NO. 18-8371

THE SUPREME COURT OF THE UNITED STATES

Term of the Court: October, 2018-2019

MARTIN E. GRANT

Petitioner,

-vs-

STATE OF MICHIGAN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT.

[Corrected Version of]
PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

CERTIFICATE OF MAILING

By: MARTIN E. GRANT #196515
Petitioner, in forma pauperis
Oakes Correctional Facility
1500 Caberfae Highway
Manistee, Michigan 49660

QUESTIONS PRESENTED FOR REVIEW

I.

Whether Petitioner has been denied the effective assistance of counsel guaranteed by the 6th Amendment to the United States Constitution, during the plea bargaining process that led to, and resulted in, a jury trial conviction of first degree murder and a mandatory sentence of life imprisonment.

II.

Whether Petitioner has been denied Due Process and Equal Protection of the law guaranteed by the 14th Amendment to the United States Constitution, where the trial court, the Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner's Motion for Relief from Judgment, based on erroneous law, and in conflict with statutes and rules adopted by the State of Michigan.

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner, Martin E. Grant, respectfully prays that a Writ of Certiorari issue to review the Orders of the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court, denying Petitioner's state Motion for Relief from Judgment pursuant to Michigan Court Rule 6.500 et. seq., where Petitioner has made a substantial showing of denial of federal constitution rights.

OPINIONS BELOW

The unpublished Orders of the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court appears in Appendix A, to this Petition.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan, in Petitioner's original Petition for Writ of Habeas Corpus, is reported as Martin E. Grant v. Jessie L. Rivers, 920 F.Supp 769 (ED Mich, 1996).

JURISDICTION

The Michigan Supreme Court's Order in this matter was filed on May 01, 2018 and is set forth in Appendix A. This Honorable Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1257(a) for Writ of Certiorari to review after rendition of final judgments of state courts; 28 U.S.C. § 2101(d) directing the time for writ of certiorari to review the judgment of a State Court in a criminal case shall be prescribed by rules of the Supreme Court; and Supreme Court Rule 10(b), a state court of last resort has decided an important federal question in conflict with a another state court of last resort or a United States Court of Appeals, (c), a state court has decided an important question of federal law that has not been, but should be, settled by this Court, andr has decided an important federal question in conflict with this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTIONAL PROVISIONS

A. United States Constitution - Amendment VI

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

B. United States Constitution - Amendment XIV

Section 1.

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 law.

II. STATUTES

A. Title 28, United States Code, § 1257(a)
State Courts, Certiorari

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) 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.

B. Title 28, United States Code, § 1915 et seq
Proceedings In Forma Pauperis
(Text is set forth in Appendix H)

C. Title 28, United States Code, § 2101(d)

The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

STATEMENT OF THE CASE

On April 2, 1988, Petitioner was charged with first degree premeditated murder (MCL 750.316(1)(a)), and first-degree felony (larceny) murder (MCL 750.316(1)(b)), with respect to the homicide of one Charles Moody.

On September 29, 1988, Petitioner was found guilty after trial by jury, in Detroit Recorder's Court before the Hon. James R. Chylinski, of first-degree felony murder, and second-degree murder (MCL 750.317). On October 13, 1988, Petitioner was sentenced to mandatory life imprisonment on the felony-murder count, and the second-degree murder count was dismissed to avoid double jeopardy concerns.

Petitioner was represented throughout pretrial proceedings, trial and sentence by court appointed counsel Clarence Bradfield (P11098).

This case involves a long appellate history (most of it with-out the assistance of counsel), but the one issue raised herein was not presented for review, or decided on the merits, in any of the previous appellate proceedings.

In 2012, this Honorable Court decided Lafter v. Cooper, 566 US 156 132 S.Ct 1376, 182 LEd2d 398 (2012), which held that defendant's right to effective assistance of counsel was violated where erroneous advice by the trial counsel led defendant to reject a plea offer by the prosecutor, and defendant was prejudiced by standing trial, being convicted victed of a more serious offense, and receiving a more severe sentence.

On September 21, 2016 Petitioner caused to be filed a Motion for Relief from Judgment, pursuant to Michigan Court (MCR) 6.500 et. seq., in the Wayne County Circuit Court - Criminal Division, before the trial

judge Hon. James Chylinski. Petitioner submitted an affidavit that indicates about one month before his trial date his attorney visited him at the Wayne County Jail, and informed him that the prosecutor had made a plea and sentence offer for a plea to second-degree murder with a sentence agreement of 40 to 80 years in prison. (Appendix C) Petitioner's sworn statements regarding the plea offer and sentence are supported by a polygraph examination administered to him at Muskegon Correctional Facility on April 20, 2016. The report and curriculum vitae of the examiner are contained Appendix D.

Petitioner's affidavit also indicates that he declined the prosecutor's offer based on erroneous advice by trial counsel, and trial counsel's failure to fully and properly explain the prosecutor's offer and review the prosecution's witnesses and evidence against him. Petitioner's affidavit states that trial counsel convinced him that he would not be convicted of first-degree murder at trial "because my post-arrest statements support a defense of self-defense, and there are also testimony that would support a defense of intoxication, to reduce the first-degree murder charges." Petitioner's affidavit also indicates that trial counsel "told me the prosecutor's offer was no deal."

Furthermore, Petitioner's affidavit indicates that if trial counsel had fully explained the prosecutor's offer to him, and the fact that the prosecution had corroborating witnesses and strong evidence to reject his claim of self-defense and the defense of intoxication, he would have accepted the prosecutor's plea and sentence offer, because he did not want to spend the rest of his life in prison without the posibility of parole. Appendix C.

While Petitioner has previously filed an in pro per Motion for Relief from Judgment under 6.500 et seq., that motion was filed in the

trial court (and appealed up through the Michigan Supreme Court) prior to August 1, 1995. See, Appendix B (Opinions & Orders or trial court, Michigan Court of Appeals and Michigan Supreme Court, relevant to previously filed MCR 6.500 motion). Accordingly the Motion for Relief from Judgment filed in the trial court in reference to the instant matter cannot be considered a "second or successive" motion under MCR 6.502(G)(1), and Petitioner did not need to meet the requirements of MCR 6.502(G)(2), because MCR 6.502(G)(1) allowed for the filing of another Motion for Relief from Judgment after August 1, 1995, regardless of whether a defendant has previously filed a motion for same.

The issue in question was not raised by Petitioner's court appointed attorneys in the Michigan Court of Appeals, or during his subsequent in pro per appeals. However, there is "good cause" under MCR 6.503(D)(3)(a) because the issue "was not reasonably available," or appellate counsel did not provide effective assistance, as explained in the argument section of this Petition. Petitioner also established "actual prejudice" under 6.503(D)(3)(b) by showing that the "conviction or sentence under the terms of the plea was less severe than the conviction or sentence that was actually imposed." Lafler, supra.

Petitioner's conviction and sentence should be set aside because Petitioner was denied effective assistance of counsel during the plea bargaining process based on Strickland v. Washington, 466 US 668, 104 S.Ct 2052, 80 LEd2d 674 (1984); Hill v. Lockhart, 474 US 52, 106 S.Ct 366, 88 LEd2d 203 (1985), Nix v. Whiteside, 475 US 157, 106 S.Ct 988, 89 LEd2d 123 (1986) and other cases leading to Lafler. and this Honorable Court should determine whether the remedy outlined in Lafler should be applied to Petitioner.

Petitioner now brings petition for a Writ of Certiorari to the

Michigan Supreme Court in People of the State of Michigan v. Martin E. Grant, Detroit Recorder's Court No. 88-005068-FC; Michigan Supreme Court Order No. 155979 - Dated May 01, 2018.

The issues above stated are set forth and more fully explained in the Argument section of this Petition.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

As an initial matter, it is the order of the trial court in Wayne County Circuit No. 88-005068-FC - dated December 29, 2016; the order of the Michigan Court of Appeals, COA No. 336776 - Dated May 05, 2017; and the order of the Michigan Supreme Court No. 155979 - Dated May 01, 2018; which Petitioner is challenging in the Petition for Writ of Certiorari now before this Honorable Court. Appendix A - (Above Orders)

A Writ of Certiorari should issue for several reasons: The Courts of Michigan, including Michigan Supreme Court, has entered decisions in conflict with decisions of other Michigan Supreme Court decisions on the same important matter, and has decided an important question of Federal Law which has not been, but should be, settled by this Court; the Petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this Honorable Court; the Michigan courts, including the Michigan Supreme Court, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power. See Arguments I & II infra.

ARGUMENT I

PETITIONER HAS BEEN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION DURING THE PLEA BARGAINING PROCESS THAT LED TO, AND RESULTED IN, A JURY TRIAL CONVICTION OF FIRST DEGREE MURDER AND A MANDATORY SENTENCE OF LIFE IMPRISONMENT.

The federal and state constitutions guarantee a defendant the right to the assistance of counsel. U.S. Constitution, AM VI; Michigan Constitution 1963, Art 1, § 20. The constitutional right to counsel encompasses the right to "effective" assistance. McMann v. Richardson, 397 US 759, 771 n 14; 90 S.Ct 1441; 25 LEd2d 763 (1970).

The standard for reviewing claims of ineffective assistance of counsel was set forth by the this Court in Strickland v. Washington, 466 US 668, 687; 104 S.Ct 2052, 2062; 80 LEd2d 674 (1984), and has been adopted in Michigan. People v. Pickens, 446 Mich 298, 302-303 (1994).

The Strickland standard has two parts or prongs: performance and prejudice. To obtain reversal, or other appropriate relief, a defendant claiming ineffective assistance must show that counsel's performance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 559 US 356; 130 S.Ct 1473; 176 LEd2d 284 (2010).

In Hill v. Lockhart, 474 US 52; 106 S.Ct 566; 88 LEd2d 203 (1985), this Court held "the two-part Strickland test applied to challenges to guilty pleas based on ineffective assistance of counsel." In Hill, 474 US at 56, defendant claimed that his guilty plea was involuntary "as a result of ineffective assistance of counsel" because his attorney gave him "information about parole eligibility that was erroneous." This Court denied relief in Hill because defendant "failed to allege the

kind of 'prejudice' necessary to satisfy the second part of the Strickland test," and explained:

> Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have plead not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Hill, 474 US 80.

Ineffective assistance of counsel during the plea bargaining process "deprives the defendant of the ability to make an intelligent and informed choice from among his alternative courses of action. People v. Corteway, 212 Mich App 442, 444-445 (1995)(A Michigan case that applied the Strickland test).

This Honorable Court reaffirmed Hill in Padilla v. Kentucky, 559 US 356 (2010), which similarly involved a claim that the defendant's plea of guilty was invalid because counsel had provided erroneous advice regarding deportation that was pertinent to his plea. This Court again held that Strickland test applied to the plea bargaining process, and indicated that "a defendant is entitled to the effective assistance of competent counsel before deciding whether or not to plead guilty." Padilla, 549 US at 364(citations, interior quotations omitted).

In 2012, this Honorable Court revisited the issue of ineffective assistance of counsel during the plea bargaining process in deciding the cases of Missouri v. Frye, 566 US 134, 132 S.Ct 1399 (2012), and Lafler v. Cooper, 566 US 156, 132 S.Ct 1376 (2012). Justice Kennedy based his opinion on the "simple reality" that in the "criminal justice

system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the most critical point for a defendant." Frye, 132 SCt at 1407; Lafler, 132 SCt at 1388.

Frye and Lafler were also based on Hill, but involved separate and different factual variations. Frye involved an attorney's failure to inform and advise defendant as to a plea offer before it expired, and resulted in defendant later pleading guilty to a more serious offense, and receiving a more severe sentence. In contrast, Lafler involved an attorney's erroneous advice, and resulted in defendant going to trial, being convicted, and again receiving a more severe sentence.

Lafler was a Michigan case in which the defendant was charged with assault with intent to murder and firearm offenses for shooting a fleeing woman in the "buttock, hip, and abdomen." Lafler, 132 SCt at 1383. The prosecutor offered defendant a plea bargain involving dismissal of two charges with a recommendation of a minimum sentence of 51-85 months in prison. However, defense counsel indicated to defendant that "the prosecution would be unable to establish his intent to murder" because he had shot the woman below the waist. Based on this erroneous advice, defendant rejected the plea offer and went to trial. At trial, "it was suggested that he [defendant] might have acted either in self-defense or in defense of another person." Defendant was convicted as charged at trial, and sentenced to 185-360 months in prison. Lafler, 132 SCt at 1383.

The Supreme Court held that where defense counsel provided erroneous advice and ineffective assistance in advising defendant not to accept a plea or sentence offer, prejudice means that the "loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Lafler, 132 SCt at 1385. The Court explained:

> "Far from curing the error, the trial caused the injury from the error. ***Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from***

> *either a conviction on more serious counts or the imposition of a more severe sentence.*"
>
> *Id* at 1387 (emphasis added).

To obtain relief under such circumstances, the Supreme Court held that defendant must show:

> ". . . that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."
>
> *Id* at 1385.

Wayne County Cases after *Lafler*

Based on Lafler and Frye, the Michigan Supreme Court has remanded at least three cases from Wayne County for reconsideration or evidentiary hearing.

In People v. Franklin, 491 Mich 916-917 (2012), the Michigan Supreme Court remanded defendant's 2008 bench trial convictions (Wayne County Circuit Court No. 88-014196-FH) to the Court of Appeals, and "specifically directed [the Court of Appeals] to consider the applicability of Lafler v. Cooper, __US__; 132 SCt 1376; 182 LEd2d 398 (2012)." Similarly, in People v. McCauley, 493 Mich 872 (2012), the Michigan Supreme Court vacated "the judgment of sentence" for defendant's 2007 jury trial conviction of first-degree murder (Wayne County Circuit Court No. 07-009190-FC) after concluding:

> "The trial court did not clearly err in concluding that defense counsel was ineffective, and if the defendant had been properly advised of the prosecutor's aiding and abetting theory, that there was a reasonable probability that the defendant would have accepted the prosecutor's plea offer."

The Supreme Court went on to remand the case "to the trial court for consideration of an appropriate

remedy in light of Lafler."

In People v. Walker, 497 Mich 894-895 (2014), defendant filed a motion for relief from judgment under MCR 6.500 with respect to his 2001 jury trial conviction for first-degree murder (Wayne County Circuit Court No. 01-003031-FC). The Michigan Supreme Court remanded the case to the trial court for an evidentiary hearing based on "the defendant's contention that his trial counsel was ineffective for failing to inform him of the prosecutor's September 26, 2001 offer of a plea to second degree murder and a sentence agreement of 25 to 50 years," citing, Missouri v. Frye, 566 US __; 132 SCt 1399; 182 LEd2d 379 (2012)." The Michigan Supreme Court also cited Lafler, and stated that to establish the "prejudice prong" for ineffective assistance of counsel, defendant must show:

> "(1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the defendant's conviction or sentence under the terms of the plea would have been less severe than the conviction or sentence that was actually imposed. Lafler v. Cooper, 566 US __; 132 SCt 1376, 1385, 182 LEd2d 398 (2012)."

The Supreme Court went on to conclude that upon such a showing, "defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D)", and if successful, "the trial court must determine whether the remedy articulated in Lafler v. Cooper, should be applied retroactively to this case, in which defendant's conviction became final in October 2005."

In Walker, the Michigan Supreme Court also stated, "If available, Judge Thomas Edward Jackson shall preside over the hearing." The Register of Actions for Wayne County Circuit Court No. 01-003031-FC indicates that Judge Jackson held an evidentiary hearing and granted the motion for relief from judgment, and defendant was permitted to plead guilty to second degree murder, and

received a sentence of 25 to 50 years.

There is also the Wayne County case of People v. Michael Beasley, in which defendant was convicted at jury trial of first-degree premeditated murder (and other offenses) and sentenced to mandatory life imprisonment on first-degree murder count in 1997, and that conviction and sentence were affirmed by the Michigan Court of Appeals, and Supreme Court, in 2000. *See*, Wayne County Circuit Court No. 96-503593-FC; Court of Appeals No. 204922; Supreme Court No. 116694.

On or about June 12, 2014, defendant filed a motion for relief from judgment under MCR 6.500 *et seq*., alleging among other matters, that he declined a plea and sentence offer of a plea to second-degree murder, with a sentence agreement of 15 to 30 years in prison, because his attorney gave him erroneous advice which convinced him to go to trial based on self-defense and defense of another. The Wayne County Register of Actions indicates that defendant's motion was assigned or reassigned to Judge Gregory Bill, who ordered the prosecution to file an answer, and then held an evidentiary hearing. Judge Bill thereafter set aside defendant's conviction and sentence for first-degree murder, and accepted defendant's guilty plea to second-degree murder, and sentenced him to 15 to 30 years in prison on that charge, in accord with the prior plea and sentence offer, and Lafler v. Cooper, *supra*, and People v. McCauley, *supra*.

Plea and Sentence Offer

In this case, Defendant has submitted an affidavit that indicates about one month before his trial was to begin on September 26, 1988, his court-appointed counsel, Clarence Bradfield, visited him at the Wayne County Jail, and informed him that the prosecutor had made a plea and sentence offer of a guilty plea to second-degree murder, with a sentence agreement of 40 to 80 years in prison. See, Appendix C. The transcripts prepared in this case (preliminary examination, trial, and

sentence) are silent as to this or any other plea and sentence offer, but the court file contains a Calendar Conference form, dated May 6, 1988, with a handwritten note of "NRP" (No Reduced Plea). **See, Appendix E.**

Practice and experience in the Criminal Division of the Wayne County Circuit Court indicate that a no-reduced-plea notation on a calendar conference form does not always, or often, mean that the prosecution will not make a plea and sentence offer at, or after, the final conference date. It is indeed the rare case, even on a charge of first-degree murder, in which the prosecution will not make a plea and sentence offer. Typically, the prosecution will offer a plea to second degree murder with a sentence agreement or recommendation of a substantial term of imprisonment, generally based in part on the Michigan Sentencing Guidelines, the strength of the prosecution's proofs, and any distinctive facts and circumstances in the case.

Defendant's sworn statements about the plea and sentence offer in this case are in accord with this practice and experience, and are bolstered by the results of a polygraph examination administered to him at Muskegon Correctional Facility on April 20, 2016. The report and *curriculum vitae* of the examiner are contained in **Appendix D.** The results of a polygraph examination may be considered in deciding a post-conviction motion where, as here, the results are offered on behalf of the defendant, the test was taken voluntarily, the professional qualifications and the quality of the polygraph equipment meet with the approval of the court, either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and the results are considered only with regard to the general credibility of the subject. People v. Barbara, 400 Mich 352, 412-413 (1972).

In conjunction with the polygraph examination administered to Defendant, **retained**

counsel has investigated other sources of information that might show a plea and sentence offer. Counsel was not able to obtain the transcripts of any of the pretrial proceedings in this case, because those proceedings were not transcribed for direct appeal, and the notes of the court reporter have been destroyed pursuant to MCL 600.1428. Counsel was also unable to obtain the prosecutor's case file by a Freedom of Information request pursuant to MCL 15.231 *et seq.*, because the prosecutor's case file could not be located, and was unable to obtain any information from defense counsel, Clarence Bradfield, because he has no recollection of the case. *See*, Attachment G.

Defendant of course has the initial burden of showing the existence of a plea and sentence offer, but this "preliminary burden is not meant to be onerous," and may be satisfied in a number of ways, "including a statement as to when or by whom the offer was made," or "a detail account of the material terms of the plea agreement." Martin v. United States, 789 F3d 703, 707 (7th Cir 2015). Here, the specific and detailed factual allegations of Defendant's affidavit are supported and bolstered by the results of a polygraph examination, and in accord with customary practice and experience, are sufficient to meet this preliminary burden.

Erroneous Advice and Ineffective Assistance of Counsel

Defendant's affidavit further indicates that he declined the prosecutor's offer of a plea to second-degree murder with a sentence agreement of 40 to 80 years in prison, based on erroneous advice from trial counsel, and trial counsel's failure to fully and properly explain the prosecutor's offer and review the prosecution witnesses and evidence against him. Defendant's affidavit states that trial counsel convinced him that he would not be convicted at trial of first-degree murder "because my post-arrest statements supported a defense of self-defense, and there was also testimony that would support a defense of intoxication, to reduce first-degree murder charges." Defendant's

affidavit also indicates that trial counsel "told me the prosecutor's offer was no deal." See, Appendix C.

In Turner v. Tennessee, 858 F2d 1201, 1206 (6th Cir 1986), the Sixth Circuit affirmed the district court's ruling that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment," and cited the following cases as being in accord with its holding:

> "The district court, after a thoughtful analysis, concluded that "an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment." *Id* at 1120. We agree with the district court's analysis and conclusion. *Accord* Johnson v. Duckworth, 793 F2d 898, 900-902 (7th Cir) (criminal defendant has right to effective assistance of counsel in deciding whether to accept or reject proposed plea agreement), *cert denied*, 479 US 937, 107 SCt 416, 93 LEd2d 367 (1986); United States ex rel. Caruso v. Zelinsky, 689 F2d 435, 438 (3rd Cir 1982) ("the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches"); Beckham v. Wainwright, 639 F2d 262, 267 (5th Cir 1981) (incompetent advice to withdraw a negotiated guilty plea and instead stand trial violates defendant's right to effective assistance of counsel).

In an earlier case, Jones v. Cunningham, 313 F2d 347, 353 (4th Cir 1963), the Court added that trial counsel has "an affirmative obligation" to make "an independent examination" and to provide defendant with "an informed opinion as to what plea should be entered:"

> ***"Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist.*** Such a duty is imposed for the salutary reason that 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved ***and then to offer his informed opinion as to what plea should be entered.***' VonMoltke v. Gillies, 332 US 708, 721, 68 SCt 316, 322, 92 LEd 309 (1948)." (Emphasis added).

Thus, it has been recognized that "counsel's performance may fall below the minimum threshold if

he advises his client to reject a plea bargain in the face of overwhelming evidence of guilt and an absence of viable defenses." Gallo-Vasquez v. United States, 402 F2d 793, 798 (7th Cir 2005).

In this case, trial counsel knew, or should have known, that rejection of the prosecutor's plea and sentence offer would be disastrous, "in the face of overwhelming evidence and absence of viable defenses."

The trial transcript shows, as indicated by Defendant's affidavit, trial counsel did in fact obtain a jury instruction on self-defense from the trial judge (TII 293-294, 366-370), and argued self-defense based on the prosecutor's introduction of Defendant's post-arrest statements (TII 255-271, 293-294). Nonetheless, the prosecution's proofs were overwhelming.

Defendant was arrested shortly after the homicide of Charles Moody, and made two written statements to Detroit Homicide Investigator Lorita Prentice on April 4, 1988 (TII 255-262). Defendant's statements admitted to the stabbing of Moody, but claimed self-defense.

Defendant's first statement was given at 9:00am (TII 257), and indicated among other things that as Defendant was handling and examining a bag of marijuana in Moody's house, Moody got angry, said "you're a dead man," and came at Defendant with a knife from his kitchen. Defendant's statement indicated that he struggled with Moody, got the knife from him, and stabbed him "twice in the stomach and chest" (TII 263-264).

Defendant's second statement was given at 2:00pm (TII 260), and indicated that he had stabbed him "all over" (TII 269-270). Defendant indicated in this statement:

> "I went into shock and I couldn't stop. * * * I killed him, but I didn't mean to. It was me or him. . ." (TII 270).

This second statement also indicated:

> "I didn't plan to rob him [Moody], and the only thing that I took from the house [Moody's] was the knife, and then after I threw the knife in the dumpster." (TII 269).

As to whether or not Defendant planned to rob Moody, Joseph Ramirez testified that Defendant came up with the idea of ripping off Moody and started talking about a plan, as Defendant was sharing cocaine with him and Kenneth Pasciak at Belinda Phillips' house (TII 69). Ramirez testified that Defendant indicated it would be easy to rob Moody because he was high on heroin (TII 69-70). The plan was for Ramirez and Pasciak to rush and hold Moody when he opened the armor gate to his front door for Defendant. (TI 70-71).

Ramirez testified that he saw Defendant take a kitchen knife from Belinda Phillips' house, but "thought he put [the knife] . . . back on the sink," before he, Pasciak and Defendant walked to Moody's house (TII 70-73). Ramirez's testimony also indicated that he and Pasciak did not rush Moody when he opened the armor gate for Defendant, but he saw Defendant take the kitchen knife from his pants and swing it twice at Moody before he and Pasciak fled (TI 72-73).

Ramirez's testimony further indicated that he and Pasciak saw Defendant a short time later at Belinda Phillips' house, and he had blood on his clothes, cocaine, and money (TI 73-78). Defendant said, "I think I killed him," and gave Ramirez and Pasciak some of the cocaine and money, and they helped Defendant hide his bloody clothes and the kitchen knife (TI 74-78).

Additionally, Ramirez provided statements and information that led police to the recovery of Defendant blood stained clothes, and the kitchen knife Defendant used to stab Moody (TI 90-91, 95; TII 208-209, 217-19, 282-287).

The testimony of Assistant Medical Examiner Marilee Frazier indicated that there were 48 stab wounds on Moody's body, in addition to various cuts and defensive wounds on his hands (TII

234-235, 239-240). Dr. Frazier also analyzed blood from Moody's body and found it to contain Morphine and two prescription drugs (TII 240-241).

On top of the testimony of Ramirez, corroborated by the physical evidence recovered by police, and the expert testimony from the medical examiner's office, the prosecutor also had independent witnesses regarding Defendant's claims as to what was taken from Moody's house, and where the kitchen knife came from.

Ted Suerecki knew Defendant and lived next door to Moody (TI 179). His testimony indicated that Defendant came to his house and borrowed $60.00 at 11:00pm on the night of the homicide (TI 180). Suerecki's testimony further indicated that at about 9:00am on the morning after the homicide, Defendant came to his place of employment with Ramirez and Pasciak, and paid back $20.00 of the borrowed money (TI 174-175, 177-178). Defendant paid him from a handful of money, and said that he had gone to Moody's house to buy drugs and found him dead (TI 174-175).

Belinda Phillips testified that her "Fuller Brush" kitchen knife was missing from her house on the morning after the homicide, and identified the knife recovered by police as her kitchen knife (TII 287-288).

Likewise, intoxication was not a viable defense to either or both first-degree murder charges. While the testimony of Ramirez (TI 83) and Suerecki (TI 180) indicated that Defendant was using drugs and ***appeared*** to be under the influence, and trial counsel claimed the defense in closing argument (TII 336), the jury was ***not*** instructed on the defense of intoxication (TII 305-307). Moreover, it was far from certain that counsel was entitled to an instruction on an intoxication defense. *See*, People v. Savoie, 419 Mich 118, 134 (1984) (holding that a defense of intoxication is only proper if the facts of the case would allow the jury to conclude that "the degree of intoxication

was so great as to render the accused incapable of entertaining the [required specific] intent."); People v. Mills, 450 Mich 61, 83 (1995) ("other than appearing high or drunk, there is no indication on the record that defendant . . . was incapable of forming the intent to commit this crime."). Even if counsel had requested and obtained a jury instruction on the defense of intoxication, the prosecutor's closing argument readily disposed of it by pointing out facts and circumstances that proved: "Not only does he [Defendant] think of a plan, he carries out the plan." (TII 327-328). The fact that the jury found Defendant guilty of second-degree murder on the premeditation count, does not lend any substance to counsel's claim of intoxication because the plan, as testified to by Ramirez, did not involve a stabbing or killing (TI 69-73).

In Smith v. United States, 348 F3d 545, 553-554 (6th Cir 2003), the Sixth Circuit further indicated that trial counsel's failure to provide professional guidance to a defendant regarding his sentence exposure prior to rejecting a plea offer may satisfy both the performance and prejudice prongs of Strickland, citing, United States v. Day, 969 F2d 39, 43 (3rd Cir 1992). In Day, *Id.* at 43, the Court found a valid claim of ineffective assistance of counsel based on the following facts and allegations:

> "Although in this case Day concedes that he was notified of the terms of the plea bargain, he alleges that the advice that he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer. That, we hold, also states a Sixth Amendment claim."

Defendant's affidavit indicates that trial counsel did not fully explain the prosecutor's plea and sentence to him, but rather indicated to him that it was no deal. Defendant, a 25 year old who dropped out of school in the ninth grade, needed and was entitled to advice and guidance from trial counsel on such basic questions as: Was there a chance of an offer with a lower sentence agreement

if he decided to plead guilty to second-degree murder? Would he be required to serve 40 years in prison before he would be eligible for parole if he accepted the prosecutor's plea and sentence offer? Could he earn an early parole, and how much time could he earn on a sentence of 40 to 80 years in prison? Was there any chance he would ever be released from prison if he rejected the prosecutor's offer and was convicted of either first-degree murder charges at trial? And, of course, what were his chances of not being convicted of either first-degree murder charge at trial?

The answers to the last two questions were clear, and require little explanation. Defendant's chances of not being convicted of either first-degree murder charge at trial were virtual non-existent, in light of the fact that his post-arrest statements admitted the stabbing that involved an extraordinary number of wounds according to expert testimony. His claim of self defense was superficial, and completely destroyed by would-be accomplish and eyewitness testimony, which in turn was corroborated in critical detail by the recovery of physical evidence by police, and by testimony from independent witnesses. And, of course, upon being convicted of either count of first-degree murder, there would be no parole.

In comparison to these grim realities, the answers to the preceding questions regarding the prosecutor's plea and sentence offer are significantly different, and amount to a realistic chance of parole and release from prison for a twenty-five year old defendant.

The use of the Michigan Sentencing Guidelines became mandatory on March 1, 1984 pursuant to administrative Order 1984-1, 418 Mich 1xxx (1984) and Administrative Order 1985-2, 420 Mich (xii (1985), and the Second Edition was approved for mandatory use on October 1, 1988. See, Appendix G (pertinent sections of Michigan Sentencing Guidelines, Second Edition 1988, West Publishing Co.).

According to the Homicide section of those Sentencing Guidelines, and scoring them in the light most favorable to the prosecution, a guilty plea to second-degree murder would have resulted in a Prior Record Level of C (25 points for PRV-1; 15 points for PRV-6), and the highest Offense Level of IV (25 points for OV-3; 25 points for OV-4; 5 points for OV-7; 5 points for OV-13), which would have produced a minimum sentence range of 180-360 months, or life imprisonment. Since a defendant sentenced to life imprisonment for second degree murder "is subject to the jurisdiction of the parole board and may be released by the parole board" after "serving 10 calendar years of a in a case of a prisoner sentenced for a crime committed before October 1, 1999" (MCL 791.234(6)), the prosecutor's offer of a 40 year minimum sentence was above the minimum Sentencing Guidelines ranges of 15 to 30 years or life imprisonment. This indicates that there was a significant and legitimate basis for negotiating a lower minimum sentence or sentence range with the prosecutor, or agreeing to refer and argue the minimum sentence or range to the judge for decision.

Even if the prosecutor refused to negotiate a minimum sentence below the 40 year offer, Defendant could have earned an early parole under MCL 800.33(3), the Disciplinary Credits statute. That statute provides that "all prisoners serving a sentence for a crime that was committed on or after April 1, 1987" (but before December 15, 1998, under MCL 800.34(4)(5)(a)) "are eligible to earn disciplinary and special disciplinary credits as provided by subsection (5)," which is MCL 800.34(5) and indicates that "all prisoners . . . are eligible to earn a disciplinary credit of 5 days per month for each month" without a major misconduct, and additionally "may be awarded 2 days per month special disciplinary credits for good institutional conduct" on recommendation. *See also*, People v. Robinson, 172 Mich App 650, 652 (1988) ("a person convicted and sentenced for a crime listed in 'Proposal B' is not eligible for parole until he has served the minimum sentence, less any disciplinary

credits. MCL 791.233(6)").

Based on these statutory provisions, Defendant was eligible for 60 days (about two months) per year in disciplinary credits, or one year in credits for every six years of imprisonment. The bottom line is that a minimum sentence of 40 years may be reduced by more than six years, without consideration of the additional two days per month for special disciplinary credits, which could total 960 days.[2]

Defense counsel was obliged to inform and explain such features and contours of the prosecutor's plea and sentence offer to Defendant. Counsel was also obliged to advise Defendant, and persuade him if necessary, that a guilty plea would be "desirable" or in his best interest, where the prosecution's proofs are overwhelming, and a not guilty plea would be "destructive," as indicated in Strickland, 466 US at 688, and the case of Boria v. Kenne, 83 F3d 48, 52-53 (2nd Cir 1996).

In Strickland, the Supreme Court indicated that the "prevailing norms of practice" were "reflected in American Bar Association standards," and those standards may be used as a guide "to determining what is reasonable." *Id* at 688. In Boria, 83 F3d at 52-53, the Court pointed out the particular American Bar Association standard regarding defense counsel's duty, and quoted from a trial manual that was "a joint project of the American College of Trial Lawyers, the National Defender Project of the National Legal Aid and Defender Association, and the ALI-ABA Committee on Continuing Professional Education" for a more detailed discussion of defense counsel's

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[2] Defendant was 25 years old when he was sentenced on October 12, 1988, and was entitled to 194 days credit for time served in custody before trial (Presentence Report, pp 1, 4). To date, Defendant has served about 28 years in prison. Based on a conservative estimate of six years in disciplinary credits and special disciplinary credits (the Department of Correction does calculate such credits on a first-degree murder sentence), Defendant would be eligible for parole within about six years on a minimum sentence of 40 years.

obligations:

> "The American Bar Association's standard on the precise question before us is simply stated in its Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992):
>
> 'A defense lawyer in a criminal case has the duty to advise his client fully on ***whether a particular plea to a charge appears to be desirable.***' (Emphasis added)
>
> Anthony G. Amsterdam, in *Trial Manual 5 for the Defense of Criminal Cases* (1988), discusses the question in more detail:
>
> 'The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and *must* give the client ***the benefit of counsel's professional advice on this crucial decision***: and often counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty ***in a case in which a not guilty plea would be destructive***. § 201 at 339' (the word "must" was emphasized by the author; otherwise, the emphasis is ours)"

Acceptance of the Offer

Furthermore, Defendant's affidavit indicates that if trial counsel had fully explained the prosecutor's offer to him, and the fact that the prosecution had very strong or overwhelming evidence to destroy his claim of self-defense, and the defense of intoxication, he would have accepted the prosecutor's plea and sentence offer, because he did not want to spend the rest of his life in prison without the possibility of parole. See, Appendix C.

In Lewandowski v. Makel, 949 F2d 884, 889 (6th Cir 1991), the Sixth Circuit stated that "in cases such as this where the question turns on the motivation of the defendant - - that is, what would

the defendant have done if supplied with accurate information - - the amount of objective evidence will quite understandably be sparse." This is especially so in the instant case because it appears that none of the parties placed anything on the record about a plea or sentence offer, and trial counsel cannot recall the case. See, Appendix F.

In Griffin v. United States, 330 F2d 733, 737 (6th Cir 2003), the Sixth Circuit pointed out:

> "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement" (quoting Dedvukovic v. Martin, 36 Fed. Appx. 795, 798 (6th Cir 2002)(unpublished)).

Even if additional objective evidence is required, there is such evidence in this case because the record provides an objective indication that Defendant relied on and accepted advice and professional guidance from trial counsel, despite his own wishes or inclinations.

At the close of the prosecution's case, trial counsel stated in the absence of the jury that "Mr. Grant has advised me that he wishes to testify in this matter," and made a motion to exclude Defendant's prior conviction for larceny from a person, which was not opposed by the prosecutor, and granted by the court (TII 297-299). Counsel then indicated that he "would like to have the lunch hour before we put Mr. Grant on," and a recess was taken. (TII 298-299). When the proceedings resumed, the following occurred:

> "(Proceedings without jury at 1:33 p.m.)
>
> THE COURT: We are back on the record on Mr. Grant.
>
> You ready to proceed?
>
> MR. CUNNINGHAM: People are ready.

THE COURT: Mr. Bradfield?

MR. BRADFIELD: Yes. At this time I would like to indicate that over the lunch hour I had conference with Mr. Grant, and we rest our case."

* * *

THE COURT: Mr. Grant, there is no jury in the courtroom, and there is for the record.

You have discussed your option to testify or not testify with Mr. Bradfield?

THE DEFENDANT: Yes, your Honor.

THE COURT: Your choice bears on his advise not to testify?

THE DEFENDANT: Yes.

* * *

THE COURT: Okay. I'm double checking.

THE COURT: Both are ready? If you need time that's fine.

MR. CUNNINGHAM: Ready.

MR. BRADFIELD: Ready.

THE COURT: You can bring the jury out."

(TII 305, 308-309).

In Williams v. State, 326 MD 367, 605 A2d 103, 110 (1992), the Maryland Court of Appeals found sufficient "objective" evidence that defendant would have accepted the prosecution's plea and sentence offer if trial counsel had provided full and accurate advice, where the trial transcript indicated that counsel "fully and accurately advised" defendant "of the consequences of testifying" at trial, and defendant "follow[ed] counsel's advise" and "elected not to testify. The Court also found that the plea and sentence offer was "certainly more favorable than the sentence the petitioner

actually received," and relied on the Sixth Circuit cases of Turner v. Tennessee, *supra*,and Lewandowski v. Makel, *supra*, in concluding that "the evidence of prejudice in this case is ample." Willimas v. State, 605 A2d at 110. Moreover, in Griffin v. United States, 330 F3d at 739, the Sixth Circuit viewed the disparity or "gap" between the plea and sentence offer, and the sentence after conviction at trial as "sufficient objective evidence in the record to warrant an evidentiary hearing:"

> "The gap between his potential sentence if convicted and the plea offer is sufficient to merit an evidentiary hearing. *See*, Dedvukovic, supra at 798; *see* also, United States v. Gordon, 156 F3d 376, 380-381 (2nd Cir 1998); United States v. Blaylock, 20 F3d 1458, 1466-1467 (9th Cir 1994)."

In this case, the disparity between the prosecutor's offer of 40 to 80 years in prison for second-degree murder, and mandatory life imprisonment for first-degree murder, cannot be reduced to a precise number of years. However, based on an average life expectancy of 78.8 years (Center for Disease Control at https://www.cdc.gov/nchs/fastacts/life-expectancy.hta), the disparity is substantial, and may be seen as the difference between Defendant being eligible for parole at about 59 years of age, or being in prison for the remaining 18 or so years of his life, save a pardon, commutation, or reprieve by the Governor. Michigan Constitution 1963, art 5, § 14.

Cause and Prejudice

When Defendant has met the requirements of Lafler, as outlined in People v. Walker, 497 Mich 894-895 (2014), he "shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D), which requires "good cause for failure to raise such grounds on appeal or in a prior motion" under subsection 3(a), and "actual prejudice" from the alleged irregularities that support the claim for relief" under subsection 3(b). The subsection defines prejudice as follows:

> "(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal:
> (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
> (iv) in the case of a challenge to the sentence, the sentence is invalid."

The *Staff Comment* to MRC 6.508 makes it clear that the standards for cause and prejudice "are based on several decisions of the United States Supreme Court," citing as examples Wainwright v. Sykes, 433 US 72 (1977) (habeas corpus action by state prisoner), and United States v. Fredy, 456 US 152 (1982) (habeas action by federal prisoner).

In Murray v. Carrier, 477 US 478, 488 (1986), and People v. Reed, 449 mich 375, 385 n 8 (1995), both the United States Supreme Court and the Michigan Supreme Court indicated that "cause" may be demonstrated by ineffective assistance of counsel on appeal, or "by showing that some factor external to the defense precluded counsel from previously raising the issue." A "factor external to the defense" includes "a showing that factual or legal basis for a claim was not reasonably available to counsel." People v. Reed, 449 Mich at 385 n 8 (citing Reed v. Ross, 468 US 1, 16 (1984)).

In Reed v. Ross, 468 US at 15-16, the United States Supreme Court explained that the failure to appeal an issue "reasonably unknown," does not involve "strategic motives of any sort," and therefore may satisfy the cause requirement:

> "On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests.

> And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met. If counsel has no reasonable basis upon which to formulate a constitutional question, . . . it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any sort.
>
> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar."

As previously indicated, Lafler v. Cooper was based on Strickland and Hill, which were decided by the United States Supreme Court in 1984 and 1985, respectively. The fact that Lafler v. Cooper originated in Wayne County (People v. Anthony G. Cooper, Circuit Court No. 03-004617-01-FC); was affirmed by the Michigan Court of Appeals (Case No. 250583) and by the Michigan Supreme Court (Case No. 128650) by 2005;[3] and was not reversed by the United States Supreme Court until *2012*, establishes that "the factual or legal basis was not reasonably available to counsel,"

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[3] In an unpublished, *per curiam* opinion dated March 15, 2005, the Michigan Court of Appeals affirmed, stating:

> "Defendant challenges the trial court's finding after a Ginther hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on claim of self-defense and because he did not obtain a more favorable plea bargain for defendant."

The Michigan Supreme Court denied application for leave to appeal in an order dated on October 31, 2005, and reported at 475 Mich 904.

Defendant, or anybody else on appeal in Michigan[4], and therefore satisfies the cause requirement of MCR 6.508(D)(3)(a).

On the other hand, if this Court were to find that court-appointed appellate counsel in this case should have been aware of such cases as Turner v. Tennessee (decided by the Sixth Circuit in 1986), or other cases which foreshadowed Lafler v. Cooper, the cause requirement is met by ineffective assistance of appellate counsel. People v. Reed, 449 Mich at 385 n8. *See*, Estremera v. United States, 724 F3d 773, 778 (7th Cir 2013) (holding that Lafler v. Cooper, and Missouri v. Frye, did not create "new rules," and "therefore apply on collateral review,"). Furthermore, neither the "retroactivity" question posed in People v. Walker, 497 Mich at 894-895, nor the retroactivity requirement of MCR 6.502 (G)(2) for "second or successive" motion for relief from judgment apply to Defendant or this Motion because MCR 6.502(G)(1), and Ambrose v. Recorder's Court Judge, 459 Mich 884 (1995), allow for the filing of another motion for relief from judgment after August 1, 1995, "not withstanding the defendant's having filed one or more such motions before that date."

The other requirement of prejudice is clear, and has previously been explained. In short, this Motion involves a claim that trial counsel provided erroneous advice and ineffective assistance during the plea bargaining process, which led to a trial. In this factual situation, prejudice means, and is shown by, a more serious conviction at trial, or imposition of a more severe sentence after trial, as indicated by Lafler, 132 SCt at 1385, 1387, and prior cases cited herein.

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[4] In Lafler v. Cooper, 132 SCT at 1388, the prosecution's main contention was that "a fair trial wipes clean any deficient performance by defense counsel during plea bargaining." The Supreme Court rejected this argument and widely-held belief, stating that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." (Citation omitted).

This showing of prejudice comes within MCR 6.508(C)(3)(b)(iii), which applies to "any case", and involves an "irregularly . . . so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand." A violation of the basic constitutional right to effective assistance of counsel that results in a first-degree murder conviction, and a mandatory life sentence, is such an "irregularity." This showing also comes within MCR 6.508(C)(3)(b)(i) and (iv), to the extent it impacted and increased Defendant's conviction and sentence.

Remedy

Lastly, with respect to the appropriate remedy, it is well established that a violation or deprivation of the right to effective assistance of counsel should be "tailored to the injury suffered from the violation and should not unnecessarily infringe on competing interests." United States v. Morrison, 449 US 361, 364 (1981). In Lafler, 132 SCt at 1388-1389, the Supreme Court added that the "remedy must neutralize the taint of a constitutional violation, while at the same time not grant a windfall to the defendant or needless squander the considerable resources of the State properly invested in the criminal prosecution." (Interior quotations, citations omitted). The Supreme Court went on to indicate that for the trial court, "the correct remedy . . .is to order the State to reoffer the plea agreement," and then after acceptance by defendant, to exercise its discretion to accept or reject the plea and sentence agreement under MCR 6.302(C)(3), which provides:

> "(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
>
> (a) reject the agreement; or
>
> (b) accept the agreement after having considered the presentence report, in which event it ??? sentence the defendant to the sentence agreement to recommend by the prosecutor; or
>
> (c) accept the agreement without having considered the presentence report; or

> (d) take plea agreement under advisement. If the court accept the agreement without having considered the presentence report or takes the under advisement, it must explain to defendant that the court is not bound to follow sentence disposition or recommendation agreed to by the prosecutor, and that if the court choose not to follow it, the defendant will be allowed to withdraw from the plea agreement.

It is the Petitioner's position that the trial court should accept his plea to second-degree murder, and sentence him to agreed upon sentence of 40 to 80 years in prison, in accord with subsection (3)(b), and as was done in the Wayne County Circuit Court case of People v. Walker, supra.

ARGUMENT II

> PETITIONER HAS BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHERE THE TRIAL COURT, THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT, DENIED PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT BASED ON ERRONEOUS LAW, AND IN CONFLICT WITH STATUTES AND RULES ADOPTED BY THE STATE OF MICHIGAN.

The 14th Amendment to the United States Constitution guarantees that no State shall 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.

TRIAL COURT

As stated above, on the date September 16, 2016 the Petitioner, Martin E Grant, caused to be filed a Motion for Relief from Judgment,

pursuant to Michigan Court Rule (MCR) 6.500 et seq, in the Wayne County Circuit Court - Criminal Division, before Honorable James R. Chylinski, the original trial judge in Petitioner's state murder trial, and raised the following issue:

> DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA BARGAINING PROCESS THAT LET TO, AND RESULTED IN, A JURY TRIAL CONVICTION OF FIRST DEGREE MURDER AND A MANDATORY SENTENCE OF LIFE IMPRISONMENT.

Because Petitioner had previously filed an in pro per motion for relief from judgment under 6.500 et seq., the Petitioner's motion had to satisfy MCR 6.502(G) entitled Successive Motions. The rule provides at 6.502(G)(1), in no uncertain terms, as follows:

> (G) Successive Motions.
> (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion. [Emphasis Added]

Petitioner's previous in pro per motion for relief from judgment was submitted in Detroit Recorder's Court, and assigned to Hon. Harvey F. Tennen, on or about December 11, 1991. The motion raised six (6) claims of error, non of which were the issue raised in the motion for relief from judgment in question.

On August 06, 1993, Judge Tennen denied Petitioner's motion in a two page opinion. Petitioner appealed to the Michigan Court of Appeals and on July 19, 1994, in Docket No. 173635 the court denied application for leave to appeal. Petitioner appealed to the Michigan Supreme Court

and on the date March 31, 1995, in Docket No. 100672 the court denied delayed application for leave to appeal. See, Appendix B (above Opinion and Orders). Thus, it is axiomatic that the motion for relief from judgment filed on September 21, 2016, the motion in question, was Petitioner's "one and only one motion" filed after August 1, 1995, and came under the exception provided by above stated MCR 6.502(G)(1).

However, and as an initial matter, Judge Chylinski erroneously treated the motion as a "second" or successive motion stating:

> "For reasons more fully explained below, the Court will deny Defendant's second motion for relief from judgment.
>
> * * *
>
> Defendant's first motion for relief from judgment was denied on August 6, 1993, Defendant now files a second motion for relief from judgment pursuant to **MCR 6.500, et seq.** The prosecution has not filed a response." (p1)

Thus, the motion was held to the requirements of MCR 6.502(G)(2), which provides:

> 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 motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

The judge's order is clear error because: "Under MCR 6.502(G)(1), a criminal defendant may file one motion for relief from judgment after August 1, 1995, notwithstanding the defendant's having filed one or more such motions before that date." Ambrose v. Recorder's Court Judge,

459 Mich 884 (1999). See also, People v. Ledura Watkins, 500 Mich 851; 883 NW2d 758 (2016)(as to MCR 6.502(G) and "the plain text of the court rule").

The trial judge's Order compounded the above stated error by concluding, without citation of authority, that Lafler v. Cooper, 566 US 156; 132 S.Ct 1376; 182 LEd2d 398 (2012), established a new rule:

> However, and contrary to defendant's contention, Lafler v. Cooper, establishes a new rule of criminal procedure."

The Order then goes on to cite in a footnote three unpublished federal district court cases, which in turn rely on three published federal appeals court opinions for the following proposition:

> Further, courts have previously held that Missouri v. Frye and Lafler v. Cooper do not recognize new rights which are retroactively applicable on collateral review.[11]
>
> Accordingly, since Lafler cannot be applied retroactively in this case and for the reasons set forth above, defendant's reliance on Lafler in support of his ineffective assistance of counsel argument is without merit.
>
> Therefore, for all the reasons stated, defendant's second motion for relief from judgment is hereby **DENIED**.

[11] Rodriquez Vilchis v. United States, 2012 US Dist LEXIS 171058, (2012) WL 6015887 (SD Ohio Dec. 3, 2012) (withdrawn on other grounds 2012 US Dist LEXIS 182955), citing In re Michael Perez, 682 F3d 930 (11th Cir 2012); and Crokett v. United States, 2012 US Dist LEXIS 160384 (SD Ohio Nov. 8, 2012), citing Buenostro v. United States 697 F3d 1137 (9th Cir 2012), and Hare v. United States, 688 F3d 878, 879 (7th Cir 2012)." (p3)

All three of the above federal appeals court opinions involved

second or successive motions under 28 USC § 2255, the model and federal counterpart of MCR 6.500 et seq. In re Michael Perez, 682 F3d 930, 931-932 (11th Cir 2012); Buenostro v. United States, 697 F3d 1137, 1139-1140 (9th Cir 2012); Hare v. United States, 688 F3d 878, 879 (7th Cir 2012). Since MCR 6.502(G)(1) and Ambrose v. Recorder's Court Judge, supra, do not treat the instant motion as a second or successive motion because Petitioner's prior motion was filed and denied before August 1, 1995, Perez, Buenostro, and Hare (and the unpublished lower court cases that rely on them) do not apply to Petitioner's motion for relief from judgment in the state court, in this case.

Also, a further reading of Perez 682 F3d at 932-933; Buenostro, 697 F3d at 1140; and Hare, 688 F3d at 879-880, indicates that all three cases held that Lafler and Frye **did not** establish a new rule of constitutional law. As explained in Buenostro, 697 F3d at 1140:

> "* * * The Supreme Court in both cases merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in Strickland v. Washington 466 US 668, 686, 104 SCt 2052, 2063, 80 LEd2d 674 (1984), and established in the plea-bargaining context in Hill v. Lockhart, 474 US 52, 106 SCt 336, 88 LEd2d 203 (1985). See Frye, 132 SCt at 1404-08 (stating "[t]his application of Strickland to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in Hill"); Lafler, 132 SCt at 1384 (stating that the "question for this Court is 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.") Because the Court in Frye and Lafler repeatedly noted its application of an established rule to the underlying facts, these cases did not break new ground or impose a new obligation on the State or Federal Government. Therefore, we join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law. See In re Perez, 682 F3d 930, 933-34 (11th Cir 2012)." (Emphasis added).

Hare 688 F3d at 879-880, also indicated that the "prevailing rule among the circuits" is that in Lafler and Frye, the Supreme Court "was applying an old rule that the state courts had misapplied."

Further, the trial court's erroneous contention that "Lafler v. Cooper establishes a new rule of criminal procedure," is in direct conflict with the Federal Circuit Courts from the First Circuit to the Eleventh, see Pagan-San Miguel v. United States, 736 F3d 44, 45 (1st Cir 2013) (per curiam); Gallagher v. United States, 711 F3d 315, 315 (2nd Cir 2013) (per curiam); Navar v. Warden Fort Dix FCI, 569 F.App'x 139, 139-40 (3rd Cir 2014) (per curiam); Harris v. Smith, 548 F.App'x 79, 79 (4th Cir 2013) (per curiam); In re King, 697 F3d 1189, 1189 (5th Cir 2012) (per curiam); In re Liddell, 722 F3d 737, 738 (6th Cir 2013) (per curiam); Hare v. United States, 688 F3d 878, 879 (7th Cir 2012); Williams v. United States, 705 F3rd 293, 294 (8th Cir 2013) (per curiam); Buenostro v. United States, 697 F3d 1137, 1140 (9th Cir 2012); In re Graham, 714 1181, 1183 (10th Cir 2013) (per curiam); In re Perez, 682 F3d 930, 932-33 (11th Cir 2012) (per curiam).

MICHIGAN COURT OF APPEALS

Petitioner appealed the erroneous ruling of the trial court to the Michigan Court of Appeals. On the date May 05, 2017, the court issued an order essentially agreeing with the erroneous ruling of the trial court by concluding the following:

> The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

MICHIGAN SUPREME COURT

Petitioner appealed the above order, and on the date May 01, 2018, the Michigan Supreme Court issued an Order which states as follows:

> On order of the Court, the application for leave to appeal the May 5, 2017 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

CONCLUSION

Petitioner, Martin E. Grant, has been denied his right to the effective assistance of counsel, due process and equal protection of the law guaranteed to him by the 6th and 14th Amendments to the United States Constitution, as articulated in Argument I, and confirmed in this Honorable Court's decision in Lafler v. Cooper.

Further, as articulated in Argument II, the courts of the State of Michigan are in violation of their own Statutes, Rules and Procedures. Where a state adopts its own laws or standards... the state must obey due process, and equal protection of the law, in applying or deviating from these laws. See i.e. Johnson v. Overberg 639 F2d 326, 327 (6 Cir 1981). Petitioner Grant's rights to substantive due process and equal protection were ignored - denial of state created right resulted in a breach of "fundamental fairness". Cf. Hutchison v. Marshall, 573 F.Supp 496, 500 (1983).

Where the State of Michigan denied Petitioner the benefit of Lafler, which resulted in such a dramatic difference in the sentencing potential the state deprived Petitioner of a protected liberty interest guaranteed by the 14th Amendment to the United States Constitution. Haynes v. Butler, 825 F2d 921, 924 (5th Cir 1987). A violation of a state created due process or liberty interest is cognizable as a 14th Amendment claim. Hicks v. Oklahoma, 477 US 343; 100 S.Ct 2227; 65 LEd2d 175 (1980). Where Petitioner's claim primarily implicates a question of state law, under Hicks and its progeny, the claim is one protected by the 14th Amendment to the United States Constitution. Browne v. Estelle, 712 F2d 1003, 1005 (1983).

It is the Petitioner's position that the appropriate remedy is to GRANT the Writ of Certiorari to the Michigan Supreme Court, REMAND the matter to that Court with instruction that the Court REMAND the matter to the trial court with instructions to REVERSE the first-degree murder conviction and sentence of imprisonment for life; accept Petitioner's plea to second-degree murder, and sentence him to the agreed upon sentence of 40 to 80 years in prison, in accord with Lafler v. Cooper; Michigan Court Rule 6.302(C)(3)(b); and as was done in Wayne County Circuit Court Case of People v. Walker, supra.

Respectfully submitted;

Martin Grant #196515

Martin E. Grant #196515
Petitioner, in forma pauperis
Oakes Correctional Facility
1500 Caberfae Highway
Manistee, Michigan 49660

Dated: October 22, 2018.