IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

JUAN T. WALKER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDICES A THROUGH E

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Appendix A: Michigan Supreme Court Order Remanding for Hearing

Supreme Court of Michigan.

PEOPLE of the State of Michigan,
Plaintiff–Appellee,
v.
Juan WALKER,
Defendant–Appellant.

Docket No. 145433.
COA No. 307480.
Nov. 19, 2014.

Order

By order of April 29, 2013, the application for leave to appeal the May 21, 2012 order of the Court of Appeals was held in abeyance pending the decision in Burt v. Titlow, cert. gtd. 571 U.S. ——, 133 S.Ct. 1457, 185 L.Ed.2d 360 (2013). On order of the Court, the case having been decided on November 5, 2013, 571 U.S. ——, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013), the application is again considered and, pursuant to MCR 7.302(H) (1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court for an evidentiary hearing, pursuant to People v. Ginther, 390 Mich. 436, 212 N.W.2d 922 (1973), as to 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 bargain to second-degree murder and a sentence agreement of 25 to 50 years. See Missouri v. Frye, 566 U.S. ——, 132 S.Ct.

1399, 182 L.Ed.2d 379 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance. People v. Carbin, 463 Mich. 590, 599–600, 623 N.W.2d 884 (2001). In order to establish the prejudice prong of the inquiry under these circumstances, the defendant must show that: (1) he would have accepted the plea offer; (2) the prosecution **745 would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the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 U.S. ——, 132 S.Ct. 1376, 1385, 182 L.Ed.2d 398 (2012).

If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain as outlined above, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D). If the defendant successfully establishes his entitlement to relief pursuant to MCR 6.508(D), the trial court must determine whether the remedy articulated in Lafler v. Cooper should be applied retroactively to this case, in which the defendant's conviction became final in October 2005. If available, Judge Thomas Edward Jackson shall preside over the hearing.

The circuit court shall, in accordance with Administrative Order 2003–03, determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant in this matter. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We do not retain jurisdiction.

Appendix B: Michigan Court of Appeals opinion reversing trial court grant of relief

PEOPLE of the State of Michigan,
Plaintiff–Appellant,
v.
Juan T. WALKER,
Defendant–Appellee.

No. 332491
October 12, 2017
Wayne Circuit Court, LC No. 01–003031–01–FC

Before: Saad, P.J., and Cavanagh and Cameron, JJ.

Opinion

Per Curiam.

The prosecution appeals by leave granted1 the trial court order granting defendant's motion for relief from judgment. We reverse and remand.

Defendant was originally sentenced in 2001 to life imprisonment without parole for first-degree premeditated murder, MCL 750.316, and two years' imprisonment for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. This Court previously affirmed defendant's convictions and sentences. People v. Walker, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2005 (Docket No. 239711). The Michigan Supreme Court denied defendant's request for leave to appeal. People v. Walker, 474 Mich 902 (2005). In 2011, defendant filed a motion for relief from judgment in the trial

court after discovering his trial counsel failed to inform him of a plea offer to second-degree murder, MCL 750.317, and felony-firearm, with a sentence of 25 to 50 years' imprisonment for second-degree murder, plus two years' imprisonment for felony-firearm. The prosecution faxed the plea offer to defense counsel several days before the trial commenced, but defendant claimed defense counsel never relayed the offer to defendant. The trial court denied defendant's motion for relief from judgment, and he sought leave to appeal in this Court, which was also denied. People v. Walker, unpublished order of the Court of Appeals, entered May 21, 2012 (Docket No. 307480). Defendant sought leave to appeal that order in the Michigan Supreme Court, which was held in abeyance pending the decision in Burt v. Titlow, —— U.S. ——; 134 S.Ct. 10; 187 L.Ed. 2d 348 (2013).2 People v. Walker, 829 N.W.2d 217 (2013). Once Burt was decided, the Michigan Supreme Court issued an order remanding defendant's case to the trial court for a Ginther hearing, with the following specific instructions:

> ... we REMAND this case to the Wayne Circuit Court for an evidentiary hearing, pursuant to [Ginther], as to 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 bargain to second-degree murder and a sentence agreement of 25 to 50 years. See Missouri v. Frye, 566 U.S. ——, 132 S.Ct. 1399, 182 L.Ed. 2d 379 (2012).

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance. People v. Carbin, 463 Mich 590, 599–600, 623 N.W.2d 884 (2001). In order to establish the prejudice prong of the inquiry under these circumstances, the defendant must show that: (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 U.S. ——, 132 S.Ct. 1376, 1385, 182 L.Ed. 2d 398 (2012).

If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain as outlined above, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D). If the defendant successfully establishes his entitlement to relief

> pursuant to MCR 6.508(D), the trial court must determine whether the remedy articulated in Lafler v. Cooper should be applied retroactively to this case, in which the defendant's conviction became final in October 2005. [People v. Walker, 497 Mich 894, 894–895 (2014).]

After the trial court held a Ginther hearing, it entered an order finding that defendant received the ineffective assistance of counsel because his trial attorney failed to inform defendant of the plea offer. Defendant then filed another motion for relief from judgment in the trial court, as required by our Supreme Court's remand order, and the trial court granted that motion and ordered the prosecution to reoffer defendant the plea deal. Defendant then pleaded guilty and was resentenced to 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm.

On appeal, the prosecution argues that defendant was afforded the effective assistance of counsel because he was not prejudiced, i.e., he did not demonstrate that there was a reasonable probability that he would have accepted the plea offer had it been made known to him. We agree.

A claim alleging ineffective assistance of counsel presents "a mixed question of fact and law." People v. Ackley, 497 Mich 381, 388; 870 N.W.2d 858 (2015). "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." People v. Armstrong, 490 Mich 281, 289; 806 N.W.2d 676

(2011) (quotation marks and citation omitted). We review the trial court's findings of fact for clear error and review questions of constitutional law de novo. People v. Trakhtenberg, 493 Mich 38, 47; 826 N.W.2d 136 (2012). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." Armstrong, 490 Mich at 289. Additionally, this Court reviews a trial court's decision regarding a motion for relief from judgment for an abuse of discretion, and we review the trial court's findings of fact supporting its decision on the motion for clear error. People v. Swain, 288 Mich App 609, 628; 794 N.W.2d 92 (2010). An abuse of discretion occurs when the trial court's decision "falls outside the range of reasonable and principled outcomes" or when the trial court "makes an error of law." Id. at 628–629.

A defendant is entitled to the effective assistance of counsel during the plea-bargaining process just as he or she is entitled to the effective assistance of counsel at trial. People v. Douglas, 496 Mich 557, 591–592; 852 N.W.2d 587 (2014). When a defendant seeks relief for ineffective assistance of counsel in the plea-bargaining context, he or she must meet the two-pronged standard set forth in Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed. 2d 674 (1984). Douglas, 496 Mich at 592. The defendant must show "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Douglas,

496 Mich at 592, quoting Lafler v. Cooper, 566 U.S. 156, 163; 132 S.Ct. 1376; 182 L.Ed. 2d 398 (2012) (quotation marks omitted). In demonstrating prejudice, "the defendant must show the outcome of the plea process would have been different with competent advice." Douglas, 496 Mich at 592, quoting Lafler, 566 U.S. at 163 (quotation marks omitted). When evaluating alleged prejudice from counsel's failure to inform the defendant of a plea offer, the defendant "must demonstrate a reasonable probability [he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel." Missouri v. Frye, 566 U.S. 134, 147; 132 S.Ct. 1399; 182 L.Ed. 2d 379 (2012). Consistent with this standard, our Supreme Court's remand order required defendant to demonstrate prejudice as outlined in Lafler:

> [A] 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. [Lafler, 566 U.S. at 164.]

The only element of this standard in dispute on appeal is whether there was a reasonable

probability that defendant would have pleaded guilty to second-degree murder had he been aware of the plea offer. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The prosecution insists that defendant was not prejudiced because defendant failed to show a reasonable probability that he would have accepted the plea, insisting throughout trial and at his Ginther hearing that he was innocent.

In Lafler, the defendant rejected a plea offer twice based on his attorney's erroneous representations that the prosecution would not be able to establish intent to murder the victim. Lafler, 566 U.S. at 161. A Ginther hearing was held, wherein the defendant argued that his attorney's advice to reject the plea offer constituted ineffective assistance of counsel. Id. The parties agreed that defense counsel's performance was deficient, satisfying the first prong of the Strickland two-part test. Id. at 163. Thus, the only issue was the application of the prejudice prong. Id. "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if 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." Id. at 168. The defendant demonstrated that but for his counsel's deficient performance, there was a reasonable probability that he would have taken the plea deal, and the trial court would have accepted it. Id. at 174. Furthermore, the defendant received a sentence

that was 3 ½ times the plea offer, thereby satisfying the prejudice prong. Id. The Supreme Court also determined that the appropriate remedy was for the prosecution to reoffer the plea, and if the defendant accepted the offer, it was up to the trial court's discretion whether to resentence the defendant. Id. at 170–172, 174–175.

In Douglas, the trial court rejected the defendant's claim that he was denied the effective assistance of counsel when his attorney failed to correctly inform the defendant of the mandatory minimum sentence for first-degree criminal sexual conduct, the defendant rejected two plea offers, and he was then convicted at trial and received a more severe sentence. Douglas, 496 Mich at 564. This Court reversed, concluding that defense counsel's performance was deficient, which prejudiced the defendant. Id. at 564–565. Our Supreme Court agreed that defense counsel's performance was deficient, but it disagreed with this Court's conclusion that the defendant had shown he was prejudiced. Id. at 595. The Douglas Court explained that this Court "made no mention of the role that the defendant's belief in his innocence may have played in his decision to go to trial, despite its prominent place in the trial court's reasoning." Id. At the Ginther hearing, the defense attorney testified that the defendant always maintained his innocence. Id. at 596. The defendant testified that he would have accepted the plea had he known of the mandatory minimum for the sentence, and had he not mistakenly believed that registering on the sex offender list would preclude him from living with his children. Id. Even though defendant

consistently claimed he would have accepted the plea, the Douglas Court said "the full body of the defendant's testimony undermines the credibility of his assertions that either these misconceptions or the misinformation regarding the sentence he faced at trial meaningfully influenced his decision to reject the prosecution's plea offer." Id. at 597. The defendant testified that he would not have accepted a plea that required sex offender registration or a plea that required jail time because he was innocent, he did not commit the crime, and he thought he would prevail at trial. Id. The Michigan Supreme Court explained:

> This testimony is confusing at best, and casts significant doubt upon what circumstances, if any, would have led the defendant to accept a plea. It certainly betrays no clear error in the trial court's discernment of the common thread running throughout both the defendant's and his counsel's testimony: that the defendant rejected the prosecution's plea offers because he was innocent of the charges, was not a sex offender, and was not interested in pleading guilty to repugnant acts that he did not commit.
>
> As a result, we are not "left with a definite and firm conviction that the trial court made a mistake" in finding that the defendant has failed to show prejudice stemming from his counsel's deficient performance, rather, the record amply supports the conclusion that, even had defendant been properly advised of the consequences he faced if convicted at trial, it was not reasonably probable that he would have accepted the prosecution's plea offer. [Id. at 597–598 (citations omitted)]

The Douglas Court held that the defendant was not entitled to reinstatement of the prosecution's plea offer because the defendant did not demonstrate that he was prejudiced by his attorney's misconduct. Id. at 599.

The issue here turns on whether the trial court clearly erred when it concluded that there was a reasonable probability that defendant would have accepted the plea had his trial counsel informed him of it. In other words, whether the trial court's finding leaves us "with a definite and firm conviction that the trial court made a mistake." Armstrong, 490 Mich at 289. In making this determination, we keep in mind that "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); People v. Dendel, 481 Mich 114, 130; 748 N.W.2d 859 (2008), amended on other grounds 481 Mich 1201 (2008).

At the Ginther hearing, defendant testified that he was innocent, that he did not kill the victim, that he was not present at the car wash on the date and time when the victim was killed, and that he had nothing to do with the shooting. Likewise, defense counsel testified at the Ginther hearing that defendant maintained his innocence throughout his jury trial. Despite his claim of innocence, defendant testified at the Ginther hearing that he would have pleaded guilty to murder in order to take advantage of a plea offer that did not "gamble with his life."

Defendant's consistent claim of innocence certainly casts doubt whether he would have accepted a plea offer before trial. It goes without

saying that defendant now has the benefit of comparing an unfavorable sentence of life imprisonment without parole to a term-of-years plea offer that appears generous in comparison. Indeed, the trial court that presided over the Ginther hearing expressed the same concern about defendant's credibility in its memorandum opinion and order that analyzed both prongs of the Strickland test for ineffective assistance of counsel. When examining whether defense counsel's performance was deficient, the trial court expressed concerns regarding defendant's credibility:

> On cross[-]examination by the prosecutor, the defendant gave inconsistent and conflicting testimony. He testified that, although he maintained his innocence at the trial, he still would have admitted guilt to a crime he did not commit because "it wasn't worth gambling." Later during cross [-]examination, when the prosecutor pressed him on the issue, he testified that he would have made a guilty plea admitting that he killed the victim. Yet, he emphatically said that he did not commit the crime—restated that he denies admitting the crime, but would admit to it because: "I wouldn't gamble with my life like that." On re-direct examination by defense counsel, defendant testified that although he entered a plea of not guilty when he appeared before the trial judge for arraignment on the Information, he would have accepted an offer and would have pled guilty if an acceptable plea offer had been made. He reiterated on further questioning that on the day that the trial court started he would pled [sic]

guilty if the "years were right". These seem to be conflicting statements that raises a question of whether the defendant was willing to accept the offer of 25 to 50 years.

Admittedly, the trial court seemed to confuse the standards set forth in Strickland and Lafler, often discussing what appeared to be a prejudice analysis during its discussion of defense counsel's performance. However, when the trial court finally turned to prejudice, it further explained:

> An examination of the defendant's testimony at the recent evidentiary hearing shows it is convoluted, contradictory, and inconsistent.... A reasonable conclusion, in the context of defendant's testimony, is that prior to the beginning of trial he did not want to plead guilty in this case.
>
> * * *
>
> Although the defendant vacillated, he eventually testified that he would have accepted the plea offer, but his testimony at the evidentiary hearing indicated a high probability of reluctance.

In the end, the trial court found that defense counsel's performance was deficient and the trial court would have accepted the guilty plea had one been offered. More importantly for this appeal, the trial court concluded that defendant "was prejudiced by defense counsel's failure to inform him of the plea offer." The only basis identified in the memorandum opinion and order for reaching this conclusion was "due to the incoherence of

defendant's testimony as to whether he would have accepted the guilty plea." Further confusing matters, the trial court expressly stated in the very next sentence of its order that "the court's reasoning does not answer the question of whether an analysis of the prejudiced [sic] prong requires a findings [sic] at this juncture of whether the defendant would have made an unequivocal plea of guilty to the reduced charged [sic] of second degree murder." In other words, the court found prejudice without finding defendant would have accepted the plea offer.

The trial court then ordered defendant to file a motion for relief from judgment under MCR 6.508(D) consistent with our Supreme Court remand order. During the hearing, the trial court readily acknowledged that its prior order may "have confused the [prejudice] issue," but ultimately concluded that there was a reasonable probability that defendant would have accepted the offer. In so finding, the trial court did not base its decision on the credibility of defendant's testimony, which the court stated it was "not putting that much weight on what the defendant said recently." Instead, it found prejudice because, had his attorney advised him of the offer, his counsel "might have" been able to convince defendant to accept the plea. The trial court's conclusion was grounded in the "many cases that I have tried ... where a [defendant does not] understand." Thereafter, the trial court granted defendant's motion for relief from judgment, finding that defendant would have accepted the plea and ordering the prosecution to reoffer the plea.

After a review of the record, we are left with a definite and firm conviction that the trial made a mistake in its findings, failed to engage in a proper analysis under Lafler, and thereby abused its discretion when it granted defendant's motion for relief from judgment. Our Supreme Court mandated the trial court to implement the prejudice standard set forth in Lafler, including whether defendant would have accepted the plea offer. Defendant had the burden of proof in showing a reasonable probability that he would have accepted the plea offer. See Douglas, 496 Mich at 592 ("The defendant has the burden of establishing the factual predicate of his ineffective assistance claim."). In making its decision, the trial court had to conduct a Ginther hearing and consider evidence to determine whether defendant was prejudiced. When presiding over the hearing, it needed to (1) hear witnesses and determine their credibility, (2) define what circumstances before trial would have affected defendant's decision to accept the plea offer, and (3) weigh the evidence to determine whether defendant met its burden of proof. After reviewing the trial court's findings, we conclude that it clearly erred by finding that defendant would have accepted the plea offer. In its ruling, the trial court failed to properly consider defendant's testimony at the Ginther hearing and did not consider any of the actual circumstances underlying the plea offer, and for those reasons, we are left with a definite and firm conviction that the trial court made a mistake.

First, the record amply supports the trial court's determination that defendant was not

credible, and therefore, his testimony did not support a finding that he would have accepted the plea offer. The trial court acknowledged that not only was defendant's testimony "convoluted, contradictory, and inconsistent," defendant expressed a "high probability of reluctance" and it would be "reasonable" to conclude "that prior to the beginning of trial [defendant] did not want to plead guilty in this case." Even though the trial court concluded that defendant was not a credible witness at the Ginther hearing and hearing on the motion for relief from judgment, it informed the prosecution at the latter hearing that it was "not putting that much weight on what [defendant] said recently." Without taking into account defendant's testimony, the trial court employed an analysis in direct contradiction to our Supreme Court's mandate in Douglas, i.e., that a defendant's testimony, especially his belief in his innocence, is a factor when considering prejudice. Id. at 595.

Second, the trial court did not consider any actual circumstances underlying defendant's case before or during trial. Instead, the trial court used its own experience with defendants in similar circumstances and reasoned they on occasion changed their minds when their counsel discussed the wisdom of accepting a plea deal—even if they originally professed innocence. The trial court did explain on multiple occasions that it had to "look at what was happening back in 2001," but at no time did it make any findings specific to defendant's case. In essence, the trial court determined that he was prejudiced because, but for the deficient representation, his trial counsel might have

convinced him to plead guilty, despite his claim of innocence, without the trial court basing its findings on any facts specific to his case. This per se approach to the prejudice analysis defies established precedent. The Frye Court indicated that the circumstances underlying each individual case at the time that the offer is presented could affect whether the defendant would accept the plea. Frye, 566 U.S. at 150 (explaining that the strength of the prosecution's case at the time of the plea offer could affect a prejudice finding). In Frye, the underlying circumstances of the case were such that it was highly likely that the defendant would have accepted the first uncommunicated plea offer because he had later pleaded guilty to a more serious charge on a separate offense without any recommendation from the prosecution. Id. Additionally, our Supreme Court has required that a defendant's belief in his innocence be reviewed in full to determine whether it undermines his proclamation that he would have accepted the plea. See Douglas at 595 (holding that a defendant's belief in his innocence and how it may have played in the decision to go to trial is an important factor to consider). By simply implementing what appears to be a per se approach to the prejudice analysis without making specific findings about the circumstances in this case, the trial court erred when it granted the motion for relief from judgment.

We acknowledge that the "reasonable probability" standard is a lower bar, requiring only that the circumstances show a "probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694. At the Ginther hearing, defendant proclaimed he would have taken the plea offer. Furthermore, the original charge, when compared to the plea offer, provides some proof alone that defendant may have accepted the plea. A first-degree murder charge resulting in a life sentence without the possibility of parole is more severe than 25 to 50 years' imprisonment. In fact, the difference between 25 years and life imprisonment is almost certainly greater than the sentences at issue in Douglas, Lafler, and Frye.5 However, the trial court did not base its decision on any of the testimony at the Ginther hearing or on any evidence of the actual circumstances before trial. For these reasons, the trial court clearly erred in finding a reasonable probability defendant would have accepted the plea offer. Therefore, defendant did not satisfy his burden in proving ineffective assistance of counsel, and the trial court abused its discretion when it granted defendant's motion for relief from judgment.

Reversed and remanded for further proceedings to reinstate defendant's original convictions and sentences. We do not retain jurisdiction.

Footnotes

1 People v. Walker, unpublished order of the Court of Appeals, entered September 9, 2016 (Docket No. 332491).

2 Although defendant's application for leave to appeal was held in abeyance pending Burt, the Michigan Supreme Court's specific instructions on

remand do not make reference to the Burt decision, and therefore, it will not be discussed herein.

3 People v. Ginther, 390 Mich 436; 212 N.W.2d 922 (1973).

4 The prosecution did not provide in its statement of the questions involved a challenge to the trial court's finding on the first prong under Strickland, as required by our court rules. MCR 7.212(C)(5). However, the prosecution provided a cursory argument in its brief, claiming the trial court erred when it held that defense counsel's performance was deficient under Strickland because it had given defendant the "benefit of the doubt" as to whether he was informed about the plea. Even if we were to address this argument, which necessarily challenges the trial court's findings in its earlier opinion and order—not on the motion for relief from judgment—the trial court did not clearly err in its finding. Defendant passed a polygraph test as to this issue, defense counsel testified that he could not remember relaying the plea offer, and there is no question that the prosecutor had sent the fax. The trial court believed defendant's testimony on this issue, and we will not disturb the trial court's credibility findings. People v. Dendel, 481 Mich 114, 130; 748 N.W.2d 859 (2008), amended on other grounds 481 Mich 1201 (2008).

5 In Douglas, defense counsel informed the defendant that he was facing a 20–year maximum sentence when in reality he was subject to a mandatory minimum sentence of 25 years' imprisonment. Douglas, 496 Mich at 593. In Lafler, instead of accepting an earlier plea offer of 51 to 85 months, the defendant was sentenced following

jury trial to 185 to 360 months. Lafler, 566 U.S. at 161. In Frye, the defendant pleaded guilty to a felony with a four-year maximum sentence after his defense counsel failed to inform him of a plea offer on a separate offense to a misdemeanor with a one-year maximum sentence. Frye, 566 U.S. at 138–140.

Appendix C: Order of Michigan Supreme Court reversing and remanding

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Juan T. WALKER,
Defendant-Appellant.

SC: 156782
COA: 332491
November 21, 2018
Wayne CC: 01-003031-FC

Order

On order of the Court, the application for leave to appeal the October 12, 2017 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals holding that the trial court clearly erred in finding a reasonable probability that the defendant would have accepted the plea offer, and we REMAND this case to that court for consideration of whether Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), should be applied retroactively to this case, in which the defendant's convictions became final in 2005.

The Court of Appeals found clear error in the trial court's memorandum opinion and in its statements during oral argument at a subsequent hearing. However, in its review of the record, the Court of Appeals failed to recognize that, at the end

of that hearing, the trial court quoted the applicable standard from Lafler and unequivocally found that there was a reasonable probability that the defendant would have accepted the plea offer. This finding—made by the trial judge who presided over the trial and the evidentiary hearing—is supported by the record, and we are not "left with a definite and firm conviction that the trial court made a mistake." People v. Armstrong, 490 Mich. 281, 289, 806 N.W.2d 676 (2011).

Appendix D: Opinion of the Michigan Court of Appeals

PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Juan T. WALKER,
Defendant-Appellee.

No. 332491
May 23, 2019, 9:10 a.m.
Wayne Circuit Court, LC No. 01-003031-FC

Before: Cavanagh, P.J., and Borrello and Cameron, JJ.
ON REMAND

Cameron, J.

On remand, our Supreme Court has directed this Court to consider whether the decision in Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), should be applied retroactively to allow defendant to successfully assert that his trial counsel provided ineffective assistance of counsel in the plea bargaining context by failing to notify defendant of a plea offer before trial. We hold that Lafler applies retroactively because the case does not announce a new rule. Therefore, applying the Lafler decision here, we affirm the trial court's order granting relief to defendant.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2001, a jury convicted defendant of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was originally sentenced to life imprisonment without parole for the first-degree premeditated murder conviction to be served consecutive to two years' imprisonment for the felony-firearm conviction. This Court affirmed defendant's convictions and sentences on direct review. People v. Walker, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2005 (Docket No. 239711, 2005 WL 473608) (Walker I).

In 2011, defendant moved for relief from judgment in the trial court on the ground that his trial counsel was ineffective for not informing defendant of the prosecutor's pretrial plea offer to second-degree murder and felony-firearm, with a sentence agreement of 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. The trial court denied defendant's motion for relief from judgment. Defendant filed a delayed application for leave to appeal, which this Court denied "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." People v. Walker, 491 Mich. 921, 812 N.W.2d 749 (2012). Defendant sought leave to appeal this Court's order in the Michigan Supreme Court, which held defendant's application in abeyance pending the decision in Burt v. Titlow, 571 U.S. 12, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013). People v. Walker, 829 N.W.2d 217 (Mich., 2013). After Burt was decided, our

Supreme Court remanded the instant case to the trial court for a Ginther1 hearing, with these instructions:

> ... we REMAND this case to the Wayne Circuit Court for an evidentiary hearing, pursuant to [Ginther], as to 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 bargain to second-degree murder and a sentence agreement of 25 to 50 years. See Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance. People v. Carbin, 463 Mich. 590, 599-600, 623 N.W.2d 884 (2001). In order to establish the prejudice prong of the inquiry under these circumstances, the defendant must show that: (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 U.S. 156, 164, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).
>
> If the defendant establishes that his trial counsel was ineffective in failing to convey the plea bargain as outlined above, the defendant shall be given the opportunity to establish his entitlement to relief pursuant to MCR 6.508(D). If the defendant successfully establishes his entitlement to relief pursuant to MCR 6.508(D), the trial court must determine whether the remedy articulated in Lafler v. Cooper should be applied retroactively to this case, in which the defendant's conviction became final in October 2005. [People v. Walker, 497 Mich. 894, 894-895, 855 N.W.2d 744 (2014).]

On remand, the trial court held a Ginther hearing, after which the trial court entered an order holding that defendant was denied the effective assistance of counsel when his trial attorney failed to inform defendant of the plea offer. The next step in the procedural history was recounted in this Court's October 12, 2017 opinion as follows:

> Defendant then filed another motion for relief from judgment in the trial court, as required by our

> Supreme Court's remand order, and the trial court granted that motion and ordered the prosecution to reoffer defendant the plea deal. Defendant then pleaded guilty and was resentenced to 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. [People v. Walker, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332491, 2017 WL 4557012) (Walker II), rev'd in part & remanded 503 Mich. 908, 919 N.W.2d 401 (2018).]

In September 2016, this Court granted the prosecution's delayed application for leave to appeal, which challenged the trial court's order granting defendant's motion for relief from judgment. People v. Walker, unpublished order of the Court of Appeals, entered September 9, 2016 (Docket No. 332491). In October 2017, this panel issued an opinion reversing the trial court's order and remanding the case for the reinstatement of defendant's original convictions and sentences. Walker II, unpub. op. at 1, 9. This Court agreed with the prosecutor's argument "that defendant was afforded the effective assistance of counsel because he was not prejudiced, i.e., he did not demonstrate that there was a reasonable probability that he would have accepted the plea offer had it been made known to him." Id. at 3.2 With respect to the prejudice requirement, this Court was "left with a definite and firm conviction

that the trial [court] made a mistake in its findings, failed to engage in a proper analysis under Lafler, and thereby abused its discretion when it granted defendant's motion for relief from judgment." Id. at 7. That is, "the trial court clearly erred in finding a reasonable probability defendant would have accepted the plea offer. Therefore, defendant did not satisfy his burden in proving ineffective assistance of counsel, and the trial court abused its discretion when it granted defendant's motion for relief from judgment." Id. at 9.

Our Supreme Court entered an order reversing in part this Court's decision and remanding the case to this Court for consideration of whether Lafler applies retroactively to this case; in particular, our Supreme Court's order stated as follows:

> On order of the Court, the application for leave to appeal the October 12, 2017 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals holding that the trial court clearly erred in finding a reasonable probability that the defendant would have accepted the plea offer, and we REMAND this case to that court for consideration of whether Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), should be applied retroactively

> to this case, in which the defendant's convictions became final in 2005.
>
> The Court of Appeals found clear error in the trial court's memorandum opinion and in its statements during oral argument at a subsequent hearing. However, in its review of the record, the Court of Appeals failed to recognize that, at the end of that hearing, the trial court quoted the applicable standard from Lafler and unequivocally found that there was a reasonable probability that the defendant would have accepted the plea offer. This finding – made by the trial judge who presided over the trial and the evidentiary hearing – is supported by the record, and we are not "left with a definite and firm conviction that the trial court made a mistake." People v. Armstrong, 490 Mich. 281, 289, 806 N.W.2d 676 (2011). [People v. Walker, 503 Mich. 908, 919 N.W.2d 401, 401 (2018) (Walker III).]

On remand, we must determine whether Lafler should apply retroactively to this case. If it does, then we must affirm the trial court's order finding that defendant was denied the effective assistance of counsel when his trial attorney failed to inform defendant of the plea offer.

II. ANALYSIS

The issue whether a United States Supreme Court decision applies retroactively presents a question of law that we review de novo. We review for an abuse of discretion the trial court's ultimate ruling on a motion for relief from a judgment." People v. Gomez, 295 Mich. App. 411, 414, 820 N.W.2d 217 (2012) (citation omitted).

Our Supreme Court has recently explained:

> Ordinarily, judicial decisions are to be given complete retroactive effect. But judicial decisions which express new rules normally are not applied retroactively to other cases that have become final. New legal principles, even when applied retroactively, do not apply to cases already closed, because at some point, the rights of the parties should be considered frozen and a conviction final. Thus, as to those cases that have become final, the general rule allows only prospective application. [People v. Barnes, 502 Mich. 265, 268, 917 N.W.2d 577 (2018) (quotation marks, ellipsis, and citations omitted).]

In Barnes, 502 Mich. at 269, 917 N.W.2d 577, our Supreme Court quoted from Montgomery v. Louisiana, 577 U.S. ——, ——, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016), for the most recent explanation of the federal standard for retroactivity:

> Justice O'Connor's plurality opinion in Teague v. Lane, 489 U.S. 288[, 109 S.Ct. 1060, 103 L.Ed.2d 334]

> (1989), set forth a framework for retroactivity in cases on federal collateral review. Under Teague, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced. Teague recognized, however, two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Second, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. [Barnes, 502 Mich. at 269, 917 N.W.2d 577, quoting Montgomery, 577 U.S. at ——, 136 S.Ct. at 728 (brackets in original; quotation marks, ellipsis, and citations omitted).]

In short, "Teague makes the retroactivity of [the United States Supreme Court's] criminal procedure decisions turn on whether they are novel." Chaidez v. United States, 568 U.S. 342, 347, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013). Absent one of the two exceptions noted above, a new rule

announced by the United States Supreme Court may not collaterally benefit a person whose convictions are already final. Id. "Only when [the United States Supreme Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review." Id.

Therefore, the first question under Teague is whether a judicial decision establishes a new rule. Barnes, 502 Mich. at 269, 917 N.W.2d 577, citing People v. Maxson, 482 Mich. 385, 388, 759 N.W.2d 817 (2008). A judicial decision's rule is considered to be new if "it breaks new ground or imposes a new obligation on the [s]tates or the [f]ederal [g]overnment." Maxson, 482 Mich. at 388, 759 N.W.2d 817 (quotation marks and citation omitted); see also Chaidez, 568 U.S. at 347, 133 S.Ct. 1103. In other words, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Chaidez, 568 U.S. at 347, 133 S.Ct. 1103 (quotation marks and citation omitted). "And a holding is not so dictated ... unless it would have been apparent to all reasonable jurists." Id. (quotation marks and citation omitted).

But a case does not announce a new rule if the case is merely applying a "principle that governed a prior decision to a different set of facts." Id. at 347-348, 133 S.Ct. 1103 (quotation marks and citations omitted). "[W]hen all [the United States Supreme Court does] is apply a general standard to the kind of factual circumstances it was meant to address, [the Court] will rarely state a new rule for Teague purposes." Id. at 348, 133 S.Ct. 1103. Therefore, "garden-variety applications

of the test in [Strickland] for assessing claims of ineffective assistance of counsel do not produce new rules." Id. The Strickland standard "provides sufficient guidance for resolving virtually all claims of ineffective assistance, even though their particular circumstances will differ." Id. (quotation marks and citation omitted). The United States Supreme Court has therefore "granted relief under Strickland in diverse contexts without ever suggesting that doing so required a new rule." Id.

In Chaidez, 568 U.S. at 344, 133 S.Ct. 1103, the United States Supreme Court considered the retroactivity of its decision in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), in which the Supreme Court "held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." The Supreme Court concluded in Chaidez that Padilla announced a new rule because the holding in Padilla was not "apparent to all reasonable jurists" before Padilla was decided. Chaidez, 568 U.S. at 354, 133 S.Ct. 1103 (quotation marks and citation omitted). Indeed, there had been no United States Supreme Court precedent before Padilla that dictated the rule that the Strickland test applied to a defense counsel's failure to advise the defendant about non-criminal consequences of sentencings, like the possibility of deportation. Id. at 353, 133 S.Ct. 1103. The Supreme Court stated in Chaidez that "Padilla would not have created a new rule had it only applied Strickland's general standard to yet another factual situation—that is, had Padilla merely made clear that a lawyer who neglects to

inform a client about the risk of deportation is professionally incompetent." Id. at 348-349, 133 S.Ct. 1103. Padilla did more than this, however; it considered a "threshold question[ ]" about whether deportation advice fell within the scope of the Sixth Amendment right to counsel. Id. at 349, 133 S.Ct. 1103. "In other words, prior to asking how the Strickland test applied ('Did this attorney act unreasonably?'), Padilla asked whether the Strickland test applied ('Should we even evaluate if this attorney acted unreasonably?')." Id. The Supreme Court's determination in Padilla that the Strickland test applied thus constituted a new rule. Id. at 349, 358, 133 S.Ct. 1103. Therefore, under Teague, defendants whose convictions became final before Padilla was issued could not benefit from the holding in Padilla. Id. at 358, 133 S.Ct. 1103.

Our Supreme Court has directed this Court to consider whether Lafler's holding applies retroactively. In doing so, this Court must consider, under the federal retroactivity jurisprudence summarized earlier, whether Lafler created a new rule of constitutional law.

In Lafler, the defendant rejected a plea offer on the advice of his attorney. Lafler, 566 U.S. at 160, 132 S.Ct. 1376. After the plea offer was rejected, the defendant had a full and fair jury trial that resulted in a guilty verdict, and the defendant received a harsher sentence than what was offered in the rejected plea bargain. Id. The parties agreed in Lafler that the defense counsel's performance was deficient when he advised the defendant to reject the plea offer. Id. at 163, 132 S.Ct. 1376. The Supreme Court noted in Lafler that the Court had

held in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), that the Strickland test applied "to challenges to guilty pleas based on ineffective assistance of counsel." Lafler, 566 U.S. at 163, 132 S.Ct. 1376, quoting Hill, 474 U.S. at 58, 106 S.Ct. 366. The Supreme Court stated that "[t]he 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." Lafler, 566 U.S. at 163, 132 S.Ct. 1376 (emphasis added). The Supreme Court quoted from Strickland's prejudice test and then noted that, while Hill involved a "claim that ineffective assistance led to the improvident acceptance of a guilty plea," in Lafler, "the ineffective advice led not to an offer's acceptance but to its rejection." Id.

The Supreme Court then explained how the Strickland prejudice test was to be applied to the circumstances in Lafler:

> In these circumstances a 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. Here, the Court of Appeals for the Sixth Circuit agreed with that test for Strickland prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. [Id. at 164, 132 S.Ct. 1376.]

The Supreme Court in Lafler rejected arguments that "there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial." Id. "The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding[,]" including pretrial critical stages of the criminal proceeding. Id. at 165, 132 S.Ct. 1376. Moreover, the Supreme Court stated that it had "not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue." Id. In Lafler, the trial did not cure the error but "caused the injury from the error." Id. at 166, 132 S.Ct. 1376. "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.

The Supreme Court in Lafler also rejected an argument that providing a remedy for the type of error that occurred in Lafler would "open the floodgates to litigation by defendants seeking to

unsettle their convictions." Id. at 172, 132 S.Ct. 1376. The Supreme Court noted that "[c]ourts have recognized claims of this sort for over 30 years, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed Strickland claims." Id. (citation omitted).

In applying its holding in Lafler to the facts of that case, the Supreme Court noted that the defendant was bringing "a federal collateral challenge to a state-court conviction." Id. at 172, 132 S.Ct. 1376.

> Under [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)], a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC 2254(d)(1). A decision is contrary to clearly established law if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases. [Lafler, 566 U.S. at 172-173, 132 S.Ct. 1376 (quotation marks, brackets, and citation omitted).]

The Supreme Court concluded in Lafler that AEDPA did not present a bar to granting relief in

that case because the state appellate court had failed to apply Strickland when assessing the defendant's ineffective assistance of counsel claim. Id. at 173, 132 S.Ct. 1376. "By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim [the defendant] raised, the state court's adjudication was contrary to clearly established federal law." Id. The defendant satisfied the Strickland test, and the parties had conceded the existence of deficient performance. Id. at 174, 132 S.Ct. 1376.

> As to prejudice, [the defendant] has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, [the defendant] received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under Strickland has thus been satisfied. [Id. (citation omitted).]

As a remedy, the Supreme Court ordered the prosecutor to reoffer the plea agreement to the defendant, and if the defendant accepted the plea offer, the state trial court was to "exercise its discretion in determining whether to vacate the convictions and resentence [the defendant] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the defendant] accordingly, or to leave the convictions and sentence from trial undisturbed." Id.

In a dissenting opinion in Lafler, Justice Scalia opined that "the Court today opens a whole new field of constitutionalized criminal procedure:

plea-bargaining law." Id. at 175, 132 S.Ct. 1376 (SCALIA, J., dissenting). Justice Scalia explained:

> [The defendant] received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that [the defendant] is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the [state appellate court's] decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces – namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all – is unheard-of and quite absurd for violation of a constitutional right. I respectfully dissent. [Id. at 176, 132 S.Ct. 1376.]

Justice Scalia found it "apparent from Strickland that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense." Id. at 177, 132 S.Ct. 1376.

Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence. That has been, until today, entirely clear. A defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Impairment of fair trial is how we

distinguish between unfortunate attorney error and error of constitutional significance. [Id. at 178, 132 S.Ct. 1376 (citations omitted).]

Justice Scalia further opined that AEDPA barred granting relief given the "[n]ovelty" of the holding in Lafler. Id. at 181, 132 S.Ct. 1376. Because the Supreme Court had never held that Strickland prejudice could be established in the circumstances presented in Lafler, Justice Scalia stated that the Supreme Court violated AEDPA in granting habeas relief. Id. at 183, 132 S.Ct. 1376. The portion of Justice Scalia's dissent summarized above was joined by Chief Justice Roberts and Justice Thomas. See id. at 175, 132 S.Ct. 1376. Justice Alito wrote a separate dissent in which he expressed agreement with this analysis of Justice Scalia. See id. at 187, 132 S.Ct. 1376 (ALITO, J., dissenting).3

Neither the United States Supreme Court nor the Michigan appellate courts have addressed whether Lafler applies retroactively. See People v. Hobson, 500 Mich. 1005, 1006, 895 N.W.2d 549 (2017) (MARKMAN, C.J., concurring) ("This Court has not specifically assessed the retroactivity of [Lafler]."). In their supplemental briefs on remand, the parties have brought to this Court's attention the opinions of lower federal courts as well as a Utah Supreme Court opinion. "While the decisions of lower federal courts and other state courts are not binding on this Court, they may be considered as persuasive authority." People v. Woodard, 321 Mich. App. 377, 385 n. 2, 909 N.W.2d 299 (2017).

The lower federal courts have concluded that Lafler did not create a new rule of constitutional

law. See In re Liddell, 722 F.3d 737, 738 (C.A. 6, 2013) (citing cases in support of the proposition that every federal circuit to consider the issue has concluded that Lafler did not create a new rule of constitutional law). Of particular note is the analysis in In re Perez, 682 F.3d 930, 932-933 (C.A. 11, 2012), concluding that Lafler and its companion case, Frye, did not announce new rules. The Perez court noted that "the Supreme Court's language in Lafler and Frye confirm[s] that the cases are merely an application of the Sixth Amendment right to counsel, as defined in Strickland, to a specific factual context." Id. at 932. "The Court has long recognized that Strickland's two-part standard applies to 'ineffective assistance of counsel claims arising out of the plea process.' " Id., citing Hill, 474 U.S. at 57, 106 S.Ct. 366.

The Court has also said that Strickland itself clearly establishes Supreme Court precedent for evaluating ineffective assistance of counsel claims under AEDPA. Because we cannot say that either Lafler or Frye breaks new ground or imposes a new obligation on the State or Federal Government, they did not announce new rules. Put another way, Lafler and Frye are not new rules because they were dictated by Strickland. [Perez, 682 F.3d at 932-933 (quotation marks and citations omitted).]

Further, the Perez court concluded that any doubt as to whether Frye and Lafler announced new rules is eliminated because the Court decided these cases in the post conviction [sic] context. Indeed, in Lafler, the Supreme Court held that the state court's decision was "contrary to clearly established [federal] law" under AEDPA. To be

"clearly established federal law" within the meaning of AEDPA, the rule applied in Lafler must, by definition, have been an old rule within the meaning of Teague.... [T]he [Supreme] Court rarely, if ever, announces and retroactively applies new rules of constitutional criminal procedure in the postconviction context. Given the general policy of not announcing or applying new rules of constitutional law in habeas proceedings reflected in Teague and AEDPA, it stands to reason that the holdings in Frye and Lafler do not constitute new rules of constitutional law. [Id. at 933-934 (citations omitted).]

Other lower federal court opinions likewise reason that Lafler did not create a new rule. See, e.g., Gallagher v. United States, 711 F.3d 315, 315-316 (C.A. 2, 2013) ("Neither Lafler nor Frye announced a new rule of constitutional law: Both are applications of [Strickland].") (quotation marks omitted); Williams v. United States, 705 F.3d 293, 294 (C.A. 8, 2013) ("We ... conclude, as have the other circuit courts of appeals that have addressed the issue, that neither [Lafler] nor Frye announced a new rule of constitutional law."); Buenrostro v. United States, 697 F.3d 1137, 1140 (C.A. 9, 2012) ("[N]either Frye nor Lafler ... decided a new rule of constitutional law. The Supreme Court in both cases merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in [Strickland] and established in the plea-bargaining context in [Hill]."); In re King, 697 F.3d 1189, 1189 (C.A. 5, 2012) ("[W]e agree with the Eleventh Circuit's determination in [Perez] that [Lafler] and Frye did not announce new rules of

constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."); but see Berry v. United States, 884 F. Supp. 2d 453, 462 (E.D. Va., 2012), app. dis. 490 F. Appx. 583 (C.A. 4, 2012) ("Although Hill and its progeny provided some foundation for the Court's decisions in Lafler and Frye, it did not dictate the result in these cases, nor did it foreclose all possibility of an alternative decision.").

Contrary to the overwhelming view of the lower federal courts, the Utah Supreme Court has concluded that "Lafler and Frye announced a new rule[.]" Winward v. Utah, 355 P.3d 1022, 1023, 2015 U.T. 61 (2015). The Utah Supreme Court acknowledged that its conclusion was "in tension with the federal circuit courts' unanimous determination that Lafler and Frye did not announce a 'new rule[.]' " Id. at 1026 n. 3 (citing cases). The Utah Supreme Court explained its reasoning as follows:

> The key holding of Lafler and Frye is that a defendant who has been convicted as the result of a fair trial or voluntary plea, and sentenced through a constitutionally immaculate sentencing process, can claim to have been prejudiced by his counsel's ineffectiveness during plea bargaining. And this key holding is simply not to be found in the Supreme Court's prior case law – not explicitly, and not by clear implication. [Id. at 1027.]

In other words, "[t]he holding of Lafler – that prejudice is possible even if a defendant has received a fair trial – decides an issue neither contemplated nor addressed by Strickland." Id. at 1028. Also, before Lafler, the United States Supreme Court's cases expanding on the Strickland prejudice test "did not dictate the result in Lafler and Frye." Id. For example, although the Supreme Court's opinion in Hill "established that prejudice exists where a defendant accepts a plea bargain because of ineffective assistance, and thus waives his right to trial[,]" id., the Hill opinion "did not establish the converse: that prejudice exists when a defendant rejects a plea bargain because of ineffective assistance, thereby exercising his right to trial." Id. "In short," the Utah Supreme Court explained, "we cannot conclude that Lafler and Frye merely applied the principles of old cases to new facts, as the 'dictated by precedent' standard requires." Id.

We find the analyses of the lower federal courts, such as in Perez, more persuasive than that of the Utah Supreme Court in Winward. The Lafler opinion did not create a new rule—it merely determined how the Strickland test applied to the specific factual context concerning plea bargaining. Unlike in Padilla, there was no threshold question in Lafler concerning whether the Strickland test applied. The Supreme Court's analysis in Lafler indicated that the "rule" being applied was the test for ineffective assistance of counsel set forth in Strickland and applied to the plea process in Hill. Although Lafler was the first case in which the Supreme Court applied the Strickland prejudice

test to the specific factual context presented in Lafler, i.e., where a defendant rejected a plea offer due to ineffective assistance of counsel and then received a fair trial, this does not change the fact that the same rule set forth in Strickland was being applied to a new factual context in Lafler. The application of the Strickland test in Lafler therefore did not produce a new rule of constitutional law. See Chaidez, 568 U.S. at 348, 133 S.Ct. 1103.

This conclusion is reinforced by the fact that the defendant in Lafler was seeking federal collateral review of a state-court conviction. By concluding that AEDPA did not bar granting relief to the defendant, the Supreme Court made clear that Strickland was the "clearly established [f]ederal law," Lafler, 566 U.S. at 172-173, 132 S.Ct. 1376, citing 28 USC 2254(d)(1), that was being applied in Lafler. " '[C]learly established' law is not 'new' within the meaning of Teague." Chaidez, 568 U.S. at 349 n. 4, 133 S.Ct. 1103. Therefore, because the Supreme Court in Lafler held that AEDPA did not bar granting relief to the defendant in that case, Lafler, 566 U.S. at 173, 132 S.Ct. 1376, it follows that the Supreme Court was applying "clearly established [f]ederal law," i.e., the Sixth Amendment right to counsel as defined in Strickland, and such clearly established federal law does not constitute a new rule of constitutional law, Chaidez, 568 U.S. at 349 n. 4, 133 S.Ct. 1103; see also Perez, 682 F.3d at 933-934.4

Accordingly, we conclude that Lafler did not create a new rule and that it therefore applies retroactively to this case. Thus, we affirm the trial

court's order granting relief to defendant predicated on Lafler.

Affirmed.

Footnotes

1 People v. Ginther, 390 Mich. 436, 212 N.W.2d 922 (1973).

2 The prosecutor made only a cursory argument regarding the first prong of defendant's ineffective assistance claim, i.e., whether defense counsel's performance was deficient. This panel found no clear error in the trial court's finding that defense counsel had failed to inform defendant of the plea offer, and therefore, the trial court's determination that the deficient performance prong was satisfied was left undisturbed. Walker II, unpub. op. at 4 n. 4.

3 To be sure, Justice Scalia's dissent in Lafler suggested that the holding in Lafler created a new rule. See Lafler, 566 U.S. at 176-178, 183, 132 S.Ct. 1376 (SCALIA, J., dissenting). But the majority in Lafler did not share this view, given the majority's analysis and conclusion that AEDPA did not bar granting relief. Although dissenting opinions may be considered in assessing whether a case created a new rule, see Chaidez, 568 U.S. at 354 n. 11, 133 S.Ct. 1103, "[d]issents have been known to exaggerate the novelty of majority opinions; and the mere existence of a dissent, like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new[,]" id.

4 In Winward, 355 P.3d at 1027 n. 5, the Utah Supreme Court stated that,

> contrary to Perez, the Lafler Court did not hold that the state court had acted

> contrary to clearly established law by applying Strickland in a manner that failed to anticipate the outcome of Lafler and Frye. Instead, the Lafler Court concluded that the state court had failed to apply Strickland at all. It was this failure, not the failure to anticipate Lafler and Frye, that was contrary to clearly established law and therefore allowed the Court to grant habeas relief. [Citation omitted.]

The Utah Supreme Court's analysis on this point is unconvincing. It is Strickland itself that the state appellate court failed to apply in Lafler; this is what led the United States Supreme Court in Lafler to conclude that the state appellate court had failed to apply "clearly established federal law." By concluding that AEDPA did not present a bar to granting habeas relief, the Court in Lafler concluded that the law being applied was "clearly established," and thus a new rule was not created. See Lafler, 566 U.S. at 173, 132 S.Ct. 1376 ("By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim [the defendant] raised, the state court's adjudication was contrary to clearly established federal law.").

Appendix E: Order of the Michigan Supreme Court denying leave to appeal

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
v
JUAN T. WALKER,

Wayne CC: 01-003031-FC
Defendant-Appellee.

SC: 159757
COA: 332491

On order of the Court, the application for leave to appeal the May 23, 2019 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

MARKMAN, J. (dissenting).

In Lafler v Cooper, 566 US 156, 164 (2012), the United States Supreme Court held for the first time that where a defendant rejects a plea offer from the prosecutor as a result of the "ineffective advice" of defense counsel and the defendant is later convicted at trial, he or she may be entitled to relief under Strickland v Washington, 466 US 668 (1984). Here, the Court of Appeals concluded "that Lafler did not create a new rule [of constitutional law] and that it therefore applies retroactively to this case." People v Walker (On Remand), 328 Mich

App 429, 449 (2019). While I have no present position as to whether the Court of Appeals erred in this regard, for the following two reasons, I would nonetheless grant leave to appeal to consider the issue of Lafler retroactivity.

First, there is a difference of contemporary judicial opinion concerning the Court of Appeals' conclusion that "[t]he Lafler opinion did not create a new rule-- it merely determined how the Strickland test applied to the specific factual context concerning plea bargaining." Id. at 448. While it is true that the prevailing conclusion among the federal appellate courts is that Lafler applies retroactively because it was simply an "application" of Strickland and thus did not create a new rule, see, e.g., Gallagher v United States, 711 F3d 315, 315 (CA 2, 2013) ("Neither Lafler nor [Missouri v Frye, 566 US 134 (2012)] announced 'a new rule of constitutional law': Both are applications of Strickland"), the Utah Supreme Court concluded to the contrary that Lafler "announced a new rule" because the "holding of Lafler—that prejudice is possible even if a defendant has received a fair trial—decides an issue neither contemplated nor addressed by Strickland." Winward v Utah, 355 P3d 1022, 1023, 1028 (Utah, 2015). See also Marceau, Embracing a New Era of Ineffective Assistance of Counsel, 14 U Pa J Const L 1161, 1163 (2012) (contending that Lafler "reflect[s] a seismic shift in Sixth Amendment jurisprudence"). In light of this difference of opinion, I believe that review of the

Court of Appeals' decision is warranted, even if this Court ultimately affirms that determination.

Second, as a substantive proposition, applying Lafler retroactively will result in the unavailability of a considerable amount of testimony and recollections from defense counsel of plea discussions occurring many years earlier, precisely because there is disagreement whether Strickland was viewed as foreshadowing the rule in Lafler and, as a result, relatively few attorneys prior to Lafler may have anticipated that their recollections in this regard might be of future constitutional consequence. In the instant case, for example, defendant was found guilty at his 2001 trial of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). He now asserts that defense counsel never conveyed a plea offer to him prior to trial in which he would have been allowed to plead guilty to second-degree murder, MCL 750.317, and felony-firearm. And at the 2015 evidentiary hearing that followed, defense counsel testified-- not unreasonably, in my judgment-- that he had no memory as to whether he had conveyed the plea offer 14 years earlier. While this Court at an earlier stage of this case concluded that the trial court did not clearly err "in finding a reasonable probability that the defendant would have accepted the plea offer," People v Walker, 503 Mich 908, 908 (2018), it strikes me as a questionable outcome that a convicted person would obtain relief (restoration of the original plea offer) despite the absence-- an

altogether predictable absence-- of a critical element of the record, defense counsel's recall after 14 years as to whether, and when, he or she presented a plea offer to a defendant.

It seems likely that more such cases will come before this Court, in which memories will have been long-lost; in which attorney records will have been long-discarded; in which attorneys will have passed; in which conversations once seen as mundane will have been transformed into critical determinants of which long-settled convictions must be revised and rewritten; and in which relevant evidence will largely be derived from the unsubstantiated recollections of long-incarcerated criminal offenders. For these reasons, I would grant leave to appeal to address whether the Court of Appeals properly concluded that Lafler applies retroactively. In my judgment, this is a jurisprudentially significant issue with far-reaching constitutional and practical implications and it deserves our careful review.

ZAHRA, J., joins the statement of MARKMAN, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
May 8, 2020