she had wanted to change her plea and enlisted [the attorney] as new counsel to do just that." App. 27a. (Batchelder, J., dissenting).

Second, the panel majority failed to identify any conflict between the Michigan Court of Appeals decision and this Court's precedent. "Any advice that Titlow may have received from [her new attorney] was the result of Titlow's wanting new counsel and no longer wanting to plead guilty." App. 28a. (Batchelder, J., dissenting.) "It is undoubtedly reasonable for an attorney to recommend that his client reject a plea if the client maintains her innocence." *Id*. There "is nothing in the record establishing that the case file would have undermined any advice that [the new attorney] may have given Titlow." App. 29a. (Batchelder, J., dissenting).

Finally, "*Lafler* . . . does not require the trial court to resentence Titlow." App. 31a, citing *Lafler*, 132 S. Ct. at 1389 (Batchelder, J., dissenting). And "it is not the trial court's responsibility . . . to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a, citing *Lafler*, 132 S. Ct. at 1389 (Batchelder, J., dissenting). The State of Michigan now seeks this Court's review.

REASONS FOR GRANTING THE PETITION

I. It is not ineffective assistance for an attorney to honor his client's desire to maintain innocence.

The Michigan Court of Appeals denied Titlow's ineffective-assistance claim based on Titlow's failure to show constitutionally deficient performance by his second attorney, Toca. On the record before it, the state court found that Titlow "told a sheriff's deputy at the jail that he planned to plead guilty despite his protestations of innocence" and that "[t]he deputy suggested that it would not be proper to plead guilty to an offense that [Titlow] did not commit, and perhaps [Titlow] should talk with another attorney." App. 100a. The state court further found that "[t]he record discloses that the second attorney's advice was set in motion by a [Titlow's] statement to the sheriff's deputy that he did not commit the offense." App. 101a. That finding makes sense, because Titlow's first attorney had advised him about the strength of the state's case and all of the potential consequences of going to trial.

Under AEDPA, a federal court can only grant habeas if a state-court decision involved an unreasonable application of this Court's precedent, 28 U.S.C. § 2254(d)(1), or if the state court's factual findings were unreasonable, 28 U.S.C. § 2254(d)(2). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011).

With respect to the law, the Michigan Court of Appeals was correct that the final decision to plead guilty is always the defendant's, not the attorney's. Michigan Rule of Professional Conduct 1.2(a) states that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered . . . ." Accord *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (defendant retains "the ultimate authority" to determine whether to plead guilty); ABA Model Rules of Prof'l Conduct R. 1.2(a). The Michigan Court of Appeals expressly acknowledged this rule: "When a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may be." App. 102a. Because the Michigan Court of Appeals did not misapply this Court's precedents, 28 U.S.C. § 2254(d)(1), the panel majority should have presumed, absent contrary evidence, that Toca honored his ethical obligation to follow his client's wishes.

With respect to the facts, the panel majority violated § 2254(d)(2) deference in two ways. First, the majority said that the Michigan Court of Appeals' ruling was unreasonable because Toca failed to advise Titlow of his sentencing exposure at trial or the reasonableness of his plea offer without first examining the evidence. App. 19a–20a. But as Chief Judge Batchelder aptly noted, "the record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw her plea." App. 26a (Batchelder, J, dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." *Id*. This is consistent with Titlow's insistence that he was innocent. Indeed, aside from his

own, unsworn, post-conviction comments at sentencing, Titlow provided no record evidence that Toca was the reason or even a decisive factor in his decision to withdraw his plea. Indeed, Titlow testified at his plea withdrawal hearing that he "fully under[stood] the consequences" of withdrawing his plea and did so "freely and voluntarily."

Titlow's understanding came from the fact that, just a few weeks earlier, his first attorney, Richard Lustig, had thoroughly discussed the merits of the plea offer with Titlow. Lustig had "gone over all of the evidence" with Titlow "over a long period of time," and advised Titlow about the elements necessary for the prosecution to secure a conviction. (Titlow also had the benefit of adverse witness testimony during a three-day preliminary exam.) Titlow understood that "although he didn't participate in what appear[ed] to be a smothering," a jury could find him guilty of first-degree murder, second-degree murder, or manslaughter. Titlow was "satisfied" with Lustig's advice, and there has never been a finding that Lustig was ineffective. The record belies any claim that Titlow did not know about the advantages and disadvantages of pleading or about the strength of the evidence.

Second, the panel majority focused myopically on a statement by Titlow's prior counsel that Toca did not pick up Titlow's case file until after the plea had been withdrawn. This was erroneous in two respects.

To begin, the panel majority apparently assumed that material in the case file was not otherwise available to Toca. This assumption is misguided and contrary to 28 U.S.C. § 2254(d)(2). The material would have been available either by reviewing public court

files or by asking the prosecutor to provide additional copies of discovery material—a common practice between state prosecutors and criminal defense attorneys in Michigan. Nothing in the record shows that Toca did not obtain material in the case file from other sources. In fact, at the hearing where Titlow withdrew his plea, Toca said that "[t]here's a lot of material here," implying that he had a significant amount of material already in his possession by that date. Under *Strickland* and *Harrington*, the panel majority should have presumed that counsel made an informed recommendation to Titlow; instead, it presumed the exact opposite. App. 19a (where the record was silent with respect to the advice Toca gave Titlow, the panel majority concluded that Toca "failed to fulfill his 'clear obligation' to provide sufficient advice to Titlow during the plea-negotiation stage."). Further, there is nothing in the record showing that the case file would have undermined any advice that Toca may have given Titlow: the state's evidence did not assure a first-degree murder conviction; indeed, the jury convicted Titlow of a lesser-included offense.

More important, even if Toca had reviewed the case file, advising Titlow to withdraw his plea either because he maintained his innocence or because he pleaded to an above-guideline sentence would "not fall below an objective standard of reasonableness." That is because Titlow hired Toca for the express purpose of withdrawing his plea. The "record indicates that [Titlow] had wanted to change her plea and enlisted Toca as new counsel to do just that." App. 27a (Batchelder, J., dissenting.) Toca did not provide ineffective assistance by honoring Titlow's decision to maintain his innocence.

II. There is a mature circuit conflict regarding the evidence needed to support a defendant's claim that he would have accepted a plea but for counsel's deficient advice.

In the context of a rejected plea, *Strickland*'s prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In *Lafler*, this Court articulated a three-part test for this proof, with the first part divided into two additional sub-parts. A defendant must show "a reasonable probably

> [1] that the plea offer would have been presented to the court (i.e.,
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> > [a] that the defendant would have accepted the plea and
> >
> > [b] the prosecution would not have withdrawn it in light of intervening circumstances),
>
> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced.

132 S. Ct. at 1385. The question here is what proof satisfies sub-component [1][a], i.e., that defendant would have accepted the plea.

The Sixth Circuit rested its analysis on Titlow's previous acceptance of the plea offer (before he rejected it), the sentencing disparity, and his post-conviction

testimony that he would have not withdrawn but for Toca's ineffective assistance. App. 22a. Consider how each of these evidentiary pieces fit within the *Lafler* multi-part rubric.

The plea's initial presentation and trial-court acceptance satisfy parts (1)(b) and (2) of the *Lafler* test. The sentencing disparity satisfies part (3). But Titlow's acceptance of the first plea cannot be used to satisfy (1)(a), because Titlow withdrew the plea and maintained his innocence.[3] Titlow cannot rely on the sentencing disparity to satisfy (1)(a), either. The third part of the *Lafler* test *always* requires a defendant to show a disparity, so sentencing disparity is a given.

That leaves only Titlow's self-serving, post-conviction testimony that he would have kept his plea deal absent ineffective assistance. In the Sixth Circuit, nothing more is required: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)); App. 22a (citing *Smith* as support for the panel majority's ability to consider Titlow's post-conviction testimony "as evidence of Titlow's [pre-conviction] intent.").

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[3] The panel majority further erred by relying on *Smith*'s language concerning the significance of a defendant's protestations of innocence. App. 16a–17a. This Court's precedent indicates that a defendant can enter a guilty plea while still protesting his innocence. *North Carolina* v. *Alford*, 400 U.S. 25, 33 (1970). But that is very different from the situation here, where Titlow withdrew a plea because he *maintained* his innocence.

But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction testimony that he would have accepted a plea offer is not sufficient, and that objective evidence of the defendant's intent is required. *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991). And the Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *United States* v. *Morris*, 106 Fed. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Maldonato* v. *Archuleta*, 61 Fed. App'x 524, 2003 WL 361303, at *2 (10th Cir. Feb. 20, 2003); *Bachicha* v. *Shanks*, 66 F.3d 338, 1995 WL 539467, at *1 (10th Cir. Aug. 31, 1995); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. 1999).

Although *Lafler* did not directly address this issue, that case did involve objective evidence, including testimony by counsel at an evidentiary hearing that the petitioner was open to pleading guilty, *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 572 (6th Cir. 2010), and communication between the petitioner and the court before trial where the petitioner admitted guilt and expressed a willingness to accept the offer. *Lafler*, 132 S. Ct. at 1383. Titlow offers nothing similar in the way of objective evidence here.

This Court should grant certiorari and reverse the Sixth Circuit. A defendant's post-conviction testimony that he would have accepted a pre-trial plea is nothing more than plea bargainer's remorse. It is wholly

unsurprising that, after having been convicted of second-degree murder, a defendant would suddenly assert his prior willingness to plead. As five circuits have recognized, the courts should require something more: objective evidence that corroborates a defendant's purported intent, as in *Lafler*. This Court in *Lafler* could not have intended such a de minimus path to habeas relief.

This is not a circuit split that should percolate. A Westlaw search reveals that in the short six months since this Court's decision in *Lafler*, lower-court opinions have cited it more than two hundred times. The Court should resolve the fundamental conflict between the circuits regarding whether a defendant's post-conviction comments, standing alone, are sufficient to show prejudice.

III. *Lafler* does not require a state trial court to resentence or to remedy the purported constitutional violation.

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

willingness to accept responsibility for his actions and information discovered post plea. *Id.* at 1389.

In two ways, the panel majority here created an entirely new scheme for fashioning a *Lafler* remedy.

First, the majority ordered the trial court to resentence. App. 25a (if the state reoffers and Titlow accepts the plea, "the state may then exercise its discretion to fashion a sentence"). As Chief Judge Batchelder noted, "*Lafler* . . . does not require the trial court to resentence Titlow. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." App. 31a (Batchelder, J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).

Second, the panel majority directed the state trial court to fashion its sentence so as to remedy "the violation of [Titlow's] constitutional right to the effective assistance of counsel." App. 25a. But "it is not the trial court's responsibility, as the majority states, to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." App. 31a–32a (Batchelder, J., dissenting (citing *Lafler*, 132 S. Ct. at 1389).) In sum, "*Lafler* does not impose such requirements on the trial court, and the majority's statements to the contrary are incorrect." App. 32a (Batchelder, J., dissenting).

These are not small mistakes. The panel majority's analysis impinges on the state trial court's discretion to accept or reject a plea offer. The circumstance under

which a trial court may accept or reject a plea offer is created by state law, and its boundaries should be defined by it. See Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). The Michigan Supreme Court has recognized that loss of judicial autonomy in sentencing is one of the "proper" considerations in exercising the trial court's discretion. *People* v. *Grove*, 455 Mich. 439, 460; 566 N.W.2d 547 (1997). But the panel majority says this discretion is now limited, and that endorsing the original sentence would cause the *Lafler* remedy to be "illusory." App. 24a–25a. *Lafler* has no such warning.

The Sixth Circuit's decision in this case is its first published decision to apply *Lafler*. The panel's decision will be binding on both subsequent panels of the Sixth Circuit and the district courts below it, and the opinion will likely influence other federal courts.

Accordingly, this Court should grant the petition and clarify that (1) a state trial court's remand options are those *Lafler* describes; and (2) a state trial court does not abuse its discretion by allowing its original sentence to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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