No. 12-414

IN THE SUPREME COURT OF THE UNITED STATES

SHERRY L. BURT, Warden, Petitioner

v.

VONLEE NICOLE TITLOW, Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VONLEE NICOLE TITLOW
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QUESTIONS PRESENTED

This case involves a straightforward application of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Lafler v. Cooper*, ____ U.S. ____; 132 S. Ct. 1376 (2012) by the Sixth Circuit to this fact bound case. The questions presented by Petitioners are:

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 of counsel, 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.

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INTRODUCTION

This case involves the granting of a writ of habeas corpus on the basis of ineffective assistance of counsel where a substitute and now permanently disbarred attorney, Frederick Tocca, advised his client to withdraw from a plea involving a charge reduction from first degree murder (with a mandatory life sentence) to a manslaughter charge with an agreed upon sentence of seven (7) to fifteen (15) years.[1] This was not merely a plea offer it was a plea agreement that had been fully effectuated. Prior to plea withdrawal, the state trial court held a plea hearing and in compliance with all Michigan state court rules, Ms. Titlow admitted to the elements of the offense and the state trial court accepted both the charge reduction and sentence plea agreement.

This Petition for Writ of Certiorari marks the fifth time Petitioners have presented the same "substantial questions" seeking to undo the Sixth Circuit's ruling. Petitioners moved for rehearing en banc *and not a single judge voted for hearing en banc.* The rehearing request was returned to the original panel and Petitioners lost there as well. Petitioners moved for a stay while seeking certiorari and the original panel, including the dissenting judge, denied the request for a stay. Petitioners then filed a motion seeking an emergency stay of the mandate with the Honorable Justice Elena Kagan pending the filing of the instant petition for a writ of certiorari, which was also denied. Now, in a fifth attempt, Petitioners seek certiorari based in large part on Judge Batchelder's dissent in the Sixth Circuit opinion on "substantial questions" which she deemed unworthy of a stay.

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1 Petitioners obfuscate the role of Frederick Toca in this case and the concept of professionalism. Respondents claim at footnote 2 that Frederick Toca's acceptance of jewelry and a book deal are "irrelevant" to this appeal. Those very facts are facts which led to his permanent disbarment. Other facts were his representation to clients that he was an expert in criminal law, had an inside track with prosecutors' offices to potential clients, practicing without a license, and mismanagement of retainer fees.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for three reasons. First, the Petitioners identify no conflict between the Sixth Circuit's application of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Lafler v. Cooper*, ____ U.S. ____; 132 S. Ct. 1376 (2012), and the law of any state or federal circuit. Second, even if this Court were inclined to revisit *Lafler v. Cooper*, this case would present a poor vehicle to develop the law as the case below was highly fact-intensive. Third, this case is nothing more than a plea for error correction – and no error occurred. The Sixth Circuit identified the correct legal principles as set forth by this Court, applied those principles to the unique facts of this case and granted relief.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHER FEDERAL CIRCUITS OR STATES

This Court rendered its decision in *Lafler v. Cooper* on March 21, 2012. The Sixth Circuit applied the principles set forth in *Lafler v Cooper* to the case below, *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), on May 22, 2012, thus the ramifications from *Lafler* have only just begun to enter the legal landscape. Petitioners cite no cases, state or federal, holding that under facts akin to this case that a conflict exists in the application of *Lafler v Cooper*.

Although Petitioners claim a conflict exists between this case and the proof required to establish prejudice in other circuits [Pet. App. at 14-18], they do not employ the term "conflict" in its ordinary sense. Ordinarily, when a litigant comes to this Court asserting the existence of a conflict, the conflict refers to a specific point of law on which courts have diverged. In other words, on the same facts, two courts would have reached a different result. Petitioners cite no cases diverging on a similar set of facts.

The facts in this case are unusual and the ruling below will have limited precedential importance. Those case facts are:

a. While represented by one attorney the defendant negotiated a plea agreement reducing a first degree murder charge to manslaughter and a sentencing benefit of avoiding a potential mandatory life sentence to a firm seven (7) to fifteen 15) year sentence.

b. Both the defense and the prosecution presented the plea offer to the state trial court and *each* expressed satisfaction with the plea to the state trial court.

c. A plea hearing was held. The defendant admitted to all of the elements of the plea offense, the prosecution expressed satisfaction with the factual basis for the plea, and the trial court *accepted* the plea of guilty to the negotiated offense and negotiated sentence - thus satisfying the State's interests as set forth in Mich. Ct. Rule 6.302(C)(3).

d. A second attorney meets with the client and without possession of the case file, prior pleadings, discussion with the first attorney, or the transcripts, moves to withdraw an existing negotiated plea because the sentence was too harsh.

Lafler v. Cooper provides a 3-part test for establishing prejudice. Petitioners *concede* that this case meets the requirements that a plea offer would have been presented to the court, that the prosecution would not have withdrawn the plea offer, the trial court would have accepted its terms, and that the conviction or sentence would have been less severe than the punishment ultimately imposed. [Pet. App. at 14-5].

Petitioners make no conflict claim as to these requirements in the Sixth Circuit's determination of these facts in this case. Instead Petitioners object to the Sixth Circuit's findings in the case below and thereby created a conflict with the requirement that the

defendant would have accepted the plea offer. Petitioners refer to a "conflict" in the sense that the court reached an incorrect conclusion in this particular case. Although there was no error, even if one occurred, this Court rarely grants review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. "The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied." *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting).

Certiorari should be denied.

II. THIS HABEAS CORPUS CASE PRESENTS A POOR VEHICLE BY WHICH TO DEVELOP SUBSTANTIVE PRINCIPLES OF CRIMINAL LAW.

Petitioners attempt to gain certiorari by making a narrow, case-specific argument based on misinterpretation of the opinion below that it was not ineffective assistance of counsel for an attorney to honor the client's desire to maintain innocence. [Pet. App. at 10]. They do so from the onset by stating in their 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. [Pet. App. at 3].

Whether or not an attorney is ineffective by honoring a client's protestations of innocence is not an issue in this appeal nor was there *any* such finding by the Sixth Circuit. What the Sixth Circuit found was that when at attorney utterly fails to investigate the facts of a case and then counsels the client to withdraw from an existing plea conviction without any understanding of the strength of the state's case, that attorney's performance was deficient under *Strickland v. Washington*, 466 US 668

(1984). The Sixth Circuit then applied the prejudice test set out in *Lafler v. Cooper* and found counsel's performance prejudicial as well as deficient.

Again, when the decision below identifies the correct rule of law and applies that rule of law to the particular set of facts of the case before it, certiorari is rarely granted. See *Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting); and *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.).

Moreover, Petitioners claim that the Sixth Circuit held that an attorney is ineffective by honoring a client's protestations of innocence is newly made and at odds with its position in all of its pleadings below. For example, in Petitioner's request for a stay made before the Honorable Justice Elena Kagan, Petitioners urged a stay because "*the Sixth Circuit did not even acknowledge a defense attorney's ethical duty to follow his client's wishes on decisions such as whether to plead guilty.*" [Petitioner's Motion to Stay Mandate, at p. 6]. Between Justice Kagan's chambers and the present application the Petitioner's complaint has shifted from a Sixth Circuit failure to consider his client's wishes to a Sixth Circuit ruling allegedly at odds with a minority of circuits.

To the extent that Petitioners want this Court to parse its ruling in *North Carolina v. Alford*, 400 U.S. 25, 33 (1970), holding that a defendant can enter a guilty plea while protesting innocence, with the facts of this case such a request is a non-starter since the attorney's basis for plea withdrawal was not innocence, but disagreement with the sentence bargained for by the prior attorney. The state court record of the plea withdrawal transcript makes it abundantly clear that it was the sentence and the sentence alone that was the reason for plea withdrawal. There is no claim of innocence in the plea

withdrawal record and dissatisfaction with the sentence was the only reason for granting defense counsel's motion to withdraw the guilty plea by the trial judge.

Certiorari should be denied.

III. THE DECISION BELOW CORRECTLY CONCLUDED THAT MS. TITLOW RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND PROVIDED A CASE SPECIFIC REMEDY FOR THE SIXTH AMENDMENT VIOLATION.

The Petitioner's belief that the Sixth Circuit decision somehow ties the hands of state court judges is mistaken. In *Lafler v Cooper* the plea had been rejected *prior* to being submitted to the judge for acceptance or rejection per Mich. Ct. Rule 6.302(C)(3). 132 S. Ct. at 1391. Unlike *Lafler v. Cooper*, Ms. Titlow had received a plea offer, accepted that plea offer, appeared in trial court where the state trial court judge exercised her discretion under Mich. Ct. Rule 6.302(C)(3) and *accepted* the terms of the plea agreement. The Sixth Circuit remedy has *not* negated the state trial court's discretion to reject the plea offer; it recognizes that the discretion has been exercised. Unlike *Lafler v. Cooper* in this case the trial court judge has already exercised its discretion under Rule 6.302(C)(3) and found the charge and sentence acceptable.

In *Lafler v. Cooper* the Court reiterated that "Sixth Amendment remedies should be 'tailored to injury suffered from the constitutional violation'" and "must neutralize the taint' of a constitutional violation[.]" [(Quoting *United States v. Morrison*, 449 U.S. 361, 364-365 (1981)]. "The Sixth Amendment mandates that the state bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). The Sixth Circuit opinion does exactly that and no more.

Certiorari should be denied.

CONCLUSION

WHEREFORE, Ms. Titlow respectfully requests that the Petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

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Dated: October 23, 2012.