No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ROBERT L. ROSE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

ANTHONY R. GALLAGHER
Federal Defender
***DAVID F. NESS**
Assistant Federal Defender
Federal Defenders of Montana
104 2nd St. South, Suite 301
Great Falls, MT 59401
(406) 449-8381
***Counsel for Petitioner**

SUBMITTED: September 17, 2018

QUESTION PRESENTED

Five years ago, this Court granted certiorari in a case that raised the very issue presented in this petition – what is the proper remedy when a defendant's lawyer fails to inform her client of, or offers deficient advice as to whether to accept, a favorable plea offer? *Burt v. Titlow*, 571 U.S. 12, 24 n.3 (2013). *Titlow* was ultimately resolved on different grounds and the Court did not find it necessary to reach this issue. Over the course of the last five years, courts have struggled with this question and have ordered different remedies for similarly situated defendants who have been injured by their attorneys' negligence during plea negotiations. *Compare Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), *rev'd on other grounds*, 571 U.S. 12 (2013)(remanding with instructions to fashion a sentence that remedied the violation of defendant's constitutional rights) and *People v. Hudson* 95 N.E.3d 1148 (Ill. App. Ct. 2017)("trial court had discretion to reject details of the plea, but that discretion was limited by the requirement that the remedy had to neutralize the taint of the constitutional violation") with *State v. Rose*, 406 P.3d 443, 450 (Mont. 2017)(noting that federal district court's remand "invited" the state trial court to accept the reoffered plea or reject the plea and thereby deny the defendant of any remedy). This factually simple case presents an excellent vehicle for providing guidance on this issue. The questions presented in this case are:

> Whether this Court should grant certiorari to clarify the appropriate remedy for ineffective assistance during plea negotiations.
>
> Whether the remand in this case, which effectively denied the petitioner of any remedy for his Sixth Amendment injury, contravenes this Court's decisions in *United States v. Morrison*, 449 U.S. 361 (1981), and *Lafler v. Cooper*, 566 U.S. 156 (2012).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

State Cases

State Statutes

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT L. ROSE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Robert L. Rose, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, (App., *infra*, 1a-4a), is unpublished but can be accessed at *Rose v. Kirkegard*, 720 Fed.Appx. 406 (9th Cir. 2018), *reh'g denied* (2018). The district court's rulings are also unpublished. They are, however, included in the appendix. The Magistrate's findings and recommendation (App., *infra*, at 1b-24b) is also available on Westlaw. *See*, *Rose v. Kirkegard*, 2016 WL 11430014 (D. Mont. 2016). The district court's order adopting the Magistrate's findings and recommendation (App., *infra*, at 1c-7c) can be accessed at *Rose v. Kirkegard*, 2016 WL 3554962 (D. Mont. 2016).

JURISDICTION AND TIMELINESS OF THE PETITION

The opinion of the court of appeals was filed on April 24, 2018. (App., *infra*, 1a-3a). Rehearing was denied on June 19, 2018. (App., *infra*, 4a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

PRELIMINARY STATEMENT

In a pair of cases decided in 2012, *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), this Court held that defendants have a right to effective assistance of counsel during the plea bargaining process. In accordance with these two cases, the Petitioner, Robert L. Rose, established that his attorney rendered defective performance when she failed to apprise him of a plea offer. Rose also established prejudice in that he showed a "reasonable probability" that: (1) the State's plea offer would have been presented to the court (*i.e.*, that he would have accepted the offer and the prosecution would not have withdrawn it in light of intervening circumstances); (2) that the state trial court would have accepted its terms; and (3) that, under the offer's terms, his convictions and sentence would have been less severe than the punishment he ultimately received. *Lafler*, 566 U.S. at 164; *see also Strickland v. Washington*, 466 U.S. 668 (1984).

As a remedy, the district court ordered the State to "reoffer the equivalent terms of the plea offer." It also, however, granted the state trial court the discretion to reject the re-offered plea

agreement and thereby deprive Rose of any remedy for his constitutional injury. In accordance with the federal court's instructions on remand, the state trial court refused to accept Rose's guilty plea based on its "doubt that Rose would have accepted the plea agreement" when it was conveyed to his trial counsel. As a result, Rose is serving a term of imprisonment that is significantly harsher than that recommended by the proposed agreement.

This factually simple case presents an excellent opportunity for the Court to provide guidance on an issue it left percolating in *Lafler* – that is, what is the proper remedy when a defendant is injured by his attorney's negligent failure to convey a plea offer. The Ninth Circuit held, in contravention to its own precedent, *see, Johnson v. Uribe*, 700 F.3d 413, 425 (9th Cir. 2012), as well as that of other courts, *see, e.g., Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), *rev'd on other grounds*, 571 U.S. 12 (2013), that defendants are entitled to no remedy other than a re-offered plea agreement. This holding not only creates a conflict within the circuits, it also conflicts with this Court's admonition in *Lafler* that a proper remedy must "neutralize the taint" and "be 'tailored to the injury suffered from the constitutional violation.'" *Lafler*, 566 U.S. at 170 (citing *United States v. Morrison*, 449 U.S. 361, 364-65 (1981)).

STATEMENT OF THE CASE

A. Factual Background

Rose was convicted in June of 2003 of aggravated kidnaping and two counts of assault. His convictions arose out of an allegation that he kidnaped a friend and co-worker, Jonathan Davies, at knife point, badly cutting Davies when he tried to escape. After he was arrested, Rose found a can of pepper spray in the back of a patrol car. When he arrived at the jail, he sprayed a law enforcement officer with the pepper spray. *State v. Rose*, 202 P.3d 749, 753 (Mont. 2009)(*Rose I*).

B. Proceedings in State Court

Rose was charged with aggravated kidnaping, assault with a weapon, and assault on a peace officer. A public defender, Larry Mansch, was appointed as his lawyer.

Five months later, in early June of 2002, the prosecutor, George Corn, offered to reduce the aggravated kidnaping charge to simple kidnaping. In return, he wanted Rose to plead guilty to simple kidnaping, assault with a dangerous weapon, and assault on a peace officer. Rose was inclined to accept Corn's offer but he told Mansch that he wanted to see it in writing and speak with his family and pastor before he decided to accept it. (Findings & Recommendation, Appendix, *supra*, at 2b-3b, 11).

Mansch met with Rose a week later. A hearing was set for the next day and Mansch asked Rose if he was prepared to plead guilty. Rose told Mansch that he could not plead guilty without seeing "something in writing" and without understanding "the legalities" and consequences of his plea. The next day, Mansch told the court that Rose had not yet decided whether he would accept the State's plea offer. Rose informed the court that he wasn't "totally turning down anything that Mr. Corn offered" but he needed a little more time to confer with his family. (Hearing Trans., ECF doc. 8-12). At the conclusion of the hearing, Mansch withdrew as Rose's counsel.

Several weeks later, another public defender, Kelli Sather, was appointed to represent Rose. Following her appointment, Rose told Sather that he was interested in a plea agreement and asked her to check on Corn's offer. (Sather Affidavit, ECF doc. 8-81 at 1).

After several continuances, Rose's trial was set for June 2, 2003. On May 21, Corn faxed a written plea offer to Sather. In the letter transmitting his offer, Corn offered to dismiss the aggravated kidnaping charge and the felony assault on a peace officer charge if Rose agreed to

plead "open" to assault with a weapon and misdemeanor assault. Corn proposed that the two sentences run consecutively to one another. Due to his criminal history, Rose was subject to an enhancement under Montana's persistent felony offender law. *See*, Mont. Code Ann. § 46-18-501 *et. seq*.[1] As part of his plea offer, Corn agreed to cap his recommendation with respect to the persistent felony offender enhancement at ten years with five years suspended with that sentence running consecutive to the assault with a weapon charge. *Rose v. State*, 304 P.3d 387, 390 (Mont. 2013)(*Rose II*). Under the terms of Corn's offer, Rose could enter a "no contest plea" to the charges and was free to make his own sentencing recommendation. (Findings & Recommendation, Appendix, *supra*, at 3b). With less than two weeks before trial, Corn told Sather that his offer would expire at close of business on May 23. *Rose II*, 304 P.3d at 390.

Under Corn's proposal, Rose faced, in the best case scenario, a sentence of 1.25 years before parole eligibility. *Id.* With credit for time served, he would have already served this sentence. In the worst case scenario, he would be parole eligible in 6.25 years less any time served. *Id.* If Rose rejected the plea agreement and was convicted of the original charges, he could be sentenced to life or 130 years. (Corn Letter, ECF doc. 8-82 at 1).

Without advising Rose of Corn's offer, Sather made a counteroffer. *Rose II*, 304 P.3d at 390. According to Corn, Sather's counteroffer was for "a much lesser sentence." (Corn depo., ECF doc. 57-1 at 24). He also recalled that on the day Sather made her counteroffer, she moved for sanctions. As a result, Corn concluded that continued negotiation was fruitless. He believed that he did all he "could to resolve the case without trial" and was not willing to offer a lower sentence, so he withdrew his offer. (Corn depo., ECF doc. 57-1 at 24-25). Corn also testified,

[1] When Rose was sentenced, a court could impose a persistent felony offender sentence of up to 100 years that ran separately and in addition to the sentences for the underlying offenses.

however, that if Sather had approached him prior to the May 23 deadline, he would of considered reopening his offer. (Findings & Recommendation, Appendix, *supra*, at 8b; Corn depo, ECF doc. 57-1 at 29).

Sather did not speak to Rose about Corn's offer at any time during the offer window. Nor did she make any attempt to reopen plea negotiations prior to Rose's trial. (Findings & Recommendation, Appendix, *supra*, at 4b). If he had been informed of Corn's plea offer, Rose would have accepted it. (Findings & Recommendation, Appendix, *supra*, at 5b, 9b).

At trial, Rose was convicted of all three felony charges. He was subsequently sentenced to a term of 100 years with 20 years suspended. His convictions and sentence were affirmed on direct appeal. *State v. Rose*, 202 P.3d 749 (Mont. 2009)(*Rose I*).

C. State Post-Conviction Proceedings

Rose filed a timely petition for post-conviction relief alleging, among other claims, that Sather was ineffective in failing to inform him about Corn's plea offer. The trial court denied post-conviction relief without a hearing and without affording Rose an opportunity to develop his ineffective assistance claim. Its order denying post-conviction relief was affirmed by the Montana Supreme Court. *Rose v. State*, 304 P.3d 387 (Mont. 2013)(*Rose II*).

D. Federal Habeas Proceedings

Rose's 28 U.S.C. § 2254 petition was referred to Magistrate Judge Jeremiah C. Lynch. (Order, ECF doc. 21). After reviewing the state court record and giving the State an opportunity to respond to Rose's § 2254 petition, Magistrate Lynch determined that the adjudication of his ineffective assistance claim was (1) based on an unreasonable application of *Strickland v. Washington* and (2) based on an unreasonable determination of the facts. *See*, 28 U.S.C. § 2254(d). (Findings & Recommendation, ECF doc. 27 at 36-37). In light of this determination, he concluded

that he was obligated to conduct a *de novo* review of the claim and granted the parties leave to depose Rose, Sather, and Corn.

After these depositions were taken, the parties moved for summary judgment. Magistrate Lynch recommended that summary judgment be granted in favor of Rose. With regard to *Strickland*'s first prong, he concluded that Sather performed ineffectively when she "made a counter-offer without apprising Rose of the terms of the original May 21, 2003, offer." (Findings & Recommendation, Appendix, *supra*, at 9b). With regard to *Strickland*'s prejudice prong, Magistrate Lynch concluded that Rose demonstrated a reasonable probability that (1) he would have accepted Corn's plea offer and (2) that his plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. (Findings & Recommendation, Appendix, *supra*, at 9b-10b)(citing, *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012)).

Having found that Rose established both prongs of *Strickland*, Magistrate Lynch recommended that his ineffective assistance claim be granted. The State filed objections to his findings and recommendation but their objections were overruled by District Court Judge Donald W. Molloy. In doing so, Judge Molloy noted that Sather had a "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 132 S.Ct. at 1408. In failing to "timely communicate Corn's formal offer to Rose," she failed to comply with this obligation and her performance fell below an "objective standard of reasonableness." (Order, Appendix, *supra*, at 2c-3c). In overruling the State's prejudice argument, Judge Molloy found that Rose's testimony that he "was interested in plea bargaining and that he would have accepted the plea in light of the disparity between the sentence offered and the sentence received . . . demonstrated a reasonable probability that he would have accepted the plea offer." (Order, Appendix, *supra*, at 3c).

Rose objected to Magistrate Lynch's recommendation in one respect. After determining that Rose was entitled to relief on his ineffective assistance claim, Magistrate Lynch recommended that his case be sent back to state court "to allow the prosecution to offer the equivalent terms of the agreement proposed by Corn on May 21, 2003, and for the trial court to "exercise discretion in deciding whether to vacate [Rose's] convictions from trial and accept [his] plea or leave [his] convictions [and sentence] undisturbed." (Findings & Recommendation, Appendix, *supra*, at 14b). Rose objected to Magistrate Lynch's proposal because he feared that it would afford the trial court a way to deny a remedy for his ineffective assistance claim.

Rose's objection was overruled. In Judge Molloy's view, the state trial court was free to deny Rose a remedy for his lawyer's incompetence. As he put, "*Lafler* plainly provides that when inadequate assistance causes nonacceptance of a plea offer and further proceedings led to a less favorable outcome, the conviction is to be left undisturbed if the trial court decides to reject the re-offered plea agreement." (Order, Appendix, *supra*, at 5c).

E. <u>Proceedings on Remand to State Court</u>

After Judge Molloy's order was filed, the State offered Rose a plea agreement that was similar to that conveyed in Corn's May 21, 2003, letter. Rose signed the plea agreement and appeared in state district court for a change of plea hearing before the same judge who sat on Rose's criminal and post-conviction proceedings.

At the hearing, the trial court judge refused to accept Rose's guilty plea. In doing so, he expressed his "sincere doubts" that Rose would have accepted the plea agreement when it was offered in 2003. Two weeks later, the judge filed a written order reaffirming the reasoning he expressed in open court. (Order, Appendix, *supra* at 1d-3d). Rose appealed to the Montana Supreme Court, but it affirmed. *State v. Rose*, 406 P.3d 443 (Mont. 2017)(*Rose III*). In doing so,

it concluded that "the express terms of the remand order which state '[t]he state trial court can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed,' allowed the [trial court] discretion in accepting or rejecting the reoffered plea, provided the [trial court's] discretion was exercised in accordance with *Lafler*." *Rose III*, 406 P.3d at 449.

F. Proceedings on Appeal to the Ninth Circuit

Rose filed an appeal with the Ninth Circuit. On appeal, he argued that the district court's remedy failed to neutralize the taint of his Sixth Amendment injury. He maintained that the remedy afforded by the district court – which granted the state trial court carte blanche discretion in determining whether to accept the re-offered plea agreement – is at odds with this Court's decisions in *Lafler*, *Frye*, and *Morrison*, as well as precedent from the Ninth and Sixth Circuits. The panel hearing his appeal disagreed, holding:

> Here the district court determined that Rose's counsel was constitutionally ineffective in failing to inform him of a favorable plea offer. The district court required the government to "reoffer the equivalent terms of the plea agreement proposed on May 21, 2003," and directed that the "state trial court can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." This remedy is in accord with *Lafler* and within the district court's "broad discretion in conditioning a judgment granting habeas relief."

(Memorandum Opinion, Appendix, *supra*, at 2a).

Rose petitioned for rehearing and rehearing *en banc*. His petition was denied on June 19, 2018. (Order, Appendix, *supra*, at 4a).

REASONS FOR GRANTING THE PETITION

In 2013, this Court granted certiorari in a case that raised the very issue presented here – that is, what is the proper remedy when a lawyer fails to apprise her client of, or offers erroneous

advice as to whether to accept, a favorable plea offer? See, Burt v. Titlow, 571 U.S. 12, 24 n.3 (2013). The Court ultimately decided *Titlow* on other grounds and did not reach this question.

This factually uncomplicated case provides an excellent vehicle for this Court to provide guidance on the issue left undecided in *Titlow*. The Court should grant certiorari to clarify the proper boundaries of discretion afforded courts in fashioning a remedy under *Lafler*. It should also grant certiorari because the Ninth Circuit's holding, which effectively deprives Rose of any remedy for his constitutional injury, is at odds with this Court's decisions in *Morrison* and *Lafler*.

A. This Court should grant certiorari to clarify the appropriate remedy for ineffective assistance during plea negotiations.

In *Missouri v. Frye*, 566 U.S. 134 (2012), this Court held that the Sixth Amendment right to effective assistance of counsel applies to the negotiation and consideration of plea offers that lapse or are rejected. In *Frye*, defense counsel failed to inform the defendant of a plea offer and after the offer lapsed, the defendant pled guilty, but on more severe terms. In articulating the standard for prejudice the defendant needed to meet, the Court held that in addition to proving that there is a reasonable probability that the petitioner would have accepted the earlier plea offer, the defendant had to show that "the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it, if they had that discretion under state law." *Id.* at 147. Because the Court remanded the case on the prejudice prong of the test, it did not reach the issue of what remedy should be imposed in such circumstances.

Lafler v. Cooper, 566 U.S. 156 (2012), which was decided on the same day as *Frye*, involved the rejection of a favorable plea offer as a result of deficient advice of defense counsel. After trial, the defendant received a significantly higher sentence, that included mandatory prison time. In *Lafler*, the Court specifically addressed the appropriate remedy that should be applied to cases involving lapsed or rejected plea offers. "Sixth Amendment remedies should be tailored to

the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests . . . Thus, a remedy must 'neutralize the taint of a constitutional violation . . . while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the state properly invested in the criminal prosecution." *Id.* at 170.

In *Lafler*, the Court observed that the "specific injury" suffered by defendants who miss out on a plea offer as a result of their lawyer's negligence and then receive a greater sentence comes in at least two forms: (1) where the defendant would have received a lesser sentence on the same charges he was convicted of after trial; and (2) where the petitioner would have pleaded guilty to lesser charges and/or avoided a mandatory minimum sentence. *Lafler,* 566 U.S. at 170-71.

As to the first form of injury – where the defendant is convicted of the same charges but would have received a lessor 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, he received at trial, or something in between." *Lafler*, 566 U.S. at 171. As to the second form of injury, which is of the type involved in this case, the Court recognized that resentencing alone would not fully redress the injury. In that case, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

The Court did not elaborate on how a trial court should weigh these factors or the boundaries of proper discretion, but it did offer two relevant considerations: (1) the defendant's willingness or unwillingness to accept responsibility for his actions; and (2) information that may have been available to the trial court after the plea but prior to sentencing. As to how these

considerations are to be weighed was not specified. The Court simply noted that "[p]rinciples elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the judge's discretion." *Id.*.

In the six years since *Lafler* and *Frye* have been decided, courts have struggled to articulate an appropriate remedy in cases involving ineffective assistance during plea bargaining. A quick Westlaw search evidences the need for further guidance on this issue.[2] A comparison of the result in Rose's case with that of other similarly situated defendants exemplifies this need. Consider just a few of the lower-court opinions issued since this Court has decided *Lafler*:

- In *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), *rev'd on other grounds*, 571 U.S. 12 (2013), the defendant received ineffective assistance of counsel when her lawyer advised her to withdraw from a plea agreement. In remanding her case to state court, the Sixth Circuit expressed concern "that the remedy articulated in *Lafler* could become illusory if the state court chose to merely reinstate [her] current sentence." In order to avoid this possibility, the court instructed the state court to fashion a sentence "that both remedie[d] the violation of her constitutional rights . . . and takes into account" the interests of the state. *Id.* at 592-93. In order to insure that the defendant was not deprived of a remedy, the court invited her to return to federal court if she received "a sentence greater than the initial plea agreement." *Id.* at 592.

- In *People v. Hudson*, 95 N.E.3d 1148 (Ill. App. Ct. 2017), the defendant was convicted of armed robbery and unlawful restraint, and received a mandatory life sentence. After exhausting his state remedies, the defendant filed a 28 U.S.C. § 2255 motion. The federal habeas court determined that his lawyer rendered ineffective assistance by leading him to reject a plea offer for a twenty year sentence on a charge that did not carry a mandatory sentence. In remanding the case to state court, the federal court ordered the state to reoffer the twenty year plea deal. Defendant accepted the offer but the trial court rejected the deal and reimposed the life sentence. The Illinois Appellate Court reversed the trial judge's ruling. Following the lead of the federal habeas court, the Illinois Appellate Court held that the "trial court had discretion to reject the details of the plea, but that discretion was limited by the requirement that the remedy had to neutralize the taint of the constitutional violation." Finding that the trial court's "discretion did not extend to rejecting a plea to a

[2] Although courts have struggled to come up with an acceptable remedy after finding counsel ineffective under *Lafler* or *Frye*, the undersigned has been unable to find any defendant, except for Rose, who has been denied any remedy whatsoever.

charge that did not trigger a mandatory life sentence," the court directed the trial court to accept the plea to the charge that carried a twenty year sentence. *Hudson*, 95 N.E.3d at 1152-53.

- In *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012), a post-*Lafler* decision, the defendant received ineffective assistance of counsel due to his attorney's failure to advise him that he was pleading to an illegal sentence. As a remedy, the district court ordered the state to resentence Johnson to a lawful sentence. On appeal, this Court reversed the district court's remedy, holding that trial counsel's ineffective performance "caused the entire plea negotiation process between Johnson and the prosecution to be conducted based on an erroneous sentencing calculation, weighted against Johnson." *Johnson*, 700 F.3d at 426. In order to afford Johnson an appropriate remedy, which would place him "back in the position he would have been in if the Sixth Amendment violation never occurred," the Court ordered a remedy that returned Johnson to the pre-plea stage of the proceedings, where he could "'bargain' from the position he would have been in had his counsel correctly calculated the legal maximum sentence and valid sentencing enhancements." *Id.* at 427.

- In *Ebron v. Commissioner of Correction*, 53 A.3d 413 (Conn. Sup. Ct. 2012), the Connecticut Supreme Court held that the proper remedy for a *Lafler/Frye* violation might include giving the defendant "the opportunity to withdraw his original plea and to be tried."In *Rodriguez v. State*, 470 S.W.2d 823, 825 (Tex. Crim. App. 2015), the court rejected the re-offered plea and imposed a sentence that was higher than the re-offered plea but lower than the defendant's previous sentence.

- In *Jones v. United States*, 2012 WL 5382950 (6th Cir. Nov. 5, 2012), the Sixth Circuit not only ordered the prosecutor to re-offer the rejected plea agreement (or release the defendant from custody), it ordered the district court to impose the plea sentence to "remedy" the violation of the defendant's constitutional right.

As these cases illustrate, courts have come up with different remedies for similarly situated defendants who have been injured by their attorneys' malfeasance during plea negotiation. Some have ordered what amounts to specific performance of the lapsed plea agreement; others have directed the trial court to accept the lapsed plea agreement while granting leeway on sentencing; at least one has directed that the defendant be placed back in time before the constitutional injury occurred. The Court should grant certiorari to provide the courts with an articulable, uniform standard that will prevent disparate treatment of similarly-situated defendants.

B. This Court should grant certiorari because the Ninth Circuit's holding, which effectively deprives Rose of any remedy for his constitutional injury, is at odds with this Court's decisions in *Morrison* and *Lafler.*

This Court has repeatedly held that Sixth Amendment remedies "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Lafler,* 566 U.S. at 170 (citing *Morrison,* 449 at 364 (1981). There is no one-size-fits-all remedy; instead courts should devise a remedy that will "'neutralize the taint' of [the] constitutional violation." *Morrison,* 449 U.S. at 365. In determining an appropriate remedy it is necessary for courts to keep two principles in mind. First, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Second, although courts should try to place defendants back into the position they occupied prior to the Sixth Amendment violation, *see, Lalfer,* 566 U.S. at 172, they must strive to ensure that their chosen remedy does not "grant a windfall to the defendant or needlessly squander the considerable resources the state properly invested in the criminal prosecution." *Lalfer,* 566 U.S. at 170 (citing *United States v. Mechanik*, 475 U.S 66, 72 (1986)).

Contrary to the decisions in *Morrison* and *Johnson*, Rose was deprived of any remedy for his Sixth Amendment violation. The remedy afforded by the district court – and upheld by the Ninth Circuit – allowed the State to avoid any of the risks and repercussions associated with his ineffective assistance claim. In trying to ensure that Rose did not receive a "windfall" – a somewhat misplaced concern in light of the fact that Rose has served well over fifteen years in prison, almost three times that which he would have served under the lapsed plea agreement – the district court and the Ninth Circuit elevated the State's interests above Rose's interest in vindicating the denial of his Sixth Amendment rights.

In light of its reliance on *Morrison* and *Kimmelman*, it is inconceivable that the *Lafler* majority intended such a result. A close reading of *Lafler* suggests that a court's selection of an appropriate remedy should center on whether there are circumstances that would make it unjust to accept a re-offered plea agreement. *Lafler* approvingly cited *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which supports using overall fairness as a guide and being aware of awarding a "windfall" to a defendant. *Lafler,* 566 U.S. at 167-68. In *Fretwell*, a jury sentenced the defendant to death after relying on pecuniary gain motive for the murder as an aggravating factor favoring the death penalty. *Fretwell*, 506 U.S. at 366. Fretwell argued that his attorney was ineffective for failing to invoke an Eighth Circuit case called *Collins v. Lockahart*, which held that capital juries cannot consider pecuniary gain as both an element of the underlying crime (felony murder) and also during capital sentencing. *Fretwell*, 506 U.S. at 367. However, the twist was that the Eighth Circuit had, by the time of the federal habeas litigation, overruled *Collins*. *Id.* at 368.

This Court rejected habeas relief, explaining that although Fretwell would have received a different sentence but for his counsel's error, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369. Fretwell's original sentence was not fundamentally unfair because the decision that would have been a basis for relief (*Collins*) had since been overruled. Put another way, "there are . . . situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'"*Lafler*, 566 U.S. at 167.

It is true that *Fretwell*'s analysis involved the prejudice component of an ineffective assistance claim, so it did come to the Court in a different posture. But, the underlying principles described in *Fretwell* nonetheless hold relevance with respect to the selection of an appropriate remedy under *Lafler*. A remedy must "'neutralize the taint' of a constitutional violation . . . while

at the same time not grant a windfall to the defendant," keeping in mind the overall objective of fairness.

The "remedy" afforded Rose was, in reality, "no remedy at all." *Lafler*, 566 U.S. at 184 (Scalia, dissenting). The federal habeas court determined that his Sixth Amendment rights had been violated because it accepted his assertions that: (1) his lawyer failed to apprise him of a favorable plea offer and (2) that he would have accepted the offer. In its order on remand, however, the federal court invited the state trial judge to second guess its ruling. Happy to oblige, the state trial judge denied relief based on his belief that Rose would not have accepted the plea agreement. To deny a defendant relief in this manner is unfair, unjust, and in contravention to the holdings of *Morrison* and *Lafler*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID F. NESS
Assistant Federal Defender
Counsel of Record

September 17, 2018