18-9543

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LONNIE HANEY — PETITIONER

vs.

SHANE JACKSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

s/
Lonnie Haney, #653382
In Pro Se
E.C. Brooks Correctional Facility
(Address)
Muskegon Heights, Michigan 49444
(City, State, Zip Code)

QUESTION(S) PRESENTED

ARE THE LOWER COURT RULINGS IN DIRECT CONFLICT WITH THE SPIRIT OF THIS COURT'S HOLDING IN LAFLER V. COOPER, WHERE DUE TO EXTERNAL FACTORS, DEFENSE COUNSEL HAD JUST UNDER FIVE MINUTES TO CONVEY A PLEA OFFER TO PETITIONER HANEY?

LIST OF PARTIES

[X]	All parties appear in the caption of the case on the cover page.
[ ]	All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

28 U.S.C. § 2254

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

[ ] reported at ; or

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix **B** to the petition and is

[ ] reported at ; or

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix **C** to the petition and is

[x] reported at 493 Mich. 954, 828 N.W.2d 56 (2013) ; or

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the Michigan appeals court

appears at Appendix **D** to the petition and is

[ ] reported at ; or

[ ] has been designated for publication but is not yet reported; or,

[**x**] is unpublished.

JURISDICTION

[**x**] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 04, 2019 .

[**x**] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court Appeals on the was

, and a copy of the order denying rehearing appears at Appendix

.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date)

in Application No. A .

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was April 01, 2013 .

A copy of that decision appears at Appendix C .

[ ] A timely petition for rehearing was thereafter denied on the following date:

, and a copy of the order denying rehearing

appears at Appendix .

[ ] An extension of time to file the petition for a writ of certiorari was granted

to and including (date) on (date)

Application No. A .

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 of and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. Const. Am. VI.

STATEMENT OF THE CASE

This case arises out of a November 2, 2010, incident occurring in the City of Kalamazoo, State of Michigan, in which testimony revealed that Petitioner picked up the twelve-year old victim and her brother as they were walking to school and drove them to McDonalds for breakfast. After getting breakfast, Petitioner took the victim's brother to school but took the victim to an apartment where he allegedly sexually assaulted her.

During the second day of jury trial, the state expressed a willingness to enter into plea negotiations with Petitioner Haney. A plea of eight-years was offered to defense counsel in chambers. Defense counsel had just five minutes or less to convey that plea to Petitioner, before the state resumed the trial.

Due to this short time, counsel advised Petitioner not to accept the state's offer because the case was weak; and because Petitioner was already in the middle of trial. Trial counsel also failed to advise Petitioner of a 25-year mandatory sentence. Petitioner Haney subsequently rejected the state's plea offer.

Petitioner proceeded to trial and on April 6, 2011, a Kalamazoo County jury subsequently found Petitioner guilty on three counts of Criminal Sexual Conduct – First Degree. Petitioner was sentenced as a habitual offender, third offense, to concurrent sentences of 25 to 40 years' imprisonment by the Honorable Gary Giguere, Jr. on May 9, 2011.

Petitioner, through a state appointed appellate counsel, took an appeal as of right to the Michigan Court of Appeals. Appellate counsel raised two

claims of error; and Petitioner Haney a pro per Standard 4 Brief, raised one claim or error, i.e., that trial counsel was ineffective for advising Petitioner to forgoing an eight-year plea offer tendered by the state, i.e., Lafler v. Cooper violation. The Michigan Court of Appeals affirmed Petitioner's convictions and sentence on the claim of errors advanced by appellate counsel.

The Court of Appeals however, remanded the case, directing the trial court to conduct an evidentiary hearing to develop a factual record and to determine whether Petitioner Haney received ineffective assistance of counsel under the framework articulated by the United States Supreme Court in *Lafler v. Cooper,* 566, U.S. ____; 132 S. Ct. 1376; 182 L. Ed. 2d 398 (2012), regarding the plea offer that was tendered outside the courtroom on the first day of trial. The Court of Appeals retained jurisdiction.

On remand, the trial court held a hearing on July 25, 2012 and after developing the factual record (upon hearing conflicting testimony concerning the circumstances surrounding Petitioner's rejection of the state's plea offer) found that Petitioner's counsel was not ineffective.

Petitioner subsequently returned to the Michigan Court of Appeals for consideration of the claim of error after remand. The court of appeals, on the bases of the developed factual record, concluded that the trial court's factual findings were not clearly erroneous because it was not left with a definite and firm conviction that a mistake had been made. The state court of appeals further concluded that Petitioner did not establish that he received ineffective assistance of counsel under *Strickland v. Washington* [466 U.S. 668; 104 S. Ct.

2052; 80 L. Ed. 2d 674 (1984)] standards. Petitioner's conviction and sentence on that claim of error was affirmed.

The Michigan Supreme Court subsequently denied discretionary review. Petitioner Hany subsequently filed a petition for habeas relief under 28 U.S.C. § 2254. In rejecting Petitioner's claim, the federal district court found that he Michigan Court of Appeals identified and relied on the correct standard and that the state trial court's resolution of the issue was entirely reasonable. Petitioner's request for habeas relief was denied.

Petitioner timely sought a certificate of Appealability in the United States Court of Appeals for the Sixth Circuit, seeking certification of the claim of error presented to the Court in the present petition. After consideration, the court of appeals denied Petitioner's application for a COA.

Petitioner Haney now seeks writ of certiorari in this Court.

REASONS FOR GRANTING THE PETITION

Petitioner Lonnie Haney pursued present claim of error in a state court Standard 4 Brief; which may or may not have been briefed, argued or articulated in a manner consistent with a trained and learned advocate of the judiciary.

Thus, Petitioner Haney advanced his claim of error under a theory that counsel rendered ineffective assistance of counsel when communicating the plea offer to him (presumably contrary to *Lafler v. Cooper,* 132 S. Ct. 1376 (2012)) and relied extensively on the argument advanced by his appellate counsel during the state court evidentiary hearing; which correctly asserted Petitioner Lonnie Haney's position on appeal.

It is axiomatic that "[the] defendant needs counsel and counsel needs time." *Brescia v. New Jersey,* 417 U.S. 921, 94 S. Ct. 2630, 41 L. Ed. 2d. 277 (1974) (quoting *Hawk v. Olson,* 326 U.S. 271, 278 (1945). Here, counsel did not have "time" and as a result Petitioner Lonnie Haney may well have been deprived of his right to the adequate assistance of counsel guaranteed by the Constitution.

The Supreme Court long ago acknowledged that the duty to provide counsel "is not discharged by an assignment at such time or under such circumstances as to produce the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama,* 287 U.S. 45, 71, 53 S. Ct. 55 (1932); (citing *Hawk v. Olson,* 326 U.S. 271, 278, 66 S. Ct. 116 (1945) ("The defendant needs counsel and counsel needs time.") and (citing *White v. Ragen,* 324 U.S.

760, 764, 65 S. Ct. 978 (1945) ("It is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of effective aid and assistance of counsel."). Confer, *Avery v. Alabama,* 308 U.S. 444, 446, 60 S. Ct. 321 (1940).

Relevant portions of the argument advanced by Petitioner Haney's appellate counsel, detailing their position concerning trial counsel's deficient performance in the context of conveying the plea offer are as follows:

> THE COURT: All right.
> Do you care to make argument?
> MS. ASHFORD [Appellate Counsel]: Yes, please.
> THE COURT: Please go ahead.
> MS. ASHFORD: Your Honor, I believe that Mr. Svikis' [prior defense attorney] recollection is of the circumstances relaying the terms of the plea offer to my client are belied by the record. I believe that in trying to reconstruct what happened over a year ago he's - - he's mistaken, and I would point to the record in this regard.
>
> At page 202, your Honor indicates we're going to take a temporarily - - excuse me. At page 202, your Honor says after the People move for an adjournment that you're going to deny the motion and that there was going to be a temporary break. That was at 3:14 p.m.
>
> So, at 3:14 p.m., it says court recessed. At 3:27 p.m. again on page 202, the court reconvened. Your Honor says, all, right, we're back on the record in People versus Lonnie Haney . . . I asked for the lawyers to meet in the chambers, there was some brief discussions about the recent developments.
>
> So, our position is in *thirteen minutes* - - so from the time that the court recessed until the time the court reconvened, there was time to have the in chambers discussion with - - with the court and counsel, and as - - and at the same time in *thirteen minutes* also Mr. Svikis had to have had the conversation with Mr. Haney about the plea offer. Because, after Your Honor makes the statements about what happened in the chambers and the plea offer, on page 202, Mr. Svikis then in response to your Honor's questions – because you - - say something to the effect of when - - I

understand that he did not avail himself of the plea. Is that right, Mr. Svikis? And Mr. Svikis continues.

So, we know that Mr. Svikis has had his conversation with Mr. Haney and all of this has happened within *thirteen minutes*. I think under these circumstances it's more reasonable to believe that Mr. Haney's recollection that the - - the terms of the new offer were conveyed to him *hurriedly* at the table than - -. Mr. - -Mr. Haney's recollection just makes more sense given the time - - time constraints that were - - that the record - - that the trans - - that the transcript establishes.

Now, we - - we understand and, again, the transcript indicates as we - - as we pointed out at page 4 of the first day of trial, and also Mr. Svikis' memo, that Mr. Haney - - there was - - you know, it was said about the 25 min - - 25-year minimum sentence that was mandatory. But, I think it's also clear that Mr. Haney - - you know, there's certainly is a difference in hearing something and *cognitively understanding something*. And, I don't know if it's a *combination of the use of street drugs, living, you know, in the under belly of life - - a lot of your life and poor education, and the combination of all of those things*. But, I - - I do believe that Mr. Haney when I was trying to elicit information from him, you know there - - there is some kind of *cognitive gap* and it does - -. I had to pull myself back and I realized that, you know, your sentences are too long and too complex and, you know, keep it - - keep them more - - just more simple and more concrete and repetition is sometimes necessary.

So, when he testified, yes, I heard that at the beginning of the trial 25 year mandatory minimum, but he didn't understand because, you know, as lawyers and people who are about court we bandy about phrases all the time.

We assume that - - that the laypeople and the litigants understand, but they may or may not understand. We have shorthand; we say Killebrew. I doubt Mr. Haney knows what Killebrew is. But, you know it's a shorthand that we have among each other, but that doesn't mean that - - that the clients and the litigants understand.

So, here is a situation where Mr. Haney, in the mist of trial, had a new offer that was relayed to him. And, we submit it was *relayed to him in less than five minutes*[1] *in a hurried situation with the deputies standing twelve feet away,*

[1] Defense Attorney Svikis and Prosecuting Attorney Bruinsma concede that the plea offer was conveyed to Mr. Haney in five minutes or less. (See *Ginther* hearing Transcript at pp. 64 [Defense Attorney Svikis] and 81[Prosecuting Attorney Bruinsma].

knowing that the jury is going to be reconvened, and your Honor's expecting a decision so that the case could proceed.

That he did not understand what was the nature of the offer and did not have time to properly digest the consequences and an opportunity to really talk with his lawyer about it. . ..

MS. ASHFORD: Yes, but I don't think - - I don't think those kinds of things were - - I mean, I don't think that kind of information was imported in the quick hurried situation. I don't think - - and I don't think that Mr. Haney, and basically my experience saying it once, twice, and sometimes three times is not enough, and sometimes it's just - - a - - you know, it just takes time to - - to - - it's not just enough to say it, but it's enough - - you have to work with him to try to help him understand it . . .

But, again, you know, we presuppose that other people are following - - tracking our conversations and it may or may not be the case. I just don't think that giving - - given the timeline that the transcript clearly establishes that the in court - - the in chambers discussion, as well as the discussion with Mr. Haney all happened within a thirteen-minute timeline. *I don't think that was sufficient and adequate under the circumstances for him to - - to intelligently exercise his decision to reject the plea offer.*

(*Ginther* Hearing Trans. at pp. 73-78, July 25, 2012) (Italics supplied).

It cannot be gainsaid that Petitioner Lonnie Haney's trial counsel's conveying of the plea offer in just five minutes (as a result of the state court's interference) was the sort of expeditious result this Court has rejected in trial proceedings and this Court should afford Petitioner Lonnie Haney the same constitutional protections during plea negotiations as that of a petitioner who has elected to proceed to trial. t is axiomatic that "[the] defendant needs counsel and counsel needs time." *Brescia* 417 U.S. Supra. at 921.

At a minimum, Petitioner Lonnie Haney's trial counsel needed time to effectively convey the plea offer and Petitioner Lonnie Haney himself, needed

time to process, way and decide whether to accept or reject the offer. That said, the lower court's decision was contrary to and an unreasonable application of this Court's clearly established precedent.

In response to the prosecution's rebuttal argument that Petitioner Haney had not established what he needed in order to establish a claim under the *Lafler* framework,[2] Appellate Counsel, Ms. Ashford continued:

> MS. ASHFORD: All right.
>
> I did not objection *(sic)*, because I just, you know, I didn't want to interrupt the prosecutor as she was making her closing, but she has misstated the standard. The standard isn't that the defense has to prove that trial counsel gave him misadvise, and that has never been our contention.
>
> *However, I think the standard, according to Lafler is competent advice and it's not because - - sometimes there are structural circumstances that can impact on competent things. Not that we're saying that Mr. Sviks said something that was erroneous or - - or told - - told Mr. Haney something that was - - that, you know, you're going for sure get probation. That's not the argument.*
>
> *We're saying that the hurriedness of the circumstances and the - - the short period, and all combined to indicate that he didn't - - that it didn't ensure that Mr. Haney knew what he was doing when he was rejecting the plea offer.*
>
> So - - and it's that how do you communicate with the person who's not the most educated person and understanding person, and talk with the judge and the prosecutor and communicate with your client, and do all of that well within *thirteen minutes*, when you're talking about something that's truly a very life - - a life decision.
>
> You know, I don't - - I mean, let's say if he *spent five talking with your Honor, and - - and - - and the prosecutor and five or six minutes with Mr. Haney. It's under those circumstances with the person who doesn't necessarily understand the jargon of courts and Killebrew and Cobbs and things of that nature.* All of that impacted - - so that Mr. Haney when he says, no I don't want it. He didn't, you know, we're - - his position is I would have taken it.

[2] *Id. Ginther* hearing Trans. at pp. 79-84.

> [] So, this is not a - - a - -a anyway saying that Mr. Svikis did impart erroneous information. That's not what we're saying, but just that the nature of the circumstances leads to the incompetent relay of information based on just the time period and the hurriedness of the circumstances. . ..

(*Ginther* Hearing Trans. at pp. 84-86, July 25, 2012) (Italics supplied).

It is abundantly clear from the argument advanced by appellate counsel, what Petitioner Haney's position has been throughout this case. In the face of appellate counsel's argument, how could the state court, federal district court, and Sixth Circuit Court of Appeals reasonably and justifiably reconcile their conclusion that the trial court was correct in finding that Petitioner Haney [sufficiently] "weighed the plea offer after discussing it with counsel", all of which took place within five minutes or less?

Worthy of mention, is trial counsel's testimony, which certainly sheds light on why Petitioner Haney maintained his innocence. Hence, Petitioner Haney was confused on the matter of penetration:

> [MR. SVIKIS]: Well yes. But his position was that I did not have sexual intercourse with that - - with that girl . . . He was describing sexual penal sexual intercourse, and this continued throughout whatever discussions that we had, that on the particular charges that he was facing that's not what was required. The touching of the genital or buttocks, anus was sufficient and that's why it was added to the memo. You can't tell on here, but it was highlighted. So, that was always a point of contention where he insisted he did not have sexual intercourse. I said, well that's - - the law says you can't do the touching . . . [3]

[3] Counsel's testimony does not indicate that he "explained penetration as it is *understood in lay terms,* is not necessary for penetration under Michigan law," as the COA found. (Mich. Ct. App. Op. After Rem, EFC No. 17-7, PageID.926-927.)

> [Prosecutor Bruinsma]: Okay. Now, you explained to us then that Mr. Haney was having difficulty understanding what penetration was under the law, as opposed to what penetration is typically understood to be in layman terms.
>
> [MR. SVIKIS]: From - - from the beginning his instance never wavered that he did not have sexua l intercourse with Tierra - - what - - that he had not - - that was - - that was consistent. . ..

(*Ginther* Hearing Trans. at p. 54, 56, July 25, 2012).

Petitioner Haney, in his misunderstanding of the law with respect to penetration, was merely maintaining his innocence on that notion because he knew (from a laymen's perspective) that he had never had penal sexual intercourse with Tierra.

There was not enough time to allow counsel to adequately explain to Petitioner Haney, the difference between sexual penetration in laymen's terms and under Michigan law. Likewise, that relatively short period was not adequate to enable Petitioner to weigh his options and make an informed and voluntary choice to reject the plea offer and to continue with trial.

A person who is physically present, but cannot understand the proceedings has been denied due process.*v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L. Ed. 2d 103 (1973) *Drope* (citing *Dusky v. United States,* 362 U.S. 402 (1960)) further concluded "For our purposes, it suffices to note that the prohibition is fundamental to an adversary system of justice . . . Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - - and

whether he has a rational as well as factual understanding of the proceedings against him.'"

Petitioner Haney submits that what the state did – shifting the burden of proof – was impermissible. In fact, this type of action has been condemned. See, *Patterson v. New York*, 432 U.S. 197, 215, 97 S. Ct. 2319, 2329, 53 L. Ed2d 281 (1977), holding that the state may not shift the burden of proof and force the defendant to prove something.

In short, it cannot be said (as the Sixth Circuit determined) that defense counsel's assistance during the plea bargain stage, was sufficient to enable Petitioner Haney "to make an informed and voluntary choice between trial and a guilty plea," as defense counsel could not have explained the range and consequences of available choices in sufficient detail (in the relative short period – five minutes or less) to enable Petitioner Haney to make an intelligent and informed choice.

Indeed, Petitioner Haney has shown that defense counsel's performance was objectively unreasonable under prevailing professional norms. *Strickland v. Washington,* 466 US 668, 687-688; 104 S. Ct. 2052; 80 L. Ed. 2d. 674 (1984). Several matters took place between counsel and Petitioner Haney in five minutes or less; i.e. (1) communication of the specific terms of the plea offer, including the lesser charge and the shorter sentence, (2) discussion of the evidence against Petitioner Haney, (3) explaining penetration under Michigan law, (4) discussed the witness's desire not to testify, (5) discussion of the offer between Petitioner Haney and counsel, (6) counsel's recommendation that Petitioner Haney take

some control over what takes place, and (7) Petitioner Haney weighted the plea offer after discussing it with counsel.

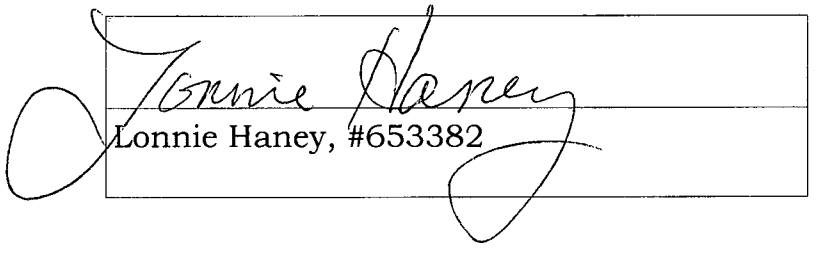
Petitioner Haney would not have rejected the plea had he and defense counsel been afforded sufficient time during the plea bargaining phase of the proceedings to consult with one another on all of the circumstances surrounding the plea offer. *Lafler v. Cooper* 132 S. Ct. 1376, 1385-1385 (2012).

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: March 20, 2019