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

PETITION FOR WRIT OF CERTIORARI

KYM L. WORTHY
Wayne County Prosecuting Attorney

JASON W. WILLIAMS
Chief of Research, Training, and Appeals

TIMOTHY A. BAUGHMAN*
Special Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792
tbaughma@waynecounty.com

* Counsel of Record

Questions Presented

Respondent maintained his innocence before trial, and testified at the evidentiary hearing ordered by the Michigan Supreme Court on his collateral attack of his conviction that he was innocent of the charge and did not kill the victim, but that if he had known of a plea offer he would have perjured himself to take the plea. Michigan has no "Alford" plea procedure, and requires a defendant pleading guilty to establish a factual basis of guilt under oath. When Respondent pled after the prosecution was ordered to re-offer the plea he in fact said under oath that he did commit the murder, contradicting his evidentiary hearing testimony, just as he said he would. The questions presented are:

I. Respondent's conviction was final when Lafler v. Cooper was decided. Did Lafler announce a new rule, one not dictated by prior precedent, so as not to be applicable retroactively on collateral attack?

II. If Lafler is retroactive on collateral attack, Michigan has no "Alford plea" procedure, and requires that a plea be taken under oath. Where a defendant maintains his innocence to his counsel both before trial and at a collateral-attack Lafler evidentiary hearing, testifying at the hearing that though he is innocent he would have perjured himself at a plea proceeding to take advantage of a plea offer, is Lafler's "reasonable possibility that the defendant would have accepted the plea" standard applicable?

III. Do the facts of this case demonstrate the flaws in Lafler and its unworkability, so that it should be reconsidered and overruled?

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OCTOBER TERM, 2019

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NOW COMES the State of Michigan, by KYM L WORTHY, Prosecuting Attorney for the County of Wayne, JASON W. WILLIAMS, Chief of Research, Training, and Appeals, and TIMOTHY A. BAUGHMAN, Special Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on May 8, 2020.

Opinions below

The order of the Michigan Supreme Court remanding to the trial court for an evidentiary hearing is reported at 497 Mich. 894, 855 N.W.2d 744 (2014), and appears as Appendix A. The opinion of the Michigan Court of Appeals reversing the trial court's grant of relief is unreported, may be found at 2017 WL 4557012, and appears as appendix B. The order of the Michigan Supreme Court reversing the Court of Appeals, and remanding for consideration of the retroactivity of

Lafler v. Cooper is reported at 503 Mich. 908, 919 N.W.2d 401 (2018), and appears as Appendix C. The opinion of the Michigan Court of Appeals on remand is reported at 328 Mich. App. 429, 938 N.W.2d 31 (2019), and appears as Appendix D. The order of the Michigan Supreme Court denying petitioner's application for leave to appear is as yet unreported, and appears as Appendix E.

Statement of Jurisdiction

The judgment of the Michigan Supreme Court was rendered May 8, 2020. This Court's jurisdiction is invoked under 28 USC §1257(a).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

The facts and proceedings are well summarized in the opinion of the Court of Appeals of May 23, 2019, edited here as to form:

In 2001, a jury convicted Respondent of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

Respondent 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. [Respondent's convictions and sentences were affirmed on direct review]

In 2011, Respondent moved for relief from judgment in the trial court on the ground that his trial counsel was ineffective for not informing Respondent 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 Respondent's motion for relief from judgment. Respondent filed a delayed application for leave to appeal, which [was] denied "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." [The Michigan] Supreme Court remanded . . . to the trial court for a . . . 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 US 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 NW2d 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 US 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.
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On remand, the trial court held a . . . hearing, after which the trial court entered an order holding that Respondent was denied the effective assistance of counsel when his trial attorney failed to inform Respondent of the plea offer.

Respondent then filed another motion for relief from judgment in the trial court, as required by the Supreme Court's remand order, and the trial court granted that motion and ordered the prosecution to reoffer Respondent the plea deal. Respondent then pleaded guilty and was resentenced to 25 to 50 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm. . . .

In September 2016, [the Michigan Court of Appeals] granted the prosecution's delayed application for leave to appeal, which challenged the trial court's order granting Respondent's motion for relief from judgment. . . . . In October 2017, [that court] issued an opinion reversing the trial court's order and remanding the case for the reinstatement of Respondent's original convictions and sentences. . . . The 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." . . . 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." . . . That is, the trial court clearly erred in finding a reasonable probability Respondent would have accepted the plea offer. Therefore, Respondent did not satisfy his burden in proving ineffective assistance of counsel, and the trial court abused its discretion when it granted Respondent's motion for relief from judgment.

[The Michigan] Supreme Court entered an order reversing in part . . . and remanding . . . for consideration of whether Lafler applies retroactively to this case; in particular, [the] 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. . . .should be applied retroactively to this case, in which the defendant's convictions became final in 2005.
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> 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,[1] and we are not "left with a definite and firm conviction that the trial court made a mistake."

The Court of Appeals said that "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."

The Court of Appeals on May 23, 2019 found that Lafler is retroactive on collateral attack, and thus affirmed the trial court. The Michigan Supreme Court denied petitioner's application for leave to appeal on May 8, 2020.

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[1] At the evidentiary hearing Respondent under oath maintained his innocence—that he did not kill Tommy Lee Baines. T 6-30-15, 43. Respondent testified he would have entered a plea if advised of the offer, but when asked if he was now saying then that he was guilty of committing these crimes, he responded, "No, ma'am." T 6-30-15, 47. When asked why he would then admit to a crime that he did not commit, Respondent said he would not have gambled with his life like that. T 6-30-15, 47.

The State seeks certiorari from the now final decision of the Michigan Supreme Court that Lafler compels reversal of the trial conviction, and the decision of the Michigan Court of Appeals on remand that Lafler is retroactive on collateral attack of a conviction, which the Michigan Supreme Court declined to review after remand.

Reasons for Granting the Writ

I. Defendant's conviction was final when Lafler v. Cooper was decided. Lafler announced a new rule, one not dictated by prior precedent, so as not to be applicable retroactively on collateral attack

Introduction

On the State's appeal, the Michigan Court of Appeals reversed the trial court's grant of a motion for relief from judgment, that relief predicated on Lafler v. Cooper.[2] The Michigan Supreme Court reversed,[3] but also remanded to the Court of Appeals for consideration of "whether Lafler v. Cooper . . . should be applied retroactively to this case, in which the defendant's convictions became final in 2005."[4] The Court of Appeals found Lafler retroactive on collateral review,[5] and the Michigan Supreme Court denied review.[6] But as one scholar has described Lafler:

> With the Court's decisions in Missouri v. Frye and Lafler v. Cooper, a new

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[2] Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 1385, 182 L.Ed. 2d 398 (2012).

[3] See Question II, infra.

[4] People v. Walker, 503 Mich. 908, 919 N.W.2d 401 (2018).

[5] People v. Walker, 328 Mich. App. 429, 938 N.W.2d 31 (2019)

[6] See Appendix E.

> era in the jurisprudence of the Sixth Amendment has begun. . . . . a significant shift in the Strickland doctrine promises to have immediate and far-reaching implications. . . . the question was whether the right to effective assistance would extend so as to ensure competent representation even when the reliability or fairness of the trial itself was not at issue. . . . these decisions reflect a seismic shift in Sixth Amendment jurisprudence.[7]

The Court of Appeals found that Lafler is retroactive to cases on collateral attack under Teague v. Lane[8] on the ground that Lafler did not establish a new rule. But a decision that works a "seismic shift in Sixth Amendment jurisprudence" establishes a new rule, one that Respondent should not be able to claim, particularly under the facts here. The Court of Appeals relied heavily on cases from the federal circuits, and the fact that Lafler itself was a collateral attack on a conviction. Review by this Court is warranted.

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[7] Justin F. Marceau, Embracing A New Era of Ineffective Assistance of Counsel, 14 U. PA. J. CONST. L. 1161, 1161–1162 (2012) (emphasis supplied; footnotes omitted).

[8] Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989).

A. The federal test for retroactivity of new rules

Decisions announcing new constitutional rules are applicable on direct appeal to the case before the Court and all cases then pending on appeal with the issue preserved.[9] Cases final at the time of the decision announcing a new rule are subject to collateral attack only in very limited circumstances. A new rule will be applied retroactively on collateral attack if it 1) places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," or 2) announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.[10]

What, then, is a new rule?

- In conducting a "new rule" analysis, it is the legal landscape as it existed when the defendant's conviction became final on direct appeal that is relevant.[11]

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[9] Griffith v. Kentucky, 479 U.S. 314, 322, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649 (1987) ("In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication").

[10] Teague v. Lane, 489 U.S. at 311, 109 S. Ct. at 1075–1076.

[11] Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 2510, 159 L. Ed. 2d 494 (2004).

- A case announces a new rule "when it breaks new ground or imposes a new obligation" on the government. . . . To put it differently . . . a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[12]

- A holding is not dictated by existing precedent unless it would have been "apparent to all reasonable jurists."[13]

- A case does not "announce a new rule, when it is merely an application of the principle that governed" a prior decision to a different set of facts.[14]

- Dissents to the decision announcing a rule are relevant to the new rule analysis, though their existence may not alone suffice to show that the rule is new.[15]

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[12] Teague v. Lane, 489 U.S. at 301, 109 S. Ct. at 1070.

[13] Lambrix v. Singletary, 520 U.S. 518, 527–528, 117 S.Ct. 1517, 1525, 137 L.Ed.2d 771 (1997).

[14] Teague v. Lane, 489 U.S. at 307, 109 S. Ct. at 1073.

[15] Beard v. Banks, 542 U.S. at 416 n. 5, 124 S. Ct. at 2513 ("although the Lockett principle —conceived of at a high level of generality—could be thought to support the Mills rule, reasonable jurists

- Garden-variety applications of the test in Strickland do not produce new rules.[16]

Lafler was not simply a "garden-variety application" of Strickland, or dictated by prior precedent; rather, its holding was one that would not have been "apparent to all reasonable jurists."

B. The federal cases, which uniformly hold that Lafler did not announce a new rule, are mistaken

As the article by Professor Marceau reveals, at least some academics view Lafler as having established a new rule, Professor Marceau saying that before the Court was "the question ... whether the right to effective assistance would extend so as to ensure competent representation even when the reliability or fairness of the trial itself was not at issue," and that the decisions rendered by the

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differed even as to this point. It follows a fortiori that reasonable jurists could have concluded that the Lockett line of cases did not compel Mills").

See also Butler v. Curry, 528 F.3d 624, 636–637 (CA 9, 2008) ("dissents do not always rest on the assertion that the precedents do not support the legal rule applied by the majority. . . . Also, dissents often disagree with the majority's application of established legal principles to discrete factual circumstances, and do not suggest that the majority has adopted a 'new rule' of constitutional law").

[16] Chaidez v. United States, 568 U.S. 342, 348, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013).

Court "reflect a seismic shift in Sixth Amendment jurisprudence." The federal circuits courts do not agree.

Typical of the cases is In re Perez,[17] cited by the Court of Appeals. There defendant sought authorization to file a second motion for collateral relief, arguing that Lafler created a new constitutional rule, which his counsel had run afoul of, and that the rule should apply on collateral attack. The court rejected his claim at its premise, finding that this Court had simply "clarified that the Sixth Amendment right to effective assistance of counsel under Strickland . . . extends to the negotiation and consideration of plea offers that lapse or are rejected."[18] Further, the Court had held that "in order to show prejudice under Strickland's two-part test, a defendant must demonstrate a reasonable probability that: (1) he would have accepted a plea offer but for counsel's ineffective assistance; and (2) the plea would have resulted in a lesser charge or a lower sentence."[19] These holdings, said the court, were "merely an application of the Sixth Amendment right to counsel, as defined in Strickland, to a specific factual context," and the Court had "long recognized that Strickland's two-part standard applies to 'ineffective assistance of counsel claims arising out of the plea process,'" citing Hill v.

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[17] In re Perez, 682 F.3d 930 (CA 11, 2012). See also, for example, In re Liddell, 722 F.3d 727 (CA 6, 2013).

[18] Id., at 932.

[19] Id.

Lockhart.[20] Put another way, the court continued, the decisions did not announce new rules "because they were dictated by Strickland."[21] The court found any doubt resolved by the fact that the Supreme Court decided the cases in the post-conviction context.[22]

At least one state supreme court has disagreed with the established view of the federal circuits. The Utah Supreme Court in Winward v. State[23] held that "[t]he 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."[24] While at one place Strickland does refer to the prejudice test as requiring defendants to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," noted the

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[20] Id., at 932, quoting Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

[21] Id., at 933.

[22] Id.

[23] Winward v. State, 355 P.3d 1022 (Utah, 2015), cert den. —U.S.—, 136 S. Ct. 1495, 194 L. Ed. 2d 587 (2016).

[24] Id., at 1027 (emphasis supplied).

court, at other points it "describes its prejudice test as requiring a 'showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable' . . . and states that the 'purpose' of the right to effective assistance of counsel is 'to ensure a fair trial."[25] Thus, 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."[26]

Further, said the court, though "[l]ater cases may have expanded Strickland's prejudice test, . . . they still did not dictate the result in Lafler and Frye."[27] Hill v. Lockhart established that "prejudice exists where a defendant accepts a plea bargain because of ineffective assistance, and thus waives his right to trial. . . . [b]ut it 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."[28] And the Lafler dissenters relied in part on Lockhart v. Fretwell,[29] "which makes clear that not

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[25] Id., at 1028.

[26] Id.(emphasis supplied).

[27] Id.

[28] Id. (emphasis supplied).

[29] Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

all potential differences in outcome can constitute prejudice."[30]

This, concluded the court, was the "pivot on which Lafler turns: whether it is 'fundamentally unfair' to give someone a harsher sentence than would have been available to him under a plea deal that he would have accepted but for his counsel's failures."[31] And for this proposition, this crucial point, the court noted that "Lafler cites only its companion case Frye and a law review article published in 2011."[32] In the end, the court concluded, "[i]t was not the Court's precedent that decided this issue, but its recognition that 'plea bargains have become … central to the administration of the criminal justice system' . . . and its desire to extend the protections of the Constitution to defendants who never go to trial. Whether this extension was wise or foolish is not for us to decide, but we are convinced that it was in fact an extension."[33] The court's opinion was unanimous.[34]

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[30] Winward, at 1028.

[31] Id.

[32] Id.

[33] Id. (emphasis supplied).

[34] The court recognized that its conclusion was "in tension with the federal circuit courts' unanimous determination that Lafler and Frye did not announce a 'new rule," but found those opinions ultimately unpersuasive. Id, at 1026 n.3. Certiorari was denied to the defendant by this Court. Winward v. Utah,

Also this Court has said that dissenting opinions are relevant to the issue of whether the Court's opinion announced a new rule.[35] In Beard v. Banks, in fact, the Court said not only did it think it "clear that reasonable jurists could have differed as to whether the Lockett principle compelled Mills," but that there was "no need to guess," as in the Mills case four justices dissented on the ground that the holding in Mills was not compelled by Lockett,[36] and so the rule announced in Mills was a new rule. While the Court said also that the existence of dissents is not always determinative, it so said because some dissents go to a point other than whether the rule being announced is or is not compelled by prior precedent.[37] Not so in Lafler.

There can be no question but that in Lafler four members of this Court viewed the rule being established as not compelled by prior precedent, and thus constituting a new rule, a rule which was mistaken. The principal dissent was by Justice Scalia, joined by Justices Thomas, Alito, and Chief Justice Roberts.[38] Quoting the majority's statement

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—U.S.—, 136 S. Ct. 1495, 194 L. Ed. 2d 587 (2016).

[35] This point was discounted by the Court of Appeals here essentially because Lafler was itself a collateral attack.

[36] Beard v. Banks, 542 U.S. at 414–415, 124 S. Ct. at 2512.

[37] And see Butler v. Curry, supra.

[38] The Chief Justice did not join part IV of the dissent, and Justice Alito did not join parts III or IV,

that "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," the four dissenters said, through Justice Scalia, that "[w]ith those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law."[39] The dissent continued that "Anthony Cooper 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 Cooper 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."[40] In the view of the dissenters, "bad plea bargaining has nothing to do with ineffective

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but the discussion regarding the creation of a new rule discussed here occurred in parts I and II.

[39] Lafler v. Cooper, 566 U.S. at 175, 132 S. Ct. at 1391 (Scalia, J., dissenting).

[40] Id, 566 U.S. at 176, 132 S. Ct. at 1392 (emphasis supplied).

assistance of counsel in the constitutional sense,"[41] for 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."[42] "Novelty alone," said Justice Scalia, supplied a reason why the Court was wrong.[43]

There is simply no gainsaying that the four dissenting Justices viewed the rule created by the Court as a new rule, not dictated by prior precedent, and indeed foreclosed by it. And the unanimous Utah Supreme Court viewed the majority decision in the same way. The rule announced in Lafler was not dictated by existing precedent, as it was not "apparent to all reasonable jurists."

The Court of Appeals discounted the Lafler dissents and instead relied heavily on the fact that Lafler itself was a collateral attack. But it appears the point was not pressed by the petitioner warden in that case;[44] Justice Cooley wisely pointed out

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[41] Id., 566 U.S. at 177–178, 132 S. Ct. at1393 (emphasis supplied).

[42] Id., 566 U.S. at 178, 132 S. Ct. 1393.

[43] Id., 566 U.S. at 181, 132 S. Ct. at 1395.

[44] See brief at: https://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-209_petitioner.pdf

many years ago that "a point assumed without consideration is, of course, not decided."[45]

That the rule is a new one is also demonstrated by the Chaidez opinion. In Padilla v. Kentucky[46] the Court held that an attorney who fails to advise a client pleading guilty of the deportation consequences of his plea performs ineffectively. Was this but an "application of the principle that governed" Strickland to a "different set of facts," a "garden-variety application of Strickland," a rule "dictated by prior precedent," or was it a rule not "apparent to all reasonable jurists"? In Chaidez the Court held the rule was a new rule.

The Court found that Padilla established a new rule—a rule, therefore, not applicable on collateral attack to convictions final at the time of its decision—because the Court had there done more than simply make clear that a lawyer who does not inform his or her client about the risk of deportation is constitutionally ineffective. It first had to consider the threshold question: "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?')."[47] Because the answer to that question was not dictated by prior precedent, Padilla established a new rule.

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[45] Allen v. Duffy, 43 Mich. 1, 11 (1880).

[46] Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010).

[47] Chaidez, 568 U.S. at 349, 133 S. Ct. at 1108.

The four Lafler dissenters were of the view that not only was the rule established there not dictated by precedent, but it was foreclosed by a proper understanding of precedent. Just as in Padilla, where the Court had first to resolve "should we even evaluate if this attorney acted unreasonably," so in Lafler the Court had to decide whether it should "even evaluate if this attorney acted unreasonably" in the plea-negotiation process, where the result was not a waiving of the constitutional right to a fair trial by the entry of a guilty plea, but the holding of a fair trial itself. That question had not previously been resolved, and was not dictated by precedent. As the Utah Supreme Court well put it, though it had been established that "prejudice exists where a defendant accepts a plea bargain because of ineffective assistance, and thus waives his right to trial," the converse, that "prejudice exists when a defendant rejects a plea bargain because of ineffective assistance, thereby exercising his right to trial" had not been established, was not apparent to all reasonable jurists, and constituted an extension of Strickland, and thus a new rule.

Lafler, then, should not be applicable in this case.

II. Michigan has no "Alford plea" procedure, and requires that a factual basis for a plea must be given under oath. Where a defendant maintains his innocence to his counsel both before trial and at a collateral-attack evidentiary hearing, testifying at the hearing that though he is innocent he would have perjured himself at a plea proceeding to take advantage of a plea offer, Lafler's "reasonable possibility that the defendant would have accepted the plea" standard should not be applicable

Though the constitution does not prohibit the taking of a guilty plea from one who insists upon their innocence,[48] there is also no constitutional requirement that such pleas be taken. Michigan is not an "Alford state," and a defendant at a guilty plea is placed under oath, and must make out a factual basis for his or her guilt.[49] Yet in the present case, the prosecution is ordered by the judicial branch to re-offer a plea concession where the Respondent testified at the collateral-attack hearing that he is not guilty, but would and will perjure himself at the taking of the plea in order to take advantage of a plea offer—which he then did (the State submits that the perjury occurred at the hearing, when Respondent denied his guilt). The Court should not countenance such a state of affairs. Where the defendant testifies at the

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[48] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[49] See MCR 6.302(A), (D)(1).

hearing that he or she did not commit the offense charged, Lafler should provide no relief.[50]

III. The facts of this case demonstrate the flaws in Lafler and its unworkability, so that it should be reconsidered and overruled

Cases such as the present one demonstrate inherent difficulties with the Lafler decision, not the least of which is the interference with the separation of powers between executive and

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[50] See State v. Smith, 2016 WL 698565, at 6 (N.J. Super. Ct. App. Div. Feb. 23, 2016) (unpublished opinion), noting that in New Jersey (as is true in Michigan) there must be "a factual basis supporting a plea of guilty and that, to accept a guilty plea, 'a judge must be satisfied from the lips of the defendant that he committed the acts which constitute the crime,'" so that "[e]ven if a defendant wished to plead guilty to a crime he or she did not commit, he or she may not do so. No court may accept such a plea." The defendant there thus "could not have entered a plea of guilty to any of the charges pursuant to the State's plea offer, 'for the simple reason that a defendant does not have the right to commit perjury in giving a factual basis for a crime he insists he did not commit.'" The court also quoted State v. Taccetta, 975 A.2d 928, 936 (N.J., 2009) that "[m]oreover, an attorney would be engaged in professional misconduct if he or she knowingly assisted a client to perpetrate a fraud on the court by assisting or encouraging a client to lie under oath." See also Jervis v. State, 28 N.E.3d 361 (Ind. Ct. App. 2015).

judicial branches when the judicial branch orders the executive to make a plea offer that it no longer wishes to make, and here to a defendant who has just testified under oath at a collateral-attack hearing that he is innocent, but would and will perjure himself to take advantage of a plea offer.[51] And the willingness of the prosecution to accept a lesser plea is generally for the purpose of obtaining a certain conviction, avoiding the expense of trial, and often preventing the anxiety and trauma that might result from testifying at trial. Lafler does not account for the fact that returning to the pretrial posture—erasing history—is not possible, for that "position" included a position occupied by the State—a pretrial posture, where the State was willing to exchange the expense and uncertainty of a trial for a certain conviction, albeit on lesser charges. That ship has sailed, and cannot be recalled. And the State, having obtained a conviction at trial, may now view the prospects of a trial much more favorably, particularly given that benefits of avoiding trial have already been lost. As the Utah Supreme Court has pointedly observed,[52] once the offer has not been taken, and the

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[51] Michigan does not have so-called "Alford pleas," where one can plead guilty while maintaining his innocence, as the defendant must make out a factual basis for his plea—and do so under oath. MCR 6.302(D)(1). And a nolo contendere plea requires the consent of the prosecutor, and was not and would not be offered in this murder case. See MCR 6.302(C).

[52] State v Greuber, 165 P.3d 1185, 1189-1190 (Utah, 2007).

defendant has received "his constitutionally guaranteed fair trial, it is impossible to resuscitate the original opportunity," for the "balance of risks and incentives on both sides that existed prior to trial" cannot be recreated.

Justice Scalia well-put the matter in his dissent in Lafler:

> even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain. . . . The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.[53]

This Court should reconsider Lafler, particularly given the decidedly odd results that occur such as in the present case.

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[53] Lafler v. Cooper, 566 U.S. at 186, 132 S. Ct. at1398 (Scalia, J., dissenting).

Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training and Appeals

TIMOTHY A. BAUGHMAN
Special Assistant
Prosecuting Attorney
1441 St. Antoine
Detroit, MI 48226
313 224-5792