

# A P P E N D I X

## **APPENDIX**

- A-1** Sixth Circuit Order Denying Rehearing En Banc, *Maslonka v. Hoffbauer*, 17-1835 (6<sup>th</sup> Cir. September 19, 2018)
- A-2** Sixth Circuit Opinion Reversing Grant of Conditional Writ of Habeas Corpus, *Maslonka v. Hoffbauer*, 17-1835 (6<sup>th</sup> Cir. August 14, 2018)
- A-3** District Court Order Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus, *Maslonaka v. Hoffbauer*, 13-cv-14110 (E.D.Mich June 21, 2017)

A-1

No. 17-1834  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Sep 19, 2018  
DEBORAH S. HUNT, Clerk

NICHOLAS MASLONKA,

Petitioner-Appellee,

v.

BONITA J. HOFFNER, WARDEN,

Respondent-Appellant.

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O R D E R

**BEFORE:** BATCHELDER, McKEAGUE, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.\* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**



Deborah S. Hunt, Clerk

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\*Judge Larsen recused herself from participation in this ruling.

A-2

RECOMMENDED FOR FULL-TEXT PUBLICATION  
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0167p.06

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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NICHOLAS MASLONKA,

*Petitioner-Appellee,*

*v.*

No. 17-1834

BONITA J. HOFFNER, Warden,

*Respondent-Appellant.*

Appeal from the United States District Court  
for the Eastern District of Michigan at Detroit.  
No. 2:13-cv-14110—Arthur J. Tarnow, District Judge.

Argued: April 26, 2018

Decided and Filed: August 14, 2018

Before: BATCHELDER, McKEAGUE, and GRIFFIN, Circuit Judges.

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**COUNSEL**

**ARGUED:** Scott R. Shimkus, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellant. Jessica Lefort, FEDERAL DEFENDER OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Scott R. Shimkus, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellant. Jessica Lefort, Andrew N. Wise, FEDERAL DEFENDER OFFICE, Detroit, Michigan, for Appellee.

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**OPINION**

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ALICE M. BATCHELDER, Circuit Judge. After Nicholas Maslonka robbed two banks to obtain money to support his drug habit, he pleaded guilty in Michigan state court to armed robbery as a third habitual offender. During his plea-negotiation process, in an attempt to secure

a better plea deal, Maslonka began to cooperate with federal authorities in a separate federal investigation. But when Maslonka did not cooperate to the full satisfaction of the federal authorities, the state prosecutor withdrew the favorable plea offer. Maslonka blames this on his state-appointed trial counsel, and brought this habeas corpus petition alleging that, among other things, his trial counsel rendered constitutionally ineffective assistance during the state plea negotiations. The district court agreed and granted Maslonka's petition. But we disagree. Even assuming Maslonka's trial counsel was constitutionally deficient, Maslonka has not shown that this deficiency prejudiced him. We therefore **REVERSE** and **REMAND** for the district court to address only Maslonka's remaining ineffective-assistance-of-appellate-counsel claims.

## I.

Nicholas Maslonka is a Michigan state prisoner currently serving a sentence of fifteen to twenty-five years' imprisonment for armed robbery under Michigan Compiled Laws § 750.529 as a third habitual offender. This conviction arose from a December, 2008, armed bank robbery in which Maslonka, a heavy heroin user at the time, entered a bank in St. Clair Shores, MI, and told a teller that he had a gun and needed money. After the teller gave him money, Maslonka left. Maslonka was arrested and initially charged with armed robbery as a fourth habitual offender.

Days later, and before the state had even appointed an attorney for Maslonka, a state detective approached Maslonka about cooperating with federal Drug Enforcement Agency ("DEA") agents in a federal drug-trafficking investigation. *Maslonka v. Hoffner*, No. 2:13-CV-14110, 2017 WL 2666103, at \*1 (E.D. Mich. June 21, 2017). In exchange, Maslonka would receive some consideration from the state. Although the details of this consideration were initially fuzzy, the state prosecutor eventually made his "best offer" to Maslonka in open court: in exchange for Maslonka's "very best of cooperation," the state would dismiss Maslonka's fourth-habitual-offender charge outright, resulting in a state guidelines range of 81 to 135 months' imprisonment. *See id.* at \*2. Privately, the state prosecutor told Maslonka's counsel that he would recommend a prison sentence at the low end of the state guidelines range. The state prosecutor could not offer any formal sentencing agreement, however, because the state judge overseeing Maslonka's case always adamantly refused to enter into any sentencing

agreements with parties. Maslonka's "very best of cooperation" would have to include, at minimum, testifying before a federal grand jury in the federal drug trafficking case, if not also at a subsequent federal trial. *See id.* Maslonka understood this and agreed to testify before the grand jury. At no point, however, did either the federal or state authorities provide written details of the cooperation they expected from Maslonka, and at no point did Maslonka's counsel ask either state or federal authorities for a written cooperation agreement. *See id.* at \*11. Maslonka's counsel apparently also never asked for Maslonka's cooperation to be limited to providing information about only some individuals, never sought additional details about what federal or state authorities expected from Maslonka beyond his grand jury testimony, and did not advise Maslonka about what was expected from him other than telling Maslonka to "cooperate to the best of his ability." *See id.*; *id.* at \*9.

As the state proceedings progressed, Maslonka had several meetings with DEA agents, and eventually with an Assistant United States Attorney ("AUSA") or two. The first of these meetings happened days after Maslonka's arrest, and before Maslonka first met with his state-appointed counsel. *See id.* at \*1. Even after Maslonka had been appointed counsel, the federal authorities came to the jail on multiple occasions without giving Maslonka or his counsel notice. But Maslonka claims that during his third meeting with federal authorities they told him that his counsel had given them permission to proceed without her. Regardless, Maslonka's counsel did not attend any of these meetings between Maslonka and the federal authorities. *See id.* at \*6.

When it came time for Maslonka to testify before the federal grand jury, his counsel was once again not present. *See id.* at \*3. An AUSA and the DEA agents met with Maslonka for a preparation session immediately before his scheduled testimony. *See id.* Maslonka and the federal authorities would later tell different stories about what happened during that preparation session. Maslonka claimed that the DEA agents began to ask him questions about his close friends and family and that he refused to provide any information about them to the federal authorities because he believed that his agreement to cooperate required only that he testify about three particular drug traffickers. According to Maslonka, when he would not provide this information about his close friends and family, the federal authorities became angry and did not allow Maslonka to testify before the grand jury. According to the federal authorities, Maslonka

“changed his story,” “became very belligerent” and “hostile,” and did not want to testify before the grand jury. In any event, Maslonka ultimately did not testify before the grand jury. *See id.*

When the state prosecutor learned that Maslonka had not cooperated to the satisfaction of the federal authorities, he rescinded his offer to dismiss Maslonka’s fourth-habitual-offender charge. *See id.* Instead, the state prosecutor made an offer that he had planned to make before he learned about Maslonka’s potential federal cooperation. Under this less-favorable offer, the state prosecutor would reduce Maslonka’s habitual-offender charge from a fourth-habitual-offender charge to a third-habitual-offender charge.

Maslonka pleaded guilty to armed robbery under Michigan Compiled Laws § 750.529 as a third habitual offender. The resulting estimated state guidelines range was 108 to 270 months’ imprisonment. While entering his plea, Maslonka testified that he was satisfied with his counsel’s advice and services. Maslonka later testified that during this court appearance, his counsel had a sidebar conversation with the judge about his attempted cooperation, but that the judge said that Maslonka would “g[e]t nothing for [his] cooperation.”

At sentencing, the state asked that Maslonka’s sentence be “as lengthy as possible.” Maslonka’s counsel asked the judge to “go below the guidelines” because Maslonka had “hurt no one but himself” and argued that his crimes were merely “crimes against property” to obtain drugs to satisfy his addiction. Maslonka’s counsel did not, however, ask the judge for a downward variance based on Maslonka’s attempted cooperation, even though Maslonka claims she promised to do so.

Maslonka unsuccessfully challenged his plea and sentence through both direct appeals and state collateral proceedings. *See id.* Maslonka first raised his ineffective-assistance-of-trial-counsel claims in his second motion for relief from judgment. *See id.* at \*5. The Michigan Court of Appeals dismissed this as an impermissible successive motion for relief from judgment. *See id.* at \*3.

Maslonka then filed a pro se 28 U.S.C. § 2254 habeas corpus petition in the district court. *See id.* Altogether, Maslonka’s petition and supporting affidavit, memorandum, and exhibits spanned over 1300 pages. The district court ordered the state to file a response, and the state

filed an answer in which it attempted to summarize and categorize Maslonka’s claims. Three years later, the district court appointed counsel to represent Maslonka in this habeas proceeding, and each side submitted supplemental briefs. *See id.* The district court then ordered an evidentiary hearing on Maslonka’s ineffective-assistance-of-trial-counsel claims, in which Maslonka, his counsel, the state prosecutor, two DEA agents, and an AUSA testified. *See id.* at \*3–4. Afterwards, the parties filed supplemental briefs. *See id.* The district court ultimately granted Maslonka’s habeas corpus petition, and the state appealed.

## II.

### A.

The state first argues that Maslonka procedurally defaulted his ineffective-assistance-of-trial-counsel claims. “[A] federal court may not review federal claims that were procedurally defaulted in state courts.” *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). This “fundamental tenet[] of federal review of state convictions,” *id.*, ensures that federal courts show the respect to “the States and the States’ procedural rules” that our federalist system requires, *Shorter v. Ohio Dep’t of Rehab. and Corr.*, 180 F.3d 723, 725 (6th Cir. 1999) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)). “A habeas petitioner procedurally defaults a claim if: (1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default.” *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (citation omitted).

It seems clear to us that Maslonka did procedurally default his ineffective-assistance-of-trial-counsel claims. Maslonka failed to comply with a state procedural rule when he filed a second motion for relief from judgment that was not based on a retroactive change in law that occurred after his motion for relief from judgment. *See* M.C.R. 6.502(G)(1). The state courts enforced that rule against Maslonka, and we have held that Michigan Court Rule 6.502(G) “acts as an adequate and independent state ground for denying review sufficient to procedurally default a claim.” *Ingram v. Prelesnik*, 730 F. App’x 304, 311 (6th Cir. 2018) (citing *Morse v. Trippett*, 37 F. App’x 96, 106 (6th Cir. 2002)).

But as Maslonka points out, the state explicitly and deliberately waived this argument in its initial answer to Maslonka's habeas petition. In its answer, the state said that although "it is difficult to discern the full course of all of Maslonka's claims," "in any case, the State is not arguing that any of Maslonka's habeas claims are barred by procedural default." Although the state now argues that it "did not clearly recognize the claims being raised" at the time, this is belied by the state's initial answer, in which the state summarized its understanding of Maslonka's claims. The state said it understood Maslonka's claims to fall into several "basic categories," including that "Maslonka was without counsel during critical stages of his attempts at cooperation with DEA agents as part of an alleged plea deal" and that "Maslonka was denied the effective assistance of counsel during plea negotiations, rendering his plea invalid." Despite understanding Maslonka's claims, the state nevertheless explicitly and deliberately waived its procedural-default defense.

We will not override the state's waiver, because to do so would be an abuse of discretion.<sup>1</sup> *Wood v. Millyard*, 566 U.S. 463, 472–73 (2012). After all, procedural default "is not a jurisdictional matter" and the state is therefore normally "obligated to raise and preserve" any procedural-default defense "if it is not to lose the right to assert the defense thereafter." *Trest v. Cain*, 522 U.S. 87, 89 (1997) (internal quotation marks, citation, and alteration omitted); see *Gumm v. Mitchell*, 775 F.3d 345, 376–77 (6th Cir. 2014). Although the Supreme Court has not absolutely barred us from considering *sua sponte* a *forfeited* habeas defense, it has said that we may not "depart from the principle of party representation basic to our adversary system" by considering a *waived* habeas defense. *See Wood*, 566 U.S. at 472. We must therefore consider Maslonka's ineffective-assistance-of-trial-counsel claims on the merits.

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<sup>1</sup>We recognize that this is not a normal waiver case, because the state did attempt to raise its procedural-default defense in a supplemental brief after the district court appointed counsel to represent Maslonka in his federal habeas proceedings. And it may seem unfair to hold the state to its initial briefing even though the district court allowed Maslonka a second round of supplemental briefing. But the state could have sought leave from the district court to amend its answer, and it did not do so. *See Day v. McDonough*, 547 U.S. 198, 208–09 (2006). As it is, we are faced with the state's explicit and deliberate waiver of its procedural-default defense, and we may not override that waiver, despite the state's change of heart. On remand, should the state wish to assert a previously waived procedural defense, it should seek leave from the district court to amend its answer. *See id.*

**B.**

Before analyzing the merits, however, we must determine the appropriate standard of review in this case. The parties dispute whether the state court that denied Maslonka’s second motion for relief from judgment adjudicated his ineffective-assistance-of-trial-counsel claims on the merits or whether it merely enforced a procedural bar against Maslonka.

Where state courts do not reach the merits of a habeas petitioner’s claim, federal habeas review is not subject to the deferential standards set out in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (citing 28 U.S.C. § 2254(d)). Instead, *de novo* review applies. *Id.*; *see Jackson v. Smith*, 745 F.3d 206, 209 (6th Cir. 2014) (“[C]laims not ‘adjudicated on the merits’ by the state court are given plenary review by a federal habeas court . . . .”).

The state, relying on *Harrington v. Richter*, 562 U.S. 86 (2011), argues that we should presume that the state court’s decision was a merits decision. *See id.* at 99 (“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”). But *Harrington* involved a one-line, unreasoned state court decision, *see id.* at 96, and the Supreme Court made clear that the on-the-merits presumption it established “may be overcome when there is reason to think some other explanation for the state court’s decision is more likely,” *id.* at 99–100.

Here, the state court decision denying Maslonka’s second motion for relief from judgment strongly indicates that the state court was enforcing a procedural bar against Maslonka and was not adjudicating Maslonka’s claims on the merits. The state court cited Michigan Court Rule 6.502(G)(1) for the proposition that, “[g]enerally speaking, ‘one and only one motion for relief from judgment may be filed with regard to a conviction.’” It then discussed the exception in Michigan Court Rule 6.502(G)(2) which allows defendants to “file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment.” Although the state court spent a paragraph discussing the Supreme Court’s decisions in *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), it did so in

the context of explaining why the exception in Michigan Court Rule 6.502(G)(2) did not apply to Maslonka. And it ultimately based its denial of Maslonka’s claim on his failure to “explain[] how the actual holdings of *Lafler* or *Frye* constitute a retroactive change in the law as applied to [his] case.” This explanation provides ample “reason to think,” *see Harrington*, 562 U.S. at 99–100, that the state court did not adjudicate Maslonka’s ineffective-assistance-of-trial-counsel claims on the merits but rather enforced a procedural bar against Maslonka. AEDPA deference is therefore inappropriate and we will review Maslonka’s claims de novo. *See Cone*, 556 U.S. at 472.

### C.

“We review the district court’s legal conclusions in a habeas proceeding de novo and its factual findings under the clear-error standard.” *Davis v. Lafler*, 658 F.3d 525, 530 (6th Cir. 2011) (en banc). “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (alteration omitted)).

#### 1.

Maslonka’s ineffective-assistance-of-trial-counsel claims center around his counsel’s purported “fail[ure] to meaningfully consult, protect[,] or advocate” for Maslonka during his attempted cooperation with the federal authorities. But the state argues that Maslonka’s attempted federal cooperation was a “collateral proceeding” in which Maslonka did not have a Sixth Amendment right to counsel at all. *See Turner v. United States*, 885 F.3d 949, 955 (6th Cir.) (en banc) (“There can be no constitutionally ineffective assistance of counsel where there is no right to counsel in the first place.”), *petition for cert. filed*, (U.S. Jul. 20, 2018) (No. 18-106).

As our en banc court recently reiterated, the Sixth Amendment right to counsel attaches when a criminal prosecution is commenced, which occurs “only at or after ‘the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Id.* at 952 (quoting *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008)). “Once the Sixth Amendment right to counsel has attached, criminal

defendants have a right to the assistance of counsel during ‘critical stages’ of the prosecution.” *Id.* And, following the Supreme Court’s decisions in *Frye* and *Lafler*, it is clear that plea negotiations are a “critical stage” of a prosecution. *See Turner*, 855 F.3d at 953.

The Supreme Court has not fully answered the “difficult question” of “the duty and responsibilities of defense counsel in the plea bargaining process.” *Frye*, 566 U.S. at 144. And the parties have cited no cases establishing whether or not cooperation with federal authorities is considered part of the critical stage of state plea negotiations where, as here, a state plea offer hinges on that federal cooperation. But because we ultimately conclude that Maslonka’s counsel was not constitutionally ineffective, we need not and do not decide this question. For purposes of this appeal, we will assume without deciding that Maslonka’s attempted cooperation with the federal authorities was part of the critical stage of his state plea negotiations because his more-favorable state plea offer hinged on that federal cooperation. *See generally Wingo v. United States*, 341 F. App’x 132, 134 (6th Cir. 2009) (assuming without deciding that federal cooperation during plea negotiations in a federal prosecution was a critical stage).

## 2.

Maslonka argues that his counsel’s absence throughout his attempted cooperation with the federal authorities constituted a constructive denial of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). In typical ineffective-assistance-of-counsel cases, a habeas petitioner has the burden of demonstrating a Sixth Amendment violation, including demonstrating that he was prejudiced by any deficient assistance of counsel. *See id.* at 658. But where a petitioner suffered a “complete denial of counsel,” such a denial is “so likely to prejudice the accused” that courts presume “that a trial is unfair if the accused is denied counsel at a critical stage of his trial.” *Id.* at 658–59. And petitioners need not even be *completely* denied counsel—courts sometimes find a “constructive” denial of counsel where “counsel is placed in circumstances in which competent counsel very likely could not render assistance.” *See United States v. Morris*, 470 F.3d 596, 601 (6th Cir. 2006) (quoting *Mitchell v. Mason*, 325 F.3d 732, 741–42 (6th Cir. 2003)).

The district court agreed with Maslonka, finding that his counsel’s “physical absence at every stage of [Maslonka]’s cooperation constituted a complete denial of counsel,” requiring an

“automatic reversal of his conviction . . . without any showing of prejudice.” *Maslonka*, 2017 WL 2666103, at \*6.

We emphatically reject the theory that a counsel’s mere physical absence from a critical stage of a proceeding, based on the counsel’s own failure to be present rather than any *denial* by the state, can constitute a constructive denial of counsel under *Cronic*. Although the Supreme Court said in *Cronic* that it “has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding,” 466 U.S. at 659 n.25, each of the cases the Supreme Court cited for this proposition involved a state statute’s or state actor’s *denying* the physical presence of counsel during a critical stage or otherwise placing limits on counsel’s representation of a criminal defendant. *See Geders v. United States*, 425 U.S. 80, 89 (1976) (trial judge denied defendant access to his attorney for seventeen hours); *Herring v. New York*, 422 U.S. 853, 865 (1975) (trial judge denied defendant’s counsel the opportunity to make a closing argument); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972) (state law required defendant to testify before other defense witnesses); *Hamilton v. Alabama*, 368 U.S. 52, 53 n.3, 54 (1961) (state did not provide counsel at arraignment); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (state did not provide counsel at arraignment); *Ferguson v. Georgia*, 365 U.S. 570, 594–96 (1961) (state prohibited counsel from questioning defendant under oath); *Williams v. Kaiser*, 323 U.S. 471, 474–77 (1945) (state denied counsel throughout entire proceeding). The Supreme Court has said that the *Cronic* exceptions to the normal requirement that habeas petitioners must demonstrate prejudice are “narrow.” *Florida v. Nixon*, 543 U.S. 175, 190 (2004).

And the closest we have come to embracing *Maslonka*’s constructive-denial theory was in *Mitchell v. Mason*, where we held:

When counsel is appointed but never consults with his client *and* is suspended from practicing law for the month preceding trial, *and* the court acquiesces in the constructive denial of counsel by ignoring the defendant’s repeated requests for assistance, *Cronic* governs.

325 F.3d at 744 (emphasis added).

Here by contrast, Maslonka’s counsel was involved throughout the pre-trial period, just not at the federal cooperation meetings. And as *Mitchell* itself made clear, “counsel’s failure in particular instances is evaluated under *Strickland*.” *Id.* But more to the point we emphasize today, in *Mitchell* the “trial court repeatedly ignored Mitchell’s entreaties for counsel who would properly prepare a defense,” *id.*, meaning that some state actor still played a part in preventing adequate representation. That feature of *Mitchell* is absent in Maslonka’s case. We therefore decline to extend the *Cronic* complete-denial exception to cases where a counsel is physically absent due to the counsel’s own failure to be present, without any denial by the state. Those cases must be brought under the traditional two-part test found in *Strickland v. Washington*, 466 U.S. 668 (1984).

### 3.

“[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*.” *Frye*, 566 U.S. at 140. This two-part test requires defendants first to show “that counsel’s performance was deficient” and second to “show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687.

#### a.

An attorney’s performance is deficient when it falls below an objective standard of reasonableness. *Id.* at 688. “Judicial scrutiny of counsel’s performance must be highly deferential,” since “[i]t is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.* at 689. We therefore “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* And we “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, *viewed as of the time of counsel’s conduct.*”<sup>2</sup> *Id.* at 690 (emphasis added).

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<sup>2</sup>Although we do not decide here whether Maslonka’s counsel was constitutionally deficient, we note that it was not until 2012 that the Supreme Court made it clear that plea negotiations are a critical stage of a prosecution. *See Frye*, 566 U.S. at 142–44. Maslonka’s plea negotiations with the state occurred in 2009. *See Maslonka*, 2017 WL 2666103, at \*1–2. In concluding that Maslonka’s counsel was constitutionally deficient, the district court failed

It is an especially “difficult question” to “define the duty and responsibilities of defense counsel in the plea bargain process.” *Frye*, 566 U.S. at 144. “Bargaining is, by its nature, defined to a substantial degree by personal style,” and “[t]he alternative courses and tactics of negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process.” *Id.* at 145.

Because we ultimately conclude that Maslonka has not shown that any constitutionally deficient performance by his counsel prejudiced him, we need not and do not decide whether Maslonka’s counsel was constitutionally deficient. For purposes of this appeal, we will assume that Maslonka’s counsel was constitutionally deficient by, as Maslonka puts it, “fail[ing] to meaningfully consult, protect[,] or advocate” for Maslonka during his attempted cooperation with the federal authorities.

**b.**

“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. So “any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” *Id.* at 692. Where, as here, *Cronic* does not apply, a defendant must “affirmatively prove prejudice.” *See id.* at 693. To do so, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

In the plea bargaining context, the “defendant must show that the outcome of the plea process would have been different with competent advice.” *Lafler*, 566 U.S. at 163. And where a defendant alleges that an earlier favorable plea offer lapsed due to constitutionally deficient performance by his counsel, the defendant must demonstrate a “reasonable probability” that, but

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to “judge the reasonableness of counsel’s challenged conduct . . . viewed as of the time of counsel’s conduct,” as *Strickland* requires. 466 U.S. at 690.

for that deficient performance, (1) the defendant “would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel,” (2) “the plea would have been entered without the prosecution canceling it . . . if [the prosecution] had the authority to exercise that discretion under state law,” (3) “the plea would have been entered without . . . the trial court refusing to accept it[] if [the trial court] had the authority to exercise that discretion under state law,” and (4) “the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Frye*, 566 U.S. at 147.

Here, the fourth prong is met because there is more than a reasonable probability that the end result of Maslonka’s state criminal process would have been more favorable if he had successfully pleaded guilty to armed robbery without a habitual-offender charge rather than pleading guilty, as he ultimately did, to armed robbery as a third habitual offender. The third prong is likely met as well, since the primary benefit that Maslonka hoped to receive was a dropped charge rather than a predetermined sentence amount, and there is no indication on the record before us that the state judge had the discretion to prevent a state prosecutor from dropping a charge before trial. Maslonka’s case fails, however, on the first and second prongs.

*First*, Maslonka has not shown a reasonable probability that, but for his counsel’s constitutionally deficient performance, he “would have accepted the earlier plea offer.” *Id.* The earlier plea offer was conditional and required Maslonka’s “very best of cooperation,” including his testifying before a grand jury, so this first prong requires Maslonka to show that he would have testified before the grand jury if his counsel had provided effective assistance.

There was conflicting testimony about why Maslonka did not ultimately testify before the grand jury. But accepting Maslonka’s story—as the district court did, *see Maslonka*, 2017 WL 2666103, at \*3—the federal authorities did not allow Maslonka to testify because he refused to answer questions posed by the DEA agents about his close friends and family. But Maslonka’s counsel had already told Maslonka to “cooperate to the best of his ability” and Maslonka already knew the potential consequences of not fully cooperating with the federal authorities. Maslonka has not shown a reasonable probability that his counsel could have convinced him to answer questions about his close friends and family had she been present and had she repeated her previous advice that he should cooperate to the best of his ability. Nor has Maslonka shown a

reasonable probability that had she been present, his counsel could have persuaded the federal authorities to place an admittedly uncooperative witness before the grand jury.

*Second*, Maslonka has not shown a reasonable probability that, but for his counsel's constitutionally deficient performance, "the plea would have been entered without the prosecution canceling it." *Frye*, 566 U.S. at 147. The state prosecutor testified extensively in the district court, and his testimony clearly showed that any deficiency in Maslonka's counsel's performance during the state plea negotiations did not prejudice Maslonka. The state prosecutor testified that Maslonka's grand jury testimony was "the bare minimum" expected of Maslonka and that he would not receive any benefit if he failed to testify, "no matter whose fault it [was]." Even if Maslonka did testify, "I would have to be absolutely convinced that he could have done absolutely, without possibility, nothing more to satisfy the United States Attorney's Office in their prosecution in order for me to be willing to give him any type of better deal" than the one Maslonka ultimately accepted. And once Maslonka failed to testify, the state prosecutor testified, there was "[a]bsolutely nothing" that Maslonka's counsel could have done to obtain a better deal than the one Maslonka accepted. In fact, even before Maslonka failed to testify, his conduct during the state proceedings had already put his plea offer in jeopardy. Maslonka has not shown a reasonable probability that his counsel could have persuaded the state prosecutor not to cancel Maslonka's plea after Maslonka failed to testify before the grand jury.

Maslonka has therefore failed to demonstrate prejudice under the standard set forth in *Frye*. *See id.* Still, Maslonka argues and the district court found that Maslonka's counsel's constitutionally deficient performance prejudiced Maslonka in two other ways, one in connection with the federal cooperation and the other in connection with the state proceedings.

Maslonka first argues that his counsel should have "formaliz[ed] his cooperation . . . obligations, either orally or in writing." The district court agreed. *See Maslonka*, 2017 WL 2666103, at \*11. But the state prosecutor testified that because of his office's "strict limitations and policies," he had never before entered into a formal cooperation agreement with a defendant and he was not aware that any other prosecutor in his office had ever done so either. Similarly, an AUSA testified that his office normally provided cooperation agreements only to federal defendants or persons about to become federal defendants, and that he did not offer Maslonka a

cooperation agreement because “Maslonka was never charged with a [federal] crime nor was he going to be charged with a federal crime.” And even if he had, “our written agreement simply says a defendant will provide substantial assistance. It’s really quite broad and, to be honest with you, it’s quite one sided.” Maslonka has not demonstrated a reasonable probability that his counsel could have persuaded either the state prosecutor or the federal authorities to deviate from their normal practices by providing a formalized cooperation agreement, or even if his counsel had been able to do so, that such a formalized cooperation agreement would be any more specific than the oral offer Maslonka had already received. Maslonka has therefore failed to demonstrate that his counsel’s failure to “formalize his cooperation obligations” prejudiced him.

Maslonka also argues that his counsel did not “effectively advocat[e]” on Maslonka’s behalf at the sentencing hearing. The district court agreed. *See id.* at 12. But Maslonka testified that at his plea-entry hearing his counsel had a sidebar conversation with the sentencing judge about Maslonka’s attempted cooperation, but that the judge said that Maslonka would “g[e]t nothing for [his] cooperation.” Maslonka has not demonstrated a reasonable probability that the sentencing judge would have changed her mind and given Maslonka some benefit for his cooperation if Maslonka’s counsel had stated on the record the details of Maslonka’s cooperation or had filed a motion for a downward departure. Maslonka has therefore failed to demonstrate that his counsel’s failure to “effectively advocate” at the sentencing hearing prejudiced him.

Because Maslonka has not demonstrated that any constitutionally deficient performance by his counsel prejudiced him, he has not satisfied *Strickland*’s test. Maslonka was therefore ineligible for habeas relief on the ground that his trial counsel rendered ineffective assistance during Maslonka’s state prosecution, and the district court erred by granting that relief.

### III.

For the foregoing reasons, we **REVERSE** the judgment of the district court. As the district court noted, however, Maslonka also alleged in his habeas petition that his three appellate attorneys were constitutionally ineffective in a variety of ways. *See, e.g., Maslonka*, 2017 WL 2666103, at \*13 n.2. Maslonka’s appointed habeas counsel did not discuss these claims in any detail in Maslonka’s supplemental briefing, nor did the district court rule on these claims. *See id.*

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We therefore **REMAND** and instruct the district court to consider only Maslonka's ineffective-assistance-of-appellate-counsel claims.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

NICHOLAS PAUL MASLONKA,

Petitioner,

v.

Civil No. 2:13-CV-14110  
HONORABLE ARTHUR J. TARNOW  
UNITED STATES DISTRICT JUDGE

BONITA HOFFNER,

Respondent.

/

**OPINION AND ORDER CONDITIONALLY GRANTING  
THE PETITION FOR A WRIT OF HABEAS CORPUS**

Nicholas Paul Maslonka, ("Petitioner"), incarcerated at the Lakeland Correctional Facility, in Coldwater, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, through his counsel Andrew Wise and Jessica Lefort of the Federal Defender Office, challenging his conviction for armed robbery, M.C.L.A. § 750.529. Petitioner is currently serving a sentence of 15 to 25 years for the armed robbery conviction.

Petitioner raises a number of claims alleging the ineffective assistance of trial counsel, and subsequent ineffective assistance of appellate counsel, in addition to challenges pertaining to the voluntariness of his plea.

This Court finds that petitioner was denied the effective assistance of trial counsel when his attorney failed to appear at critical stages that required petitioner's cooperation, set forth by the prosecution, to fulfill the contingency of

the plea agreement offered by the prosecution. Due to his attorney's absence, and subsequent allegations of insufficient cooperation on behalf of petitioner, petitioner was forced to accept a much less favorable plea offer, two hours prior to the commencement of his trial. In addition to this being a structural defect, the attorney did not provide adequate assistance of counsel, resulting in prejudice to the petitioner and requiring habeas relief. Accordingly, the petition for a writ of habeas corpus is **CONDITIONALLY GRANTED**.

### **I. Background**

Petitioner was convicted following entry of a plea in the Macomb County Circuit Court.

At his arraignment on December 26, 2008, Detective Eidt met petitioner in the holding area and asked about drug trafficking connections. [Doc. 3, Pg ID 39; Doc. 10, Pg ID 807; Doc. 45, Pg ID 2372]. Petitioner provided Eidt with three names, which Eidt took to the Drug Enforcement Administration ("DEA") agents for review. [*Id.*, Doc. 45 Pg ID 2376]. The agents were very interested and agreed to meet with petitioner. [Doc. 3, Pg ID 39-40, 807-808].

Four DEA agents visited petitioner at the jail on December 31, 2008. Petitioner requested counsel, but the agents informed him that "it was not their responsibility to" arrange that. [*Id.*, Pg ID 40, 808, 2377]. The agents told petitioner that they would not "reschedule this" meeting with him and that "Either you are going to give help right now or we walk out this door and we are not

coming back and anything you have coming is lost." [Doc. 45, Pg ID 2378].

Petitioner then spent three hours providing the agents with information related to his drug trafficking contacts. [Doc. 3, Pg ID 41; Doc. 10, Pg ID 809; Doc. 45 Pg ID 2378].

On January 6, 2009, the day of his preliminary hearing, petitioner met with his court-appointed attorney, Salle Erwin, who informed petitioner that Eidt told her that the DEA found his information "credible and exceptional" and wanted to schedule another interview. [*Id.*, Doc. 45 Pg ID 2381]. Petitioner requested Erwin's presence at "any further potential interview with the DEA," to which she agreed. [*Id.*, Pg ID 41-42, 809; Doc. 45 Pg ID 2383].

The following day petitioner was written out of jail for a ride-along and meeting with DEA agents. [*Id.*, Pg ID 42, 810; Doc. 9-1, Pg ID 796-801]. Although requested by petitioner to be there, Erwin was not present. For fear of losing a cooperation deal, petitioner proceeded without counsel. [Doc. 45, Pg ID 2386]. During the ride-along and meeting, which lasted for a total of six hours, petitioner allowed the agents to search his house and business for documents, and provided extensive information of an inter-state drug trafficking organization and its financial structure. [Doc. 3, Pg ID 42-43; Doc. 10, Pg ID 810-811; Doc. 9-1, Pg ID 796-801; Exhibit 53, U.S. Department of Justice, Drug Enforcement Administration, Report of Investigation; Doc. 45, Pg ID 2386-88].

On February 5, 2009, DEA agents again met with petitioner for two hours and went over documents they obtained from his house and business. [Doc. 9-1, Pg ID 803-804]. Erwin was not present for this interview. [*Id.*; Doc. 10, Pg ID 811-12]. When petitioner asked the agents about his lawyer, they said that Erwin told Detective Eidt “that she was too busy with a bunch of cases that she had to take care of and she couldn’t attend.” [Doc. 45, Pg ID 2394].

At the subsequent pre-trial hearing on February 9, 2009, Erwin was not present and petitioner voiced concerns about Erwin’s representation, which included her failure to meet with him and attend DEA interviews. [Doc 21-3, Pg ID 1461; Doc. 3, Pg ID 43; Doc. 9-1, Pg ID 745; Doc. 10, Pg ID 812]. Petitioner “expressed to the judge that [he] had grave concern[s] about [Erwin’s] representation because she had totally been non-existent basically.” [Doc. 45, Pg ID 2395]. The trial court judge agreed to hear petitioner’s concerns, but asked that Erwin be present, and set another pre-trial date. [Doc. 9-1, Pg ID 745; Doc 21-3, Pg ID 1461].

The DEA and detective Eidt met again with petitioner in late February. [Doc. 3, Pg ID 45; Doc. 10, Pg ID 813]. Again, Erwin was not present. [*Id.*].

The final pre-trial conference took place on March 18, 2009. Erwin met with petitioner in lock-up and told him she had spoken to the federal and state prosecutors, and that Prosecutor Fox had agreed to make an offer which dismissed the habitual offender charge outright, resulting in a guidelines range of

a minimum of nearly 7 years. [Doc. 21-5, Pg ID 1467-1469]. Erwin then said that she would also seek a downward departure based on petitioner's cooperation, and that Fox had agreed not to oppose the departure. [Doc. 10, Pg ID 815; Doc. 46, Pg ID 2419]. Erwin told petitioner that the offer was contingent on his testifying before a grand jury. [Doc. 3, Pg ID 46; Doc. 10, Pg ID 815].

Fox placed the state's "last best offer" on the record, which consisted of a guidelines range of 81-135 months (6 years, 9 months to 11 years, 3 months), and the dismissal of the habitual offender charge, based on petitioner's continued cooperation. Specifically, Fox informed the Court that there was "an intervening court proceeding before [the] scheduled trial that may effect whether [the] plea moves forward," referring to the upcoming hearing before the grand jury. [Doc. 9-1, Pg ID 753; Doc. 21-5, Pg ID 1467]. Fox stated that he would keep this offer open up until the day of trial. [*Id.*]. Due to a misunderstanding, Erwin indicated on the record that petitioner was hesitating to accept the deal. [Doc. 21-5, Pg ID 1468]. Petitioner requested a brief recess, during which time he informed Erwin this was the deal he had agreed to, except it was missing the agreement on the departure motion, to which she responded "that would come at sentencing." [Doc. 3, Pg ID 47-48; Doc. 10, Pg ID 816; Doc. 46, Pg ID 2422].

The judge then advised Erwin to visit petitioner before the grand jury hearing, to "make sure you are both on the same page," and Erwin agreed to do so. [Doc. 21-5, Pg ID 1469]. Petitioner "never [got] a visit from Ms. Erwin" prior to

appearing before the grand jury on April 7th to provide testimony. [Doc. 3, Pg ID 48; Doc. 10, Pg ID 817; Doc. 46, Pg ID 2424].

Approximately three weeks later, on April 7th, petitioner met with DEA agents and an assistant U.S. attorney to review grand jury testimony. Erwin was not present. [*Id.*]. When petitioner said he would feel better if Erwin was present, he was told that there was not time to reschedule, and that they needed to prepare his testimony as soon as possible. [*Id.*; Doc. 46, Pg ID 2426].

Petitioner was written out of the jail and spent thirty minutes reviewing his testimony with the federal prosecutor, who asked before leaving if the DEA agents could present a couple of questions to petitioner. [*Id.*]. The questions regarded individuals who were not connected with petitioner's grand jury testimony. [*Id.*] Following the discussion, the agents informed petitioner that the grand jury would not meet, that they had all the information they needed from him, and that his grand jury testimony was no longer necessary. [*Id.*; Doc. 46, Pg ID 2431].

On the day of trial, the prosecutor rescinded the plea offer citing lack of cooperation on April 7th, and offered a subsequent less favorable plea offer two hours before the commencement of petitioner's trial. [Doc. 21-6, Pg ID 1472].

Petitioner's conviction was affirmed on appeal. *People v. Maslonka*, No. 304898, \*1 (Mich. Ct. App. Aug. 10, 2011), *lv. den.* 490 Mich. 974, 806 N.W.2d 739 (2011).

While petitioner's direct appeal was pending, petitioner filed a motion to withdraw his guilty plea, which was construed as a post-conviction motion for relief from judgment filed pursuant to M.C.R. 6.500, *et seq.* and denied. *People v. Maslonka*, No. 2009-0045-FC (Macomb County Circuit Court, Nov. 3, 2010).<sup>1</sup> The Michigan appellate courts denied petitioner leave to appeal. *People v. Maslonka*, No. 305058 (Mich. Ct. App. March 23, 2012); *lv. den.* 493 Mich. 856, 821 N.W.2d 166 (2012).

On October 25, 2012, petitioner filed a second motion for relief from judgment, which was dismissed as a successive motion for relief from judgment. *People v. Maslonka*, No. 2009-0045-FC (Macomb County Circuit Court, Dec. 11, 2012).

Petitioner filed a petition for a writ of habeas corpus on September 26, 2013. Respondent filed an answer to the petition on December 16, 2013. On February 8, 2016, this Court appointed counsel to represent petitioner. On May 23, 2016, petitioner, through his new counsel, Andrew Wise and Jessica Lefort, filed a supplemental petition for a writ of habeas corpus, seeking relief on the basis of ineffective assistance of trial and appellate counsel in violation of the Sixth Amendment, and violations of his Fifth Amendment right to due process.

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<sup>1</sup>The judge construed the motion to withdraw as a motion for relief from judgment, because petitioner sought to withdraw his guilty plea more than six months after he had been sentenced. Under M.C.R. 6.310(c), a defendant may file a motion to withdraw the plea within six months after sentence. If a defendant wishes to withdraw a guilty plea more than six months after being sentenced, he or she may do so "only in accordance with the procedure set forth in subchapter 6.500." [The Michigan Court Rule governing post-conviction relief]. *Id.*

Respondent filed a response to the supplemental petition on June 16, 2016.

An evidentiary hearing was conducted before this Court on March 9, 2017 and March 10, 2017. The issues discussed at the hearing were:

- 1) Whether there was an absence of counsel at a critical stage of the proceedings, and
- 2) Whether counsel was ineffective when she failed to:
  - A) Place the cooperation agreement in writing, thereby allowing Fox to withdraw the favorable plea offer on a mere allegation of non-cooperation;
  - B) Obtain information from the DEA regarding petitioner's cooperation; and
  - C) Document the extent of petitioner's cooperation and appraise the court at sentencing of the extensive cooperation given by petitioner.

The parties filed supplemental briefs on May 24, 2017, followed by petitioner's reply brief filed on May 31, 2017.

## **II. Standard of Review**

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

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.

A decision of a state court is “contrary to” clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An “unreasonable application” occurs when “a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner’s case.” *Id.* at 409. A federal habeas court may not “issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 410-11.

### **III. Discussion**

Petitioner contends that he was denied the effective assistance of counsel when his attorney failed to appear at meetings scheduled with the DEA, which were the basis of a cooperation agreement entered into by petitioner in exchange for a plea to armed robbery with a sentence of 81-135 months (6 years, 9 months to 11 years, 3 months) on the minimum sentence and dismissal of the habitual offender charge. Petitioner further claims that due to counsel’s absence, as well as counsel’s failure to place the terms of the cooperation agreement into writing or familiarize herself with the terms of the cooperation

agreement, petitioner was placed in a precarious position when the prosecution withdrew the offer, claiming that petitioner did not sufficiently fulfill the terms of the cooperation agreement, and then offered petitioner a much less favorable plea, two hours prior to the commencement of petitioner's trial. [Doc. 21-6, Pg ID 1472]. Rather than outright dismissal of the habitual charge and a minimum guideline sentence of 81-135 months (6 years, 9 months to 11 years, 3 months), petitioner was given the option of accepting a plea to a habitual third and 108 to 270 months (9 years to 22 years, 6 months) on the minimum guidelines, or to proceed to trial. Petitioner accepted the plea and was ultimately sentenced to 15 to 25 years in prison.

Petitioner contends in his Habeas Petition, pp. 6-8, 19, supplemental attachments, and his Supplemental Reply brief, page 11, that he was denied representation throughout the plea negotiation process and had counsel participated in the grand jury preparation, and met with him prior to the grand jury hearing, or been present at the hearing, she could have cleared up any confusion as to what was expected of petitioner and whether the terms of the cooperation agreement had been met. More importantly, had counsel secured a written cooperation agreement outlining petitioner's obligations, petitioner would not be in the position, on the day of trial, of having to prove that he met the terms of the cooperation agreement, so as to be entitled to the plea offer.

Respondent contends that petitioner's claim is procedurally defaulted because he raised it only for the first time in his second motion for relief from judgment and the trial court relied on M.C.R. 6.502(G)(1) to deny petitioner's claim. Under M.C.R. 6.502(G)(1), a criminal defendant in Michigan can typically file only one motion for relief from judgment with regard to a criminal conviction. See *Banks v. Jackson*, 149 F.App'x 414, 418 (6th Cir. 2005); *Mohn v. Bock*, 208 F. Supp. 2d 796, 801 (E.D. Mich. 2002); *Hudson v. Martin*, 68 F. Supp. 2d 798, 800 (E.D. Mich. 1999)(citing to *People v. Ambrose*, 459 Mich. 884; 587 N.W.2d 282 (1998)). However, M.C.R. 6.502(G)(2) states that a defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. *Banks*, 149 F.App'x at 418; *Mohn*, 208 F. Supp. 2d at 801; *Hudson*, 68 F. Supp. 2d at 800-01.

Respondent did not raise a procedural default defense in his initial answer to the petition for a writ of habeas corpus that was filed on December 16, 2013. Respondent clearly waived this defense by stating that "[t]he State is not arguing that any of Maslonka's habeas claims are barred by procedural default," thereby waiving a procedural default defense. (Response Brief, p.5). Respondent raised the procedural default defense only for the first time in the supplemental answer filed on June 16, 2016.

Procedural default is an affirmative defense that must be raised by the state at the first possible opportunity, or it will be considered waived. *Trest v. Cain*, 522 U.S. 87, 89 (1997)(holding that state's failure to raise procedural default normally constitutes waiver of the default). By failing to argue that petitioner's claim was procedurally defaulted in the initial answer, respondent has waived any defense that the claim is procedurally defaulted. See *Williams v. Birkett*, 697 F. Supp. 2d 716, 722 (E.D. Mich. 2010); *vacated on other grds*, 670 F.3d 729 (6th Cir. 2012); *on remand*, 895 F. Supp. 2d 864 (E.D. Mich. 2012); *Ward v. Wolfenbarger*, 323 F. Supp. 2d 818, 828 (E.D. Mich. 2004); *modified on other grds*, 340 F. Supp. 2d 773 (E.D. Mich. 2004); see also *Miller v. Stovall*, 641 F. Supp. 2d 657, 665 (E.D. Mich. 2009)(State, by failing to argue harmless error defense in its response to federal habeas corpus petition, waived issue); *Dickens v. Jones*, 203 F. Supp. 2d 354, 361 (E.D. Mich. 2002)(state waived affirmative defenses that habeas petitioner's federal habeas claims were noncognizable and waived because of petitioner's alleged misrepresentation and failure to object, where state failed to assert affirmative defenses in its initial answer to the habeas petition); *Benoit v. Bock*, 237 F. Supp. 2d 804, 807 (E.D. Mich. 2003) (Respondent's failure to raise issue of procedural default constituted implicit waiver of that affirmative defense to state prisoner's federal habeas petition). Respondent's failure to argue in his initial answer that petitioner's claim was procedurally defaulted waives this procedural defense.

Before ruling on the merits of petitioner's underlying claim, this Court notes that the Macomb County Circuit Court, the last court to issue a decision on petitioner's claim, never addressed the merits of this claim. When a state court fails to adjudicate a habeas petitioner's claim on the merits, federal habeas review is not subject to the deferential standard contained in § 2254(d) and a federal court is required to review that claim *de novo*. See *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); see also *McKenzie v. Smith*, 326 F.3d 721, 726 (6th Cir. 2003). In the present case, the Macomb County Circuit Court declined to address the merits of petitioner's claim that he raised in his second post-conviction motion. Therefore, "there are simply no results, let alone reasoning, to which this Court can defer. Without such results or reasoning, any attempt to determine whether the state court decision 'was contrary to, or involved an unreasonable application of clearly established Federal law,' 28 U.S.C. § 2254(d)(1), would be futile." *McKenzie*, 326 F.3d at 727; see also *Maples v. Stegall*, 340 F.3d 433, 437 (6th Cir. 2003)(Michigan courts' failure to consider the petitioner's ineffective assistance of counsel claims rendered the AEDPA's deferential standard of review inapplicable. Thus, the Sixth Circuit would review petitioner's claims under a *de novo* standard). This Court cannot apply the deferential standard of review contained in the AEDPA, but must review *de novo* petitioner's claim.

Petitioner initially contends that he was denied the assistance of counsel at a critical stage of the proceedings against him when his trial counsel was absent during the entire pendency of his pre-plea cooperation meetings and assistance with the government.

The U.S. Supreme Court has clearly established that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *United States v. Cronic*, 466 U.S. 648, 659 (1984). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brech v. Abrahamson*, 507 U.S. 619, 629-30 (1993). The U.S. Supreme Court has routinely found constitutional error without any specific showing of prejudice to a defendant when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. *Cronic*, 466 U.S. at 659, n.25; *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992).

“The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). The Sixth Circuit has presumed that a criminal defendant’s pre-trial cooperation period is a critical stage of the

proceedings, at least prior to the entry of a written cooperation agreement.

*Wingo v. United States*, 341 F.App'x 132, 134 (6th Cir. 2009)(pre-trial cooperation period assumed to be critical prior to entry of a *Kastigar* agreement). A federal court can “consider lower court decisions to the extent they shed light on the analysis of Supreme Court holdings to determine whether a legal principle had been clearly established.” *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013). Moreover, “[i]f the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Williams v. Taylor*, 529 U.S. at 382 (quoting *Wright v. West*, 505 U.S. 277, 308-309 (1992)).

Petitioner was constructively denied the assistance of counsel because counsel was absent during petitioner’s meetings with the DEA, which were contingent on receiving the more favorable plea bargain offered by the prosecution. Petitioner was denied counsel during the critical stages of implementing the cooperation agreement. “[A]n attorney’s assistance is critical to the cooperation process in a number of respects, including, but not limited to, facilitating communication between the defendant and the government, attending

proffer sessions, ascertaining the government's expectations and whether the defendant is satisfying them, communicating the client's limitations to the government, and establishing a record of attempts to cooperate." *United States v. Leonti*, 326 F.3d 1111, 1119 (9th Cir. 2003). Counsel's physical absence at every stage of petitioner's cooperation "certainly constitutes denial of counsel." *Peters v. Chandler*, 292 F.App'x 453, 465 (6th Cir. 2008)(citing *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961)). Lack of appearance at these meetings is not disputed by respondent.

Compounding the error is the fact that petitioner's trial counsel never met with petitioner before or after his meetings with the DEA, in order to offer petitioner advice or debrief him on the nature of the discussions between the DEA agents and himself.

ABA Standards provide:

Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused.

1 ABA Standard for Criminal Justice 1(a) & (b).

The United States Supreme Court applied a standard of reasonableness

when ascertaining whether counsel provided adequate representation, as follows:

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. [The Supreme Court has long] recognized that [p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable....” *Padilla v. Kentucky*, 559 U.S. 356, 366–67, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (internal citations and quotations omitted). The same is equally true of an agent’s obligations to his principal under the law of agency. See e.g., *Maples v. Thomas*, \_\_\_\_ U.S. \_\_\_\_, 132 S.Ct. 912, 924, 181 L.Ed.2d 807 (2012). “Although they are only guides, and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation....” *Padilla v. Kentucky*, 559 U.S. 356, 366–67, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)(internal citations and quotations omitted).

*Gunner v. Welch*, 749 F.3d 511, 516 (6th Cir. 2014).

A criminal defendant who is denied adequate consultation with his or her attorney is constructively denied the assistance of counsel.

In *Mitchell v. Mason*, 325 F.3d 732, 741 (6th Cir.2003), the Sixth Circuit held that there was a complete denial of counsel where the defendant’s attorney spent approximately six minutes in the course of three separate meetings with the defendant in the “bull pen” prior to the start of trial.

In *United States v. Morris*, 470 F.3d 596, 601-02 (6th Cir. 2006), the Sixth Circuit held that a defendant facing state charges of firearms and drug possession was constructively denied the right to counsel, when counsel was assigned shortly before defendant attended the hearing at which he was offered a choice of a plea bargain or the transfer of his case to federal prosecution with

a potential of a higher sentence. The Sixth Circuit observed that counsel did not meet with defendant until the day of the hearing, when they conversed for a few minutes in the “bull pen” and counsel was forced to review his client’s options in a crowded and noisy room with no privacy. *Id.* The Sixth Circuit also indicated that the fee system for court-appointed counsel, whereby counsel was paid a \$40.00 fee for appearing at the pre-preliminary hearing, but received no additional fee if they requested a continuance for additional preparation, provided “counsel an incentive to encourage the defendant to accept the state’s plea offer immediately, and a disincentive to seek more time to investigate and seriously weigh the merits of a defendant’s case.” *Id.*, at 601, n. 4.

In *Turner v. Bagley*, 401 F.3d 718, 721, 723, 727 (6th Cir. 2005), the Sixth Circuit granted petitioner a writ of habeas corpus on an ineffective assistance of appellate counsel claim, based in part on the fact that petitioner had inadequate consultation with one of his appellate attorneys. *Id.* at 721.

In *Williams v. Birkett*, 697 F. Supp. 2d at 726, this Court ruled that the state circuit court’s practice of assigning counsel shortly before a probation violation hearing amounted to a state impediment to effective assistance of counsel. In reaching this conclusion, the Court noted that counsel admitted that he was unaware of petitioner’s special educational needs and cognitive problems, nor did he appear to know the precise nature of the probation violation charges against petitioner. Counsel never raised any defense to the probation

violation charge, nor did he make any objection or offer any argument when the trial court berated petitioner. *Id.* This Court also noted that counsel failed to mention petitioner's special educational needs and cognitive problems to attempt to mitigate the sentence imposed. *Id.*

In this case, counsel's physical absence at every stage of petitioner's cooperation constituted a complete denial of counsel. Furthermore, the record reflects that counsel was unaware of the extent of petitioner's cooperation and made no mention of petitioner's cooperation at the time of sentencing. Counsel merely agreed with the assessment made on the record that things didn't work out, without reference to petitioner's cooperation or lack of cooperation. No appeal for leniency was given by counsel at the time of sentencing in connection with petitioner's cooperation and no details pertaining to the cooperation given can be found anywhere on the record. The record merely reflects that counsel parroted the information given to her by the DEA as to whether petitioner cooperated, or failed to cooperate. This approach can be seen from the record where counsel informed the trial court judge, "I'm going to be in touch with Mr. Fox after the Grand Jury on the 7th," and then counsel's reporting to the trial court that things didn't work out, in response to the withdraw of the plea by the prosecutor. [Doc 21-6]. Trial counsel appeared on the trial date without making prior contact with the U.S. Attorney's office, the prosecutor's office or her client and was totally unaware of the circumstance which resulted in the withdraw of

the plea offer.

Because petitioner was deprived of the assistance of counsel at a critical stage of the proceedings, automatic reversal of his conviction is required, without any showing of prejudice.

Petitioner further contends that counsel was ineffective, and prejudice can be shown, when the terms of the cooperation agreement were never placed in writing, allowing for the offer to be withdrawn on a mere allegation of non-cooperation, when counsel failed to obtain information from the DEA regarding petitioner's cooperation, failed to document the extent of petitioner's cooperation, and failed to appraise the court at sentencing of the extensive cooperation given by petitioner.

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689. Second, the defendant must

show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

The Sixth Amendment right to counsel extends to the plea bargaining process. *Lafler v. Cooper*, 132 S. Ct. at 1384; *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012). Thus, a criminal defendant during plea negotiations is “entitled to the effective assistance of competent counsel.” *Lafler*, 132 S. Ct. at 1384 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The Supreme Court noted in *Frye*,

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” *Lafler*, post, at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

566 U.S. at 143–44.

As the Court stated in *Frye*, the plea negotiation stage “is not some adjunct to the criminal justice system, it *is* the criminal justice system.” 566 U.S. at 144 (emphasis original). Ninety-seven percent of federal cases and ninety-four percent of state cases, resolve in pleas. *Frye*, 566 U.S. at 143; *Lafler*, 566 U.S. at 170. The Sixth Circuit recently stated, “[I]t is undisputed that

the plea negotiation process is adversarial by nature and the average defendant is ill equipped to navigate the process on his own.” *Turner v. United States*, 848 F.3d 767, 773 (6th Cir. 2017) *rehr’g granted en banc* 2017 WL 1359475 (6th Cir. Apr. 13, 2017). The Supreme Court declined to delineate the components required of counsel during the plea negotiation process finding that “[t]he alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process.” *Frye*, 566 U.S. at 145. The Court by acknowledging that negotiations take many forms and include many different factual scenarios, left it to the lower courts to determine whether ineffective assistance exists during the plea negotiation stage on a case by case basis.

Petitioner alleges that trial counsel was ineffective, and prejudice can be shown, by counsel’s failure to place the agreement in writing, consult with petitioner regarding the terms of the cooperation agreement, debrief petitioner as to cooperation rendered in conjunction with the cooperation agreement, meet with petitioner to prepare for the meetings with the DEA, meet with petitioner to prepare petitioner to give grand jury testimony, and allocute on behalf of petitioner at the time of sentencing to the extent of his cooperation.

The record reflects that the prosecutor placed the state’s “last best offer” on the record, indicating that the intent was “to keep the offer open until the day

of trial." (Doc. 21-5, Pg ID 1467). The trial court judge reiterated the agreement as follows:

THE COURT: So the offer being made, which will be open through the day of trial, is guilty to Count 1, dismiss habitual fourth, estimated guidelines 81 to 135, cooperation will have been extended and complied with prior to our April 14th trial date, is that --

MS. ERWIN: Yes. It is scheduled for the 7th of April.

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THE COURT: So what you are saying is if there is cooperation on the 7th then the plea would be guilty to Count 1, dismiss habitual fourth?

MR. FOX : Correct.

[Doc. 21-5, Pg ID1467, 1468].

When petitioner requested to meet with counsel prior to April 7th, the trial court judge directed counsel to meet with petitioner, prior to the grand jury and indicated that she could petition the court for additional fees as follows:

THE DEFENDANT: Would it be possible --considering the high profile case that we've had going on it is really hard to talk back there, and so things get crossed up because you can't really say everything back there. I have to go back to jail with these people, and considering what is going on that is sometimes not a good thing.

THE COURT: Well, obviously I didn't participate in the decisions which landed you back there to begin with.

THE DEFENDANT: Right, no.

THE COURT: Perhaps if Counsel has an opportunity, you're asking that she come and see you at the jail in private.

THE DEFENDANT: Right.

MS. ERWIN: In segregation? I hate to see him -- you don't want to go into segregation?

THE COURT: Not him in segregation, but my understanding is that if you come see him at the jail you have an opportunity to talk to him with a few less people around.

MS. ERWIN: Yes, I can do that.

THE COURT: Okay.

MS. ERWIN: And will do that.

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THE COURT: And I do agree with your client that sometimes it is difficult to do that in the lockup in the courthouse, but you also have the opportunity to request any additional fees, but I would prefer that you make sure that you're both on the same page.

[Doc. 21-5, Pg ID 1469].

The pre-trial hearing defined the terms of cooperation expected from petitioner and the record clearly indicates that the only additional term that existed pertained to petitioner's testimony on April 7th before the grand jury. At the pre-trial hearing, which defined the terms of the cooperation agreement, petitioner asked the court if he could meet with counsel privately prior to appearing before the grand jury. The court informed counsel that additional funds could be requested, instructing counsel to meet with petitioner ahead of the grand jury, to "make sure you are both on the same page." Counsel agreed to do so. [*Id.*].

The grand jury was to meet on April 7, 2009. Counsel failed to visit petitioner at the jail and was absent when petitioner met with the federal prosecutor to review his testimony. Petitioner contends that the federal

prosecutor then asked him if DEA agents present could ask a couple of questions. He further contends that it was then that the agents sought information about several individuals unrelated to petitioner's grand jury testimony or his cooperation to date, informing petitioner that if he provided the additional information, they would seek additional consideration from the prosecutor. Petitioner responded by informing the agents that the prosecutor had already indicated on the record that the deal on the table was the best he was going to get. When petitioner would not expand the scope of the questioning, petitioner claims that the DEA agents escorted him back to his cell, telling him that the grand jury would not meet, and his testimony was no longer needed.

Petitioner is entitled to habeas relief, because he has established that trial counsel was ineffective by her absence during critical stages of the proceedings which were contingent upon him getting the plea agreement offered in exchange for his cooperation and because petitioner was prejudiced by counsel's mistakes.

Trial counsel was ineffective for failing to inquire into the nature of petitioner's cooperation, nor did she attempt to secure a written or oral cooperation agreement in order to define the scope of that cooperation. *Leonti*, 326 F.3d at 1121 (counsel ineffective for making no attempt to define scope or method of cooperation).

Counsel also failed to mitigate her physical absences by debriefing petitioner about his cooperation or seeking the reports of any of his sessions, in order to apprise herself of the status of his cooperation efforts. *Id.* (counsel ineffective for failing to appear at debriefings or discuss them with client).

Not only did counsel fail to advise her client during the critical stages during the implementation of a cooperation agreement, by defining and placing the terms into a written agreement and being present to vouch for petitioner's compliance, counsel further failed to advise her client before the calling of the grand jury, and failed to be present at the time that the federal prosecutor met with petitioner to go over petitioner's testimony. At this point, the decision was made not to use petitioner's testimony before the grand jury. At this critical stage, the prosecutor withdrew the plea offer claiming that petitioner failed to comply with the cooperation agreement.

Both the trial court judge and petitioner were aware that petitioner's presence on April 7th to possibly provide grand jury testimony was pivotal in obtaining the plea offered by the prosecutor at the last pre-trial conference. [Doc. 9-1, Pg. ID 753]. Both the trial court judge and Agent Robert Ziskie stressed the need of a defendant and counsel to be "on the same page" prior to the giving of grand jury testimony. [Doc. 21-5, Pg ID 1469; Doc. 46, Pg ID 2584]. The trial court judge at the pre-trial hearing directed trial counsel to petition for additional fees and meet with petitioner at the jail to prepare for the grand jury testimony.

Just as trial counsel was totally unaware of all cooperation rendered by petitioner up to the grand jury hearing, trial counsel was also totally unaware of the grand jury process or her role of acting as standby counsel to assist her client. [Doc. 45, Pg ID 2354, 2362]. Trial counsel did not prepare petitioner to give testimony before the grand jury, as instructed by the trial court judge and merely told him to cooperate, [Id., Pg ID 2362], nor did she appear as standby counsel to vouch that petitioner complied, or rehabilitate petitioner, if necessary, to obtain the plea offer.

Trial counsel's willful ignorance of petitioner's cooperation, and her inability to participate as standby counsel, left her unable to rebut the prosecutor's assertion on the trial date that petitioner had been uncooperative with law enforcement and therefore, was not entitled to the plea offer as articulated on the record at the last pre-trial conference.

It is clear from the record that petitioner cooperated at each meeting with the DEA, as indicated at the last pretrial hearing. The absence of counsel, when the grand jury was to be called, created an opportunity to withdraw the plea agreement on a mere allegation by the prosecutor that petitioner had not cooperated. Respondent does not deny that the prosecutor chose not to use petitioner's testimony before the grand jury. Choosing not to use petitioner's testimony prevented petitioner from complying with the last contingency of the plea agreement, if that was a requirement for obtaining the more favored plea

offer. Had trial counsel been present, she could have advocated on behalf of her client as to his compliance or rehabilitate her client if necessary. The record clearly indicates that if there was cooperation on April 7th, the prosecutor was prepared to accept the plea outlined at the pretrial hearing.

On the trial date, the prosecutor withdrew the plea offer based on the representations made by the U.S. Attorney. Trial Counsel reported the determination made by the U.S. Attorney, as reported by the prosecutor, to the trial court judge.

Furthermore, trial counsel did not allocute on behalf of her client at sentencing and never indicated to the court the extensive cooperation given by petitioner, resulting in the trial court judge informing trial counsel "he gets nothing" for his cooperation. [Doc. 46, Pg ID 2473-2474]. Trial counsel merely indicated to the trial court that the plea agreement was based on his cooperation with the DEA. Trial counsel was totally unaware of the terms of the cooperation agreement between her client and the DEA, having never discussed the terms with the DEA, or her client, never seeking to obtain and reduce the terms of the cooperation agreement to writing, never debriefing her client, never meeting with her client as instructed by the trial court to prepare for the giving of grand jury testimony, and never consulting with her client or attempting to rehabilitate her client prior to the withdrawal of the plea agreement on the day of trial.

Trial counsel also failed to move the sentencing court for a downward

departure from the sentencing guidelines range based on the value of petitioner's proffered information. Trial counsel never attempted to argue that the sentencing court exhibit leniency in light of petitioner's cooperation, as evidenced by the extensive information provided within the DEA's Report of Investigation. [Doc. 9-1, Pg. ID 796-801]. "In short, [trial counsel] never did anything to make it more likely that [petitioner] would in fact be able to provide substantial assistance[.]" *Leonti*, 326 F.3d at 1121, or advocate on behalf of her client as to the level of her client's cooperation, which was unknown to trial counsel. This court directly questioned trial counsel as to when petitioner "hit the wall" in his cooperation. Trial counsel could not provide any specifics as to an impediment or whether petitioner fulfilled the terms of the cooperation agreement.

THE COURT: Can I repeat the question? The question is, if he thought that he had fulfilled the contract, how were you to know whether to advise him, to give him more or not to give him more? In other words, the scope of the contract.

THE WITNESS: I always encouraged him to work with them to the fullest extent of his ability.

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THE COURT: But you have testified several times that all you could say to Mr. Fox is that he started out good and stopped. But you couldn't say to Mr. Fox that he fulfilled the contract.

THE WITNESS: No, I couldn't. I couldn't say that, no, and I didn't. I just know that the DEA agents said he started out helping them and then it stopped.

[Doc. 45, Pg ID 2363-2364].

The record clearly indicates that counsel was absent during the plea negotiation process. It also shows that trial counsel did not advocate on behalf of her client, failing to meet the minimum standards of the effective assistance of counsel. Petitioner pleaded to an offer which was originally made following the arraignment in exchange for his trial rights. The prosecutor testified, as follows, that such an offer is customarily made to avoid trial and was not the result of any negotiations with trial counsel.

A. Yes. Exactly as I normally would, the week before, I reviewed his file. And, again, obviously there is a lot of specifics from this nine years ago I don't recall. But to the best of my recollection I would have reviewed his file the week before his arraignment. Within that, I would have reviewed his criminal history, the actual facts of the case. If there was a victim where I particularly cared about their position or was concerned how they would feel about our resolving the case, I would contact them. And then I normally notate within the file itself, a manila folder with all the documents inside, I normally notate what was going to be my initial offer at the time of arraignment before meeting with defense counsel or anyone else involved in the case.

Q. And in this specific case, do you remember what your initial offer was?

A. I do. The initial offer was to reduce the habitual notice from a habitual fourth offender status to habitual third. No reduction in the charge itself. He would have to plead as charged otherwise.

Q. And just so we are clear, this is before you've really met anyone or handled the case in court, is that right?

A. Yes.

[Doc. 46, Pg. ID 2488].

Petitioner was prejudiced by counsel's absence when the prosecutor withdrew the plea, citing lack of cooperation at the time petitioner was to testify before the grand jury on April 7th. Petitioner was also prejudiced by trial counsel's deficient performance when she failed to ascertain the terms of the plea agreement, reduce the terms to writing, meet, discuss, debrief, and rehabilitate her client in connection with the grand jury proceedings. The record clearly reflects trial counsel's absence or deficient representation throughout the plea negotiation process and at sentencing resulted in petitioner accepting the initial plea offered by the prosecutor to a habitual third, no reduction in the charge, in exchange for waiving his trial rights, which was offered before petitioner had any contact with trial counsel.

The question becomes what the appropriate habeas remedy would be in this case. A federal habeas court has broad discretion in conditioning a judgment granting habeas relief. *Hilton v. Braunschweig*, 481 U.S. 770, 775 (1987). 28 U.S.C. § 2243 authorizes federal courts to dispose of habeas corpus matters "as law and justice require." Cases involving deprivations of the Sixth Amendment right to the assistance of counsel are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation. *United States v. Morrison*, 449 U.S. 361, 364 (1981).

The proper remedy in this case is to issue a writ of habeas corpus conditioned upon the state prosecutor reoffering the original plea agreement.

*Lafler*, 132 S. Ct. at 1391.<sup>2</sup>

Because this Court's conclusion that petitioner is entitled to habeas relief on his assistance of counsel claim during the pre-plea cooperation period and at sentencing is dispositive of the petition, the Court considers it unnecessary to review petitioner's other claims and declines to do so. See *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562, 567 (E.D. Mich. 2005).

#### **IV. ORDER**

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO RE-OFFER THE MORE FAVORABLE PLEA AGREEMENT WITHIN NINETY (90) DAYS OF THE DATE OF THIS OPINION, PETITIONER MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

s/Arthur J. Tarnow  
HON. ARTHUR J. TARNOW  
SENIOR U.S. DISTRICT JUDGE

Dated: June 21, 2017

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<sup>2</sup> Petitioner also alleges that his three different appellate attorneys were ineffective for failing to raise this claim on his direct appeal. In light of the fact that this Court is granting petitioner habeas relief on his assistance of trial counsel claim, petitioner's ineffective assistance of appellate counsel claim is now moot. *Couch v. Booker*, 650 F. Supp. 2d 683, 696 (E.D. Mich. 2009), *aff'd*, 632 F.3d 241 (6th Cir. 2011).