No.

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD DERNARD BOZELL

Vs.

CARMEN PALMER

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD DERNARD BOZELL #423470
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QUESTIONS PRESENTED FOR REVIEW

Whether it can be presumed given the fact that (**1**) the USSC in *Blackledge* clearly stated that guilty plea cases were cognizable for federal review?; Whether it can be presumed given the fact that (**2**) the USSC in *Lafler* clearly stated that a trial counsel's effectiveness applies equally in guilty plea cases?; and (**3**) did the USSC in *Class* reaffirmed *Blackledge* and *Lafler's* analysis that all guilty plea case like that of the Petitioner has cognizablility in all federal courts?

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A. *Bozell v Palmer* USMJ R&R Case #1:17-cv-301 05/08/2018

B. *Bozell v Palmer* USDJ Order Adopting the R&R Case #1:17-cv-301 07/16/2018

C. *Bozell v Palmer* Sixth Circuit Order Denial for a COA Case #18-2012 11/02/2018

LIST OF PARTIES INVOLVED PURSUANT TO USSC RULE 12.6

1. Richard Dernard Bozell #423470 The Petitioner.
2. Michigan Attorney General Bill Schutte the Respondent for the State.
3. The Solicitor General the Respondent for The United States.

TABLE OF AUTHORITIES

SUPREME COURT CASES

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CITATION OF OPINION BELOW

USMJ Phillip J. Green issued his Report and Recommendation in case #1:17-cv-301 05/08/2018 on May 08, 2018. USDJ Robert J. Jonker Approved and Adopted the Report and Recommendation in case #1:17-cv-301 on July 16, 2018. The Petitioner filed an application for leave to appeal in the Sixth Circuit Court of Appeals who denied him a COA in case #18-2012 November 02, 2018. See Appendix A-C.

JURISDICTION

A petition for a Writ of Certiorari to reviewed a judgment of a United States Court of Appeals is timely sought when filed with the Clerk of the USSC within 90-days after entry of the judgment. See USSC R. 13.1; 28 USC §1254(1); see also Hohn v United States 524 US 236; 118 SC 1969 (1998). This Writ is being timely filed pursuant to R. 13.1.

U.S. CONSTITUTIONAL INVOLVEMENT

USCS CONST. AMEND. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

USCS CONST. AMEND. 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws**.

FEDERAL STATUTORY INVOLVED

28 USC§1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 USC §2253(c)

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from: (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court or (B) the final order in a proceeding under section 2255 or (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

MICHIGAN COURT RULE INVOLVED

MCR 6.310 Withdrawal or Vacation of Plea. Subsection-C Motion to Withdraw Plea After Sentence provides in pertinent parts:

> The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.
>
> To succeed on such a motion after sentencing the defendant must demonstrate a defect in the plea process.

MCR 6.302 Pleas of Guilty and Nolo Contendere. Subsections C-D provides in pertinent parts:

(C) A Voluntary Plea.

> (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. If they have made a plea agreement, which may include an agreement to a sentence to a specific term or within a specific range, the agreement must be stated on the record or reduced to writing and signed by the parties. The parties may memorialize their agreement on a form substantially approved by the SCAO. The written agreement shall be made part of the case file.
>
> (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agreed to; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(1) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and (c) whether it is the defendant's own choice to plead guilty.

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) state why a plea of nolo contendere is appropriate; and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

STATEMENT OF FACTS

The Petitioner Richard Dernard Bozell is presently confined at the Ionia Correctional Facility in Ionia, Michigan and has filed a petition for a writ of habeas corpus pursuant to 28 USC §2254. In his pro se petition the Petitioner challenges his convictions and sentences for Second Degree Murder MCL 750.317, Possession of a Firearm MCL 750.224f, and three counts of Felony Firearm MCL 750.227BA which he was sentenced to consecutive terms of 60 to 90 years of imprisonment to run consecutive to 2

years for the felony Firearm charges. The Respondent filed a reply brief asking this court to summarily dismiss his petition on the grounds that the Petitioner has failed to properly exhaust some of his claims contained in his petition with the state courts but failed to addressed the merits of both the exhaustion and procedural default analysis on new issues raised in the Michigan Supreme Court in their brief to this court for granting such a Judgment. In the instant petition the Petitioner sought Habeas Relief on the following grounds:

> I. THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA
>
> II. THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT FAILED TO FOLLOW HIS SENTENCING AGREEMENT

PROCEDURAL BACKGROUND

In this case, the Respondent contends that Claim-II was unexhausted because this claim was never presented in the Petitioner's appeal before the Michigan Court of Appeals being raised instead for the first time before the Michigan Supreme Court. The Petitioner contends that this issue was properly exhausted because it was presented to the Michigan Supreme Court as a New Issues as part of his pro per application for leave to appeal to the Michigan Supreme Court. Although the Michigan Supreme Court could have denied the Petitioner's new issue in its order or remanded the case to the Michigan Court of Appeals for consideration of the added issue, the Michigan Supreme Court permitted the Petitioner to add the new issues which the Supreme Court presumably considered when it denied him leave to appeal. Given the State Supreme Court's discretionary authority, coupled with the procedural formalisms invoked by the Petitioner in this brief, he argued that he complied with the exhaustion requirement of 28 USC §2254(b). On the 8th day of May 2018 Magistrate Phillip J. Green issued a Report and Recommendations (R & R) recommending to District Judge Robert J. Jonker to deny the Petitioner's Petition for Writ of Habeas Corpus as (1) the question under state rules, i.e. MCR 6.302 and MCR 6.310, on whether the Petitioner could withdraw his plea is not reviewable in a habeas corpus

petition; (2) the petitioner's no-contest plea was knowingly and voluntary made; (3) his plea was not illusory; and (4) the Petitioner fails to show that he suffered any prejudice as a result of counsel's alleged ineffectiveness. Magistrate Judge Green also recommended to this court to deny the Petitioner a Certification of Appealability because jurors of reasons would not conclude that this court's denial is debatable or wrong. Because the Petitioner could not reasonably meet the 14 days filing requirements of 28 USC §636(b)(1)(c); F.R.Civ.P. 72(b)(2); and W.D. Mich. LR 72.3(b) the Petitioner sought an extension of time not attributable to bad-faith and will not operate to substantially prejudice Respondent. District Judge Jonker Approved and Adopted the Report and Recommendation on July 16, 2018. Thereafter, the Petitioner filed an application for a Certificate of Appealability in both the Western District Court and the Sixth Circuit Court of Appeals. District Judge Jonker reviewed the Petitioner motion pursuant to federal rules of appellate procedure 24(a) and Granted the Petitioner's motion to proceed in forma pauperis on September 25, 2018. The Petitioner also filed a Notice of Appeal in the Sixth Circuit Court of Appeals which was docket as case #18-2012 on September 06, 2018. The Petitioner argued that the trial court erred by denying his motion to withdraw his no-contest plea and contends that he should have been allowed to withdraw his plea because he pleaded in reliance on counsel's erroneous assertion that he would receive a sentence within his thirty-year minimum sentence. In the federal courts the Petitioner argued that in Magistrate Judge Green's Report and Recommendation recommended that his Habeas Petition be denied because the Petitioner's claims were not cognizable for federal review. See Exhibit-A at p-11 stating (1) The Petitioner's claim is not cognizable for federal review. The Sixth Circuit Court of Appeals denied the Petitioner COA Application on November 02, 2018 erroneously on the grounds that the magistrate judge made no such assessment on the merits of the Petitioner claims. Id. P-11; see also p-12 & 21 (2) It is well settle that a voluntary and plea of guilty by an accused person who has been advised by **competent counsel** may not be attacked and (3) the Petitioner has failed to show that he suffered any prejudice as a result of counsel's ineffectiveness. See

Exhibit-C at p-2 fn-2. The Sixth Circuit ignores the fact that District Judge Jonker stated that the Magistrate Judge found that this argument was not cognizable for Habeas review and that the Magistrate Judge's decision was correct. See Exhibit-B at p-2 (Emphasis Added).

The Petitioner now seeks a Writ of Certiorari from the Sixth Circuit Court of Appeals and ask this Court to Grant Certiorari on the questions of whether it can be presumed (**1**) that guilty plea cases were cognizable for federal review? and (**2**) whether it can be presumed that a trial counsel's ineffectiveness applies equally in guilty plea cases?

SUMMARY OF LEGAL PROCEEDINGS

After the Petitioner filed his objections the United States Supreme Court issued its decision in *Class v United States 138 S Ct 798 (2018)*, in which the Petitioner filed a Motion to Alter or Amend the Judgment Entered and argued that in light of this decision the Federal District Court should order all parties to file supplemental briefs on whether the Petitioner federal review bars his ability to bring his constitutional challenge that his trial counsel was ineffective, that counsel's ineffectiveness applies equally to the plea bargaining process, and whether his plea agreement regarding counsel's ineffectiveness is foreclosed by *Class* and asked the court to reject the Magistrate Judge's (R&R) due to intervening changes in the law and to consider *U.S. v Bacon 884 F3d 605, 610 (6th Cir Mich 2018); Lee v U.S. 2018 U.S. Dist Lexis 52473 (D. Ariz 9th Cir); and Anderson v Baca 2018 U.S. Dist Lexis 40646 (D. Nev 9th Cir)* where each of these cases addressed whether a guilty plea by itself bars the constitutionality of a plea based conviction on appeal and in a federal habeas petition?

For example, this Supreme Court recent decision in *Class* addressed whether a guilty plea by itself bars a criminal defendant from challenging the constitutionality of his conviction on direct appeal. In *Class* the defendant raised constitutional challenges of his conviction at a preliminary hearing but ultimately entered a guilty plea pursuant to a written agreement. Under the terms of his plea agreement *Class* waived a number of appellate rights and preserved several others. The agreement was silent on

the issue of constitutional challenges. The Supreme Court held that such silence did not constitute a waiver to a defendant's challenges of his guilty plea, determining that a defendant does not relinquish his or her rights to appeal a court's constitutional determinations simply by pleading guilty. The Petitioner's interpretation of *Class*, is that *Class* clarification is a direct appeal as of right.

Like *Class*, Bozell's guilty plea did not bar his appeal on the circumstances of his plea agreement or trial counsel's effectiveness during his plea negotiations with the state nor, is this conclusion, is not affected by Bozell's failure to raise his constitutional arguments before the State Circuit Court. *Class* did so, but the Supreme Court's decision does not turn on that fact and nothing in the opinion suggests that its holding is limited to cases where the defendant has raised the constitutional challenge before entering a plea. To the contrary, the relevant portion of the Court's analysis relies on a number of cases where that is not true. See *Class* discussing e.g. *United States v Broce 488 US 563; 109 SC 757 (1989); Blackledge v Perry 417 US 21; 94 SC 2098 (1974); and Tollett v Henderson 411 US 258; 93 SC 1602 (1973).* Accordingly, pursuant to *Class's* instructions, the Petitioner would argue that his plea based constitutional arguments was then and still being cognizable for federal review.

Magistrate Judge Green contents that the Petitioner's grounds for habeas corpus relief are not cognizable and District Judge Jonker approved and adopted that R&R on that analysis because he believed that the Petitioner's claims constituted pre-plea errors attributed to trial counsel's effectiveness during the Petitioner's plea negotiations which occurred prior to the state's sentencing hearing had no effect on the terms of his plea agreement. This is contrary to this Supreme Court's recent decision in *Class v United States 138 S Ct 798 (2018)* citing *Blackledge v Perry 417 US 21; 94 SC 2098 (1974)* in conjunction with *Lafler v Cooper 566 US 156, 161 & 182-83; 132 SC 1376, 1384 (2012)* and *Hill v Lockhart 474 US 52, 58-59; 106 SC 366 (1985)* reaffirmed that the *Strickland v Washington* analysis to ineffective assistance of counsel applies equally to a claim raising out of the plea bargaining process are confirmations that the Petitioner's claims are cognizable in a habeas corpus proceeding. Jurist of reasons

could easily debate that District Court Judge Robert J. Jonker adoption of the Magistrate Judge Phillip J. Green's R&R should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further or on an Appeal to the Sixth Circuit Court of Appeals on the Question of whether *Class v United States* applies to guilty plea cases like that of the petitioner. See *Slack v McDaniel 529 US 473, 484; 120 SC 1595 (2000).*

District Court Judge Robert J. Jonker additionally stated that the Petitioner's objections to the R&R contained little by way of raising specific objections and merely repeats the Petitioner's underlying argument that he should have been permitted to withdraw his plea due to his counsel's mistake that his minimum sentencing underlines were 30 years and that his plea agreement would be within that range. Jurist of reasons could easily debate that District Judge Jonker adoption of the R&R should have been resolved in a different manner or was wrong.

For example, the judge ignored the fact that the Petitioner challenged the validity of his guilty plea and trial counsel's effectiveness in his objection to the R&R under *Blackledge v Perry 417 US 21; 94 SC 2098 (1974)*(**stating that guilty pleas are not barred from federal review**); see also *Haring v Prosise 462 US 306, 320; 103 SC 2368 (1983); Hill v Lockhart 474 US 52, 58-59; 106 SC 366 (1985)*(**where the Supreme Court addressed ineffective assistance of counsel at the trial stage applies equally to the plea bargaining process**) cited in *Lafler v Cooper 566 US 156; 132 SC 1376, 1384 (2012)*(**reaffirming that the** *Strickland v Washington* **analysis to ineffective assistance of counsel applies equally to a claim raising out of the plea bargaining process**); see also *Towns v Smith 395 F3d 251 (6th Cir Mich 2005)*(**where the court stated it will not hesitated to find ineffective assistance in violation of the Sixth Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudices his or her client**); finally see also *People v Walker 497 Mich 894, 895 (2014)*(**if the defendant establishes that his trial counsel was ineffective as outlined in *Lafler* the defendant shall be given the opportunity to establish his**

entitlement on whether *Lafler* applies to his case) see also *People v Doulas 496 Mich 557, 591-94 (2014)*(**we agree with the Court of Appeals that counsel's mistaken advice regarding the sentence the defendant faced at trial fell below an objective standard of reasonableness**). The judge ignored the fact that under MCR 6.310(B)(2) Michigan defendants are entitled to withdraw the plea if under subsection (**2**)(**a**) the plea involves an agreement for a sentence for a specified term or within a specified range. These cases and procedural rule was raised for the first time in the Petitioner's Objections to the R&R and was not a repeat from the claims he raised in his Memorandum of Law. Jurist of reasons could debate whether this court's adoption of the R&R should have been resolved in a different manner or was wrong.

More importantly, jurist of reasons could unequivocally debate whether the District Court's adoption of the R&R should have been resolved differently given the fact that (**1**) the USSC in *Blackledge* clearly stated that guilty plea cases were cognizable for federal review (**2**) the USSC in *Lafler* clearly stated that a trial counsel's effectiveness applies equally in guilty plea cases and (**3**) the USSC in *Class* reaffirmed *Blackledge* and *Lafler's* analysis that all guilty plea cases like that of the Petitioner are cognizable in all federal courts.

GROUNDS FOR GRANTING RELIEF

STANDARD OF REVIEW

In the State of Michigan, the standard of review regarding guilty plea cases is determined when a defendant argues ineffective assistance of counsel in the context of a guilty plea, the defendant is essentially arguing that counsel failed to provide insufficient information regarding the consequences, elements, or possible defenses of the plea. To establish ineffective assistance of counsel in the context of guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understanding. Absent sufficient information the plea would be unknowing and, consequently, involuntary. More specifically, for purposes of determining whether defense was ineffective, a defendant

need only be made aware of the direct consequences of a guilty. E.g. *People v Fonville 291 Mich App 363 (2011).* Likewise, this Supreme Court has held that a defendant has a Sixth Amendment Right to counsel, a right that extends to the plea bargaining process. During plea negotiations this court stated, defendants are entitled to effective assistance of "**competent counsel**" and a two-part test applies to challenges to guilty plea based on ineffective assistance of counsel. The performance prong of the test, this court stated, requires a defendant to show that counsel's performance fell below an objective standard of reasonableness. *Lafler v Cooper 566 US 156; 132 SC 1376 (2012).* In the instant case, counsel's inaccurate advice that the Petitioner's minimum sentencing guidelines range was 30 years and that his plea agreement would be within that range was caused him to tendered a plea that was involuntarily and, consequently, unknowing made.

LEGAL SYNOPSIS

The sole purpose of the Sixth Amendment is to protect the right to a fair trial. The Federal District Court and the Sixth Circuit Court of Appeals in this case regarding counsel's errors before trial, they argued that in guilty plea cases, counsel's ineffectiveness prior to trial or a plea hearing are not cognizable under the Sixth Amendment. The summary of facts regarding this petition is sample:

> **1.** The Petitioner argued that the trial court erred by denying his motion to withdraw his no-contest plea and contends that he should have been allowed to withdraw his plea because he pleaded in reliance on counsel's erroneous assertion, prior to accepting a plea agreement, that he would receive a sentence within his thirty-year minimum sentence. And;
>
> **2.** The Petitioner convictions and sentences for Second Degree Murder MCL 750.317, Possession of a Firearm MCL 750.224f, and three counts of Felony Firearm MCL 750.227BA was sentenced to consecutive terms of 60 to 90 years of imprisonment to run consecutive to 2 years for the felony Firearm charges on December 29, 2014.
>
> **3.** During sentencing, the trial court asked defense counsel, who had objected to the scoring of the guidelines, and argued that the bottom of the guidelines sentence was appropriate.

The Petitioner filed a motion to withdraw the plea on June 24, 2015 arguing that his trial attorney was ineffective in explaining the plea and the maximum minimum sentence would be thirty years,

therefore, his plea was illusory because the sentence he received amounted to Life in Prison. After hearing oral arguments on July 27, 2015 the trial court denied the Petitioner's motion on July 31, 2015. The court stated that the guidelines fell within the guideline range and that no sentencing agreement was part of the plea deal. The trial court also declined to hold an evidentiary hearing on the effectiveness of counsel, stating, that even if defense counsel made an incorrect prediction about the about the outcome of the plea it did not constitute grounds for relief. The petitioner raised the same series of arguments in both the State and Federal Courts that his plea was illusorily, not knowing and voluntarily made, because he believed he receive a sentence within the maximum minimum sentence of thirty years, based on the reliance on counsel's erroneous assertion that he would receive this type of sentence prior to trial, prior to his plea hearing, and prior to sentencing. The questions before this court is whether or not the Sixth Circuit reached a decision that was contrary too or involved an unreasonable application of Supreme Court precedent in denying the Petitioner Habeas Petition on the grounds that (**1**) Guilty Pleas Case are not cognizable for Federal Review and (**2**) A trial counsel's errors prior to accepting a Plea does not raise to the level of a Sixth Amendment Violation? The Petitioner relies on the following USSC case citations in support of this petition.

In *Blackledge v Perry 417 US 21; 94 SC 2098 (1974)* this court stated in relationship to Guilty Pleas regarding Competency, when a criminal defendant enters a guilty plea, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Rather, a person complaining of such antecedent constitutional violations is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea **[through proof]** that the advice received **[from counsel]** was not within the range of competence demanded of attorneys in criminal cases. Citing *McMann v Richardson 397 US 759; 90 SC 1441 (1970).*

In *Blackledge* this court affirmed the issuance of a writ of habeas corpus because petitioner's charging a greater offense for the same conduct in respondent individual's de novo retrial of lower court

conviction had the potential for vindictive abuse and could unconstitutionally deter defendants from pursuing their appeal rights and held that review by writ of habeas corpus of such a violation of due process was not precluded by respondent's guilty plea. In an opinion by Stewart, J., expressing the views of seven members of the court, it was held that (1) upon appeal from a misdemeanor conviction, entitling the convicted defendant to a trial de novo, the state denies due process by bringing a felony charge against him for the same conduct, unless the state shows that it was impossible to proceed on the felony charge at the outset, and (2) the accused's guilty plea to the felony charge did not foreclose his post-conviction attack on his conviction, since he thereby challenged the state's right to bring any felony charge against him. Therefore, in crux of *Blackledge*, guilty pleas are not barred from federal review.

In *Lafler v Cooper 566 US 156; 132 SC 1376, 1384 (2012)* citing *Hill v Lockhart 474 US 52, 58-59; 106 SC 366 (1985)* this court in *Lafler* Respondent state prison inmate rejected a plea bargain based on erroneous legal advice of counsel and was convicted at trial of all offenses and received a much greater sentence than offered in the plea bargain. Upon the grant of a writ of certiorari, petitioner prison warden appealed the judgment of the U.S. Court of Appeals for the Sixth Circuit which upheld a grant of a writ of habeas corpus based on ineffective assistance of counsel. It was conceded that the inmate's counsel was deficient in providing erroneous legal advice concerning the plea bargain, but the warden contended that the inmate suffered no prejudice because the inmate was properly convicted after a fair trial. The U.S. Supreme Court held that the inmate's fair trial did not preclude prejudice from counsel's ineffective assistance. The right to effective assistance of counsel was not solely to ensure a fair trial, and there was no indication that the fair trial cured counsel's error. Further, the inmate suffered prejudice rather than a windfall based on the likelihood that the outcome would have been different, since the inmate sought relief based on a failure to meet a valid legal standard rather than application of an incorrect legal principle. Also, a lack of prejudice could not be based on the reliability of the trial since the reliability of the pretrial bargaining, which caused the inmate to lose the benefits of the bargain, was the concern at

issue. However, the appropriate remedy for counsel's error was to re-offer the plea bargain and conduct further proceedings in state court, rather than directing that the plea bargain be enforced. The United States Court of Appeals for the Sixth Circuit affirmed finding even full deference under AEDPA cannot salvage the state court's decision. Applying Strickland, the Court of Appeals found that respondent's attorney had provided deficient performance by informing respondent of "**an incorrect legal rule**" and that respondent suffered prejudice because he lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him. See *Cooper v Lafler 376 Fed Appx 563, 569-73 (2010).* This Court granted certiorari in *Lafler v Cooper 562 US 1127; 131 SC 856 (2011).* In do so, this Court held that Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process and that during plea negotiations defendants are "entitled to the effective assistance of competent counsel. Citing *McMann v Richardson 397 US 759, 771; 90 SC 1441 (1970).*

In *Hill v Lockhart 474 US 52, 58-59; 106 SC 366 (1985)* this Court held the two part *Strickland v Washington 466 US 668; 104 SC 2052 (1984)* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill* Ibid 474 US at 58. The performance prong of *Strickland* requires a defendant to show that counsel's representation fell below an objective standard of reasonableness. *Hill* Ibid 474 US at 57 (quoting Strickland 466 US at 688). In *Hill* all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. The question this Court next addressed was how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

To establish Strickland prejudice 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. *Strickland* 466 US at 694. In the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice. See *Missouri v Frye 566 US 134, 148; 132 SC 1399*

(2012)(noting that Strickland's inquiry, as applied to advice with respect to plea bargains, turns on whether the result of the proceeding would have been different (quoting *Strickland* 466 US at 694); see also *Hill* 474 US at 59 (The . . . prejudice requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process).

In *Hill*, the Court of Appeals for the Sixth Circuit agreed with that test for Strickland in the context of a rejected plea bargain and this was consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See *Cooper v Lafler 376 Fed Appx 563, 571-73 (2010)*; see also, e.g., *United States v Rodriguez 929 F2d 747, 753, n. 1 (CA1 1991); United States v Gordon 156 F3d 376, 380-81 (CA2 1998); United States v Day 969 F. 2d 39, 43-45 (CA3 1992); Beckham v Wainwright 639 F2d 262, 267 (CA5 1981); Julian v Bartley 495 F3d 487, 498-500 (CA7 2007); Wanatee v Ault 259 F3d 700, 703-04 (CA8 2001); Nunes v Mueller 350 F3d 1045, 1052-53 (CA9 2003); Williams v Jones 571 F3d 1086, 1094-95 (CA10 2009); United States v Gaviria 116 F3d 1498, 1512-14; 325 US App DC 322 (CADC 1997).*

In *Tollett v Henderson 411 US 258; 93 SC 1602 (1973)* a state prisoner, who had pleaded guilty to a 1948 Tennessee indictment for murder on advice of counsel, and who had thereupon been sentenced to imprisonment for 99 years, was subsequently denied state habeas corpus relief sought on the ground of unconstitutional exclusion of Negroes from the grand jury which had indicted him, the state courts holding that the prisoner's guilty plea constituted a waiver of his constitutional claim, notwithstanding that neither the prisoner nor his attorney had been aware of the unconstitutional method of grand jury selection when the guilty plea was entered. Thereafter, the prisoner instituted habeas corpus proceedings in the United States District Court for the Middle District of Tennessee asserting the same violation of his constitutional right to a properly selected grand jury, and the District Court granted relief, finding that there had been unconstitutional exclusion of Negroes from grand jury service and that the prisoner had

not knowingly waived his constitutional right to a properly selected grand jury. The Court of Appeals for the Sixth Circuit affirmed in *Henderson v Tollett 459 F2d 237 (6th Cir Tenn 1972).*

On certiorari, the United States Supreme Court reversed and remanded in an opinion by Rehnquist, J., expressing the views of six members of the court, it was held that (1) the state prisoner, after pleading guilty on advice of counsel, could not later obtain release through federal habeas corpus by proving only that the indictment to which he had pleaded was returned by an unconstitutionally selected grand jury **but must also establish that his attorney's advice to plead guilty, without having made inquiry into the composition of the grand jury rendered such advice outside the range of competence demanded of attorneys in criminal cases** and (2) **the issue whether the prisoner could successfully attack his guilty plea as having been based on incompetent advice of counsel should first be considered by the lower federal courts.**

Marshall, J., joined by Douglas and Brennan, JJ., dissented on the ground that under the facts of the instant case the prisoner had amply demonstrated that he was entitled to relief **on any theory of voluntariness of the guilty plea, right to effective assistance of counsel, or waiver, and that no further proceedings were necessary since an attorney representing an accused should be required to investigate as to, and inform the accused of, possible constitutional challenges to the prosecution before considering a plea bargain or before entering a guilty plea,** and since the prisoner's attorney in the instant case had not acted within the range of competence demanded of attorneys, it being clear at the time of the indictment that the method employed for selecting the grand jury was unconstitutional.

In *Tollett*, this court stated we hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity. A state prisoner must, of course, prove that some constitutional infirmity occurred in the proceedings. But the inquiry does not end at that point, as the Court of Appeals apparently thought. If a prisoner pleads guilty

on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases. See *McMann v Richardson 397 US 759, 771; 90 SC 1441 (1970)*. Counsel's failure to evaluate properly facts giving rise to a constitutional claim or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim might in particular fact situations meet this standard of proof.

In the instant case, the Petitioner was charged with open murder MCL 750.318, possession of a firearm by a felon MCL 750.224f, an assault with intent to murder MCL 750.83, and 3 counts felony firearm. On the day before the Petitioner's jury trial was to begin, December 01, 2014, trial counsel advised the Petitioner of the State's offer of a no contest plea to count-1 (reduced to second degree murder, count-2 an assaults with intent to murder, and count-3 one court of felony firearm, in exchange for which the State agreed to dismiss the remaining charges. Trial counsel further advised the petitioner that the State would agree to a sentence within his maximum minimum sentencing guidelines of 30 years. On the day the Petitioner's jury trial was to begin, December 02, 2014, the court accepted the Petitioner's no contest plea after conducting a full discussion explaining the charges and maximum possible sentences the Petitioner could receive. The court sentenced the petitioner on December 29, 2014 as a forth offense habitual offender MCL 769.12 to two concurrent prison terms of 60 to 90 years for an assault with intent to murder and murder, and a consecutive prison term of two years on the felony firearm charge.

In the case, the imposition of a minimum sentence of 60 year exceeded the nature of the advice given by trial counsel and the voluntariness of the Petitioner's plea by 100%. More importantly, the sentence prescribed for first degree murder for individuals who receive a sentence of imprisonment for life with parole is 200% less than the 60 years the Petitioner received because after 20 years in prison he would have been eligible for parole every 5 years thereafter. These facts are not new because of the discrepancy in the sentencing scheme between life sentences and indeterminate sentences in Michigan, a person serving a life sentence may come under the jurisdiction of the Parole Board more quickly than

one serving an indeterminate sentence. While the sentencing judge or his successor has the authority to preclude parole for a defendant who is sentenced to life in prison, see MCL 791.234(8)(c), the sentencing judge may not effectively sentence a defendant convicted of murder to a non-parolable life sentence by means of a lengthy term of years. In the Petitioner's view, as in many other Michigan State Prisoner views, it is an abuse of discretion to deliberately sentence a defendant with the purpose of depriving the Parole Board of its jurisdiction. Had the Petitioner been given a life sentence or a term-of-years within the sentencing guidelines of the 30 years based on the inaccurately advise given to him by his trial counsel, defendant would have been eligible for parole, more likely than not, in 2034. Under the sentence imposed by the trial court, however, the earliest date the Petitioner will be eligible for parole is 2074. Had the Petitioner been advised correctly by trial counsel the Petitioner would have gone to trial on December 02, 2014 rather than accepting the State's plea offer, and the trial judge would have had the option to sentence him to life in prison, which substantively would have had the same effect as the 60 to 90 years sentence he received by excepting the State's plea offer. Given the disproportionate upward departure from what was advised to the Petitioner by trial counsel prior to his jury trial, effectively amounted to a life sentence. Like the USSC cases cited herein, counsel's failure to evaluate properly facts giving rise to a constitutional claim or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim might in particular fact situations meet this standard of proof articulated in the two part *Strickland v Washington 466 US 668; 104 SC 2052 (1984)* test to challenges regarding guilty pleas based on ineffective assistance of counsel.

In the instant case, the Petitioner avers he has amply demonstrated that he was entitled to relief on any theory of voluntariness of his guilty plea, his right to effective assistance of counsel, and that no further proceedings were necessary, in the lower courts, since the attorney representing his was required to investigate as to, and inform him of, any possible constitutional challenges to the prosecution case before considering a plea bargain or before entering a guilty plea, and since the attorney in this case had

not acted within the range of competence demanded of attorneys, counsel was constitutionally ineffective regarding the petitioner no contest guilty plea prior to his jury trial.

Finally, in *Class v United States 138 S Ct 798 (2018)* a federal grand jury indicted petitioner, Rodney Class, for possessing firearms in his locked jeep, which was parked on the grounds of the United States Capitol in Washington, D. C. See 40 USC §5104(e)(1)(An individual may not carry on the grounds or in any of the Capitol Buildings a firearm). Appearing pro se, Class asked the District Court to dismiss the indictment. He alleged that the statute, §5104(e), violates the Second Amendment and the Due Process Clause. After the District Court dismissed both claims, Class pleaded guilty to Possession of a Firearm on U. S. Capitol Grounds, in violation of 40 USC §5104(e). A written plea agreement set forth the terms of Class guilty plea, including several categories of rights that he agreed to waive. The agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction. The Court of Appeals held that Class could not do so because, by pleading guilty, he had waived his constitutional claims.

This Court held that a guilty plea, by itself, does not bar ... criminal defendants from challenging the constitutionality of his statute of conviction on direct appeal. This holding flows directly from this court's prior decisions.

Fifty years ago, in *Haynes v United States, 390 US 85; 88 SC 722 (1968)* this court addressed a similar claim challenging the constitutionality of a criminal statute. Justice Harlan's opinion for the Court stated that the defendant's plea of guilty did not, of course, waive his previous [constitutional] claim. That clear statement reflects an understanding of the nature of guilty pleas that stretches, in broad outline, for nearly 150 years.

In *Blackledge v Perry*, this Court recognized that a guilty plea bars some antecedent constitutional violations, related to events that occur prior to the entry of the guilty plea quoting *Tollett v. Henderson*.

However, this Court held where the claim implicates the very power of the State to prosecute the defendant, a guilty plea cannot by itself bar it.

For the reasons outlined herein, the Petitioner avers that both the Federal District Court and the Sixth Circuit Court of Appeals ruling that the Petitioner guilty plea claim based on trial counsel's failure to investigate as to, and inform him of, any possible constitutional challenges to the prosecution case, i.e. regarding the accurate amount of his maximum minimum sentencing guidelines, before considering a plea and before entering a guilty plea, was not an act within the range of competence demanded of attorneys, therefore, counsel was constitutionally ineffective regarding the petitioner no contest guilty plea prior to his jury trial and the Federal District Court and the Sixth Circuit Court of Appeals ruling that this claim was not cognizable for federal review is contrary to or an unreasonable application of the United States Supreme Court Precedent discussed in this petition.

RELIEF SOUGHT

For the reasons stated herein the Petitioner implores this court to grant his petition for a writ of certiorari and either reverse the Sixth Circuit's decision or allow the parties to submit briefs on the merits of the questions presented in this petition.

SUBMITTED BY:

RICHARD DERNARD BOZELL #423470

DATED: 12-10, 2018