Case No. 19-1330

IN THE

SUPREME COURT OF THE UNITED STATES

PEOPLE OF MICHIGAN,

Petitioner,

v

JUAN WALKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Counsel of Record:

Mary A. Owens (P33896)
Attorney for Defendant
124 E. Fulton, Ste. 100
Grand Rapids, Michigan 49503
(616) 742-0431
maryowens515@gmail.com

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In the trial-level proceedings, the Petitioner agreed that *Lafler v Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L.Ed. 2d 398 (2012) applied to Respondent Juan Walker and that there was no question of "retroactivity" as applied to Walker. Once the trial court granted relief to Walker, Petitioner appealed to the Michigan Court of Appeals and to the Michigan Supreme Court. But, on appeal, Petitioner took the exact opposite position it had previously conceded in the trial court, i.e. Petitioner now claimed that *Lafler* did not apply to Respondent and should not apply to his collateral proceedings. Most significantly, however, Petitioner did not inform the Michigan Supreme Court that it had diametrically changed its position, leading Respondent to inform the Michigan Supreme Court that Petitioner had "lacked candor" in its pleadings before that Court. Respondent suggested that Petitioner should be judicially estopped from claiming that *Lafler* did not apply to Juan Walker. In light of Petitioner's shifting positions, the questions presented should include:

1. Has Petitioner waived its right to contest *Lafler's* applicability to Respondent's case or is Petitioner judicially estopped from changing its position from what it argued at the trial level?

2. Should Petitioner have informed this Court (as it should have informed the Michigan Supreme Court) that it had conceded at the trial level that *Lafler* applied to Juan Walker?

4. Because *Lafler* cases are highly fact-specific and dependent on the trial court's discretion as to remedy, should this Court review this particular iteration of a *Lafler* remedy?

5. Is Michigan free to adopt a rule of retroactivity when reviewing its own convictions that might be broader than allowable for federal courts under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct., 103 L.Ed. 2d 334 (1989)?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Federal Cases

State Cases

Treatises

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Introduction

Petitioner has not told this Court a very important fact – that it now takes a diametrically opposite position from that taken before the trial court. In the Wayne County Circuit Court proceedings before the trial judge, Petitioner agreed that *Lafler v. Cooper,* 566 U.S. 156, 132 S. Ct. 1376, 182 L.Ed. 2d 398 (2012) applied to Respondent Juan Walker, and that there was no issue of retroactivity involved in his case. Nor did Petitioner reveal to the Michigan Supreme Court that it had agreed to the applicability of *Lafler* to Juan Walker. Before the Michigan Supreme Court, Respondent contended that Petitioner's failure to reveal its "volte face" as to the applicability of *Lafler* amounted to "lack of candor" to the Court, and we reiterate that claim now. We called out Petitioner's actions as "cynical" and actually suggested that the Michigan Supreme Court admonish Petitioner for not revealing this highly salient fact. See, Respondent's Appendix 1, Page 14B.

1. Factual Background

Respondent accepts as accurate the proceedings as recited by the Michigan Court of Appeals in Petitioner's Appendix 25A-31A. However, as it did before the Michigan Supreme Court, Petitioner is omitting to state some of the most salient legal aspects of the case in its petition to this Court. These omissions are highly significant and should disqualify Petitioner from now being heard before this Court.

After Respondent's convictions became final after direct review, Respondent filed a motion for relief from judgment pursuant to the Michigan Court Rules governing collateral attacks on criminal convictions. Respondent claimed that his trial attorney had not conveyed a plea offer to him shortly before trial. The Michigan Supreme Court remanded the case for an evidentiary hearing on Respondent's claim that his trial counsel was constitutionally ineffective for failing to convey a 25-year minimum plea offer. *People v. Walker*, 497 Mich. 894 (2014). On remand, the

circuit court found counsel constitutionally ineffective, granted relief from judgment, allowed Defendant to enter the plea, and sentenced him, pursuant to the plea offer, to 25-50 years in prison. The prosecution appealed, and the Court of Appeals reversed finding that *Lafler v. Cooper,* supra, did not apply to Respondent Juan Walker on collateral review, because he could not show "prejudice" under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Significantly, in its appeal to the Michigan Court of Appeals the prosecution argued only that the trial court erred in finding prejudice under *Strickland, supra*, i.e., a reasonable probability that Respondent would have accepted the plea offer. The Court of Appeals agreed. Instead of deferring to the trial court's judgment, the Court of Appeals reversed because, although it acknowledged there was sufficient evidence to find prejudice (Petitioner's testimony that he would have accepted the offer and the disparity between the sentences threatened and offered), it believed "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." Petitioner's Appendix 20A.

Respondent appealed this decision and the Michigan Supreme Court reversed the Court of Appeals and remanded to the trial court. See Petitioner's Appendix 23A. In its Order, the Michigan Supreme Court specifically directed the trial court to consider whether *Lafler* should apply retroactively to Respondent Juan Walker.

Then, on remand to the trial court, hearings were held over four days, including two days of evidentiary hearings. Five witnesses testified, Respondent, his trial attorney, James Feinberg, his appellate attorney, Suzanna Kostovski, polygraph examiner Christopher Lanfear, and Respondent's brother, Omar Walker.

Respondent testified that he was innocent and would not have pleaded guilty as charged, to first-degree murder. However, he testified that his trial counsel never told him about the plea offer to second-degree murder with a 25-50 year sentence agreement and that, if he had, he would have accepted it, pleaded guilty, and admitted guilt, despite his innocence, "[bec]ause it wasn't

worth gambling" and "[b]ecause I wouldn't [have] gamble[d] with my life like that."

Trial counsel Feinberg testified that he remembered the offer but did not remember conveying it to Respondent. Appellate counsel Kostovski testified that, when she spoke to Respondent in preparation for his appeal, he told her there had been no plea offer.

Polygraph examiner Lanfear testified that he conducted a polygraph examination of Respondent and that he believed Respondent was being truthful in saying he had been unaware of the plea offer until the conclusion of his direct appeal and that his trial counsel never presented the offer to him, the only two questions Lanfear asked.

Respondent's brother Omar Walker testified that he hired Feinberg to represent Respondent in this case, that he was continually trying to chase Feinberg down to ask him about the case, and that, whenever he caught him, Feinberg would only say he'd get back to him. Feinberg never told Omar that the prosecution made a plea offer. Had he done so, Omar would have told Respondent that, if it were him, he would take the offer.

After the evidentiary hearings, the trial court issued the opinion attached as Respondent's Appendix 3, Pages 36B-41B. The trial court found that trial counsel had not conveyed the plea offer to Respondent, and held that he had performed deficiently. The trial court then reserved the question of the "remedy" it should fashion in its "discretion" (*Lafler,* supra at 163-164). The trial court specifically directed the parties to address the question whether *Lafler* should be applied retroactivity to Juan Walker. See Appendix 3, at page 40B-41B.

In response to the trial court's directive, Petitioner filed the document attached as Respondent's Appendix 2, Pages 26B-35B. In that document, Petitioner specifically conceded that there was no question of retroactivity, and that *Lafler* applied to Respondent's case. As Petitioner framed the issue, the only question before the trial court was whether Respondent could show "prejudice" under *Strickland v. Washington*, supra.

A further hearing was held on December 17, 2015. Appendix 4, Pages 42B-80B. After further briefing and argument, the trial court granted relief from judgment, ordering the prosecution to re-extend the offer. The prosecution complied. On January 15, 2016, Defendant pleaded guilty pursuant to the offer and admitted shooting and killing the victim. He was later sentenced to 25-50 years for second-degree murder plus two years for felony firearm.

Then, Respondent, having lost before the trial court, appealed again, but this time – for the ***first*** time – claimed that *Lafler* should not be applied retroactively to Respondent. The Michigan Court of Appeals held that *Lafler* did apply to Respondent's case on collateral review, and the Michigan Supreme Court denied leave to appeal. Respondent's Answer to Petitioner's Application for Leave to Appeal is attached as Respondent's Appendix 1, Pages 1B-25B.

2. The relevant chronology of the "retroactivity" issue as discussed by the parties and the court below.

We contended below that there was no issue of "retroactivity" involved in this case at all. And, at least at the trial court level, Petitioner agreed with us! We also argued that it involved lack of candor to the Michigan courts for Petitioner not to have acknowledged that it had conceded to Judge Jackson that *Lafler* applied to Respondent Juan Walker.

Here is the relevant chronology of the discussion of "retroactivity" in this case:

The Michigan Supreme Court in its November 19, 2014 Order (Petitioner's Appendix 1A-3A) remanding the case to the circuit court, had specifically directed that the issue of retroactivity should be addressed on remand:

> 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.

As noted, post conviction evidentiary hearings were held. Petitioner's trial counsel and Petitioner himself testified. On September 8, 2015 the trial court issued a written Opinion. (Respondent's Appendix 3, 36B-41B). In that Opinion, the trial court ordered another hearing to be held and specifically directed the parties to address the retroactivity question ordered by the Michigan Supreme Court:

> Further, be prepared to present argument the final directive of the Michigan Supreme Court Remand Order: "***whether the remedy articulated in *Lafler v Cooper* should be applied retroactively to this case***".

(Appendix 3, Pages 40B-41B).

A hearing was held on December 17, 2015 (See Appendix 4, Pages 42B-80B). At that hearing, the issue of retroactivity was never addressed by either the parties or by the court, even though the circuit court had specifically ordered the parties to be prepared to address it. At that hearing all parties ***assumed*** that *Lafler* applied to Defendant's case:

THE COURT: Noting that Mr. Walker is also present in court also. Initially I thought that this would be a argument without the need or the presence of Mr. Walker. But there was a request made by defense to have him present.

And I agreed with that. Just for no other reason then just to make sure that we get everything hopefully, resolved or close to resolution here. We've been going back and forth with this.

My understanding right now, I'm gonna give you both a chance to respond. That after I wrote my opinion back in September or so, I scheduled this for some further hearing. Giving both sides a chance to – well, actually it came down to the defense following the procedure of *Lafler v Cooper*, or whatever the case is.

Lafler, L-A-F-L-E-R. And what the Michigan Supreme Court said as to what the process, you know, should be. And part of that was to allow the defense to file a motion for relief from judgment.

And the prosecution to respond, you know, to that. So that's kind of like where we are. Am I right with that?

MR. SCHARG: Yes, your Honor.

THE COURT: Okay. Now –

MR. CHAMBERS: Yes, your Honor.

THE COURT: As I still understand basically what the issue or maybe issue or issues is or are. Is after I made the decision here that counsel was in fact deficient, the Prosecution essentially disagreed with that because of the fact that it wasn't clear in making that decision. That the defendant would have accepted the plea.

And because of that and what is set forth by the Supreme Court, of the procedure to be followed in *Lafler*. That means that counsel was not deficient essentially. That kind of sums it up Mr. Chambers. (Tr 3-4).

At the conclusion of the hearing the circuit court ordered that the prosecution re-offer the 25-50 plea offer that had initially been tendered to defense counsel.

Then, Petitioner appealed to the Court of Appeals, contending that Judge Jackson had abused his discretion in finding *Strickland* "prejudice" that there was a reasonable probability that Respondent would have accepted the original plea offer, had he known about it. The Court of Appeals agreed with the prosecution and on October 12, 2017 reinstated Defendant's conviction of first degree murder. ***The Court of Appeals did not discuss the issue of retroactivity, either.*** Rather, the Court simply reversed the trial court's findings that Defendant had been prejudiced when trial counsel did not convey the plea offer to him.

Respondent appealed to the Michigan Supreme Court, which, as noted above, reversed the Court of Appeals' finding of "no prejudice" and affirmed Judge Jackson's application

of *Lafler*. But the Michigan Supreme Court then remanded the case to the trial for a discussion of whether *Lafler* is "retroactive" to Respondent's case. And, as noted, Petitioner ***agreed*** that *Lafler* applied retroactively to Juan Walker.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED - ARGUMENT

I.

PETITIONER HAS WAIVED ITS RIGHT TO CONTEST *LAFLER'S* APPLICABILITY TO RESPONDENT'S CASE. FURTHER PETITIONER IS JUDICIALLY ESTOPEED FROM CHANGING ITS POSITION FROM WHAT IT ARGUED AT THE TRIAL LEVEL. FINALLY, PETITIONER SHOULD HAVE BEEN CANDID WITH THIS COURT ABOUT WHAT IT ARGUED BELOW AND THAT IT HAD CONCEDED AT THE TRIAL LEVEL THAT *LAFLER V. COOPER* APPLIED TO RESPONDENT JUAN WALKER.

This Court has frequently said that it is a "court of review" not a "court of first view". *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005); *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1170, 197 L. Ed. 2d 500 (2017), as revised (Apr. 3, 2017); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 494, 121 S. Ct. 1711, 1719, 149 L. Ed. 2d 722 (2001). In this case, Petitioner conceded to the Michigan trial court that *Lafler* applied to Juan Walker, even though the Michigan courts had directed the parties specifically to address the question of retroactivity. See Petitioner's Appendix 23A-24A. Thus, when Petitioner conceded there was no retroactivity issue involved, Judge Jackson never considered it. This Court, being a "court of review", should not grant certiorari when the court of first instance – the Wayne County Circuit Court Criminal Division – did not. We submit that Petitioner's actions should constitute a waiver of any claim in this case that *Lafler* does not apply to Respondent Juan Walker.

Further, this Court has also said that had it known that a party has taken an inconsistent position below from that taken after *certiorari* was granted, it would not have granted the writ. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1202, 103 L. Ed. 2d 412 (1989).

How do these points of law apply here? Consider first what Petitioner has claimed in its "Reasons for Granting the Writ":

> "*Lafler* announced a new rule, one not dictated by prior precedent, so as not to be applicable retroactively on collateral attack."

Then, also consider Petitioner' assertion at page 23 of its Petition:

> *"Lafler,* then, should not be applicable in this case." (Petition, page 23).

But what did Petitioner say in the trial court proceedings before the state court?

In its October 28, 2015 Response to Defendant's Motion for Relief from Judgment, Petitioner stated, at page 8 of the Response:

> As far as the retroactivity of *Lafler v Cooper* to this case, retroactivity would only be an issue if this Court had found that Defendant knew of the plea offer at the time that he filed his appeal of right with the Court of Appeals, but did not raise an issue as to it in his appeal of right because he did not think that the claim was a cognizable one. If that were the case, he would be precluded from doing so now because *Lafler v Cooper*, according to a number of federal court cases, is not retroactive on collateral review. FN5 But this Court found that that is not the case, that is, that Defendant did not know of the plea offer at the time of his appeal of right to the Court of Appeals. ***Thus the retroactivity of Lafler v Cooper to this case is not an issue***.

(Appendix 2, Page 33B, Emphasis supplied).

And, in its Footnote 5 (referenced in the paragraph above) to its Response the prosecution said the following:

> 5. For example, in *In re Perez*, 682 F3d 930, 932 (CA 11, 2012) the Court considered whether *Lafler* announced a new rule of constitutional law, made retroactive to cases on collateral review by

> the Supreme Court. The Court held that *Lafler* did not announce a new rule of constitutional law because it merely was an application of the Sixth Amendment right to counsel, as defined in *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 Led 2d 674 (1984) to a specific factual context. The Court further reasoned that the Supreme court had long recognized that *Strickland's* two part standard applied to ineffective assistance claims arising out of the plea process. See also, *Hare v United States*, 688 F3d 878, 879 (CA 7, 2012), and *In re Graham*, 714 F3d 1181 (CA 10, 2013).

We argued below that the inconsistent positions taken by Petitioner were grounds for admonishment by the Michigan Supreme Court (Respondent's Appendix 14B), were "cynical" if not duplicitous (Appendix 7B), that the position taken by Petitioner in the Michigan appellate courts was "wholly inconsistent" with the position it took at the trial level (Appendix 23B), and that the doctrine of judicial estoppel barred Petitioner from taking diametrically opposite positions as to the applicability of *Lafler*.

The doctrine of judicial estoppel applies where a party has unequivocally asserted a position in a prior proceeding that is wholly inconsistent with the position now taken. This Court has discussed it in *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001):

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." ... This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."... see 18 Moore's Federal Practice § 134.30, p. 134–62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice

> and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory")." (Internal citations omitted).

The purpose of this doctrine is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co*., 690 F.2d 595, 598 (C.A.6 1982), and to prevent parties from "playing 'fast and loose with the courts." *New Hampshire v. Maine*, supra at 749–50.

We argued the applicability of this doctrine in our Response to Petitioner's Application for Leave to Appeal in the Michigan Supreme Court. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Paschke v. Retool Indus*., 445 Mich. 502, 509–510, 519 N.W.2d 441 (1994); *Lichon v. Am. Universal Ins. Co.*, 435 Mich. 408, 416–17, 459 N.W.2d 288, 293 (1990). This doctrine is "utilized in order to preserve 'the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.' " *Browning v. Levy*, 283 F.3d 761, 775 (C.A. 6 2002); This doctrine prevents a party from asserting one position when that party "successfully and 'unequivocally' asserted a position in a prior proceeding that is ' wholly inconsistent' with the position now taken." *Szyszlo v. Akowitz*, 296 Mich. App. 40, 51, 818 N.W.2d 424 (2012) (citation omitted).

The criteria for the application of judicial estoppel are present in this case. First, the prosecution was "successful" below – it persuaded the trial court to accept its argument that *Lafler* applied to Respondent and that there was no issue of "retroactivity." Second, the position it has taken in its Petition for Certiorari is wholly inconsistent with the position it took below in the Michigan trial court.

Of course, this Court need not take notice of the decisions of the Michigan Court of Appeals. But, in at least one Michigan Court of Appeals case, the doctrine of judicial estoppel has been applied to preclude the prosecution from taking two diametrically opposing positions. *People v. Jones*, 52 Mich. App. 522, 217 N.W.2d 884 (1974)(Prosecutor would not be heard to argue both that certain persons were not res gestae witnesses to crime of sale of heroin and that they were accomplices. M.C.L.A. § 335.152.); *Duncan v. Michigan,* 300 Mich. App. 176, 190, 832 N.W.2d 761, 768–69 (2013).

In conclusion, this Court should deny the Petition for Certiorari due to Petitioner's waiver of the issue and due to the doctrine of judicial estoppel.

II.

BECAUSE *LAFLER* CASES ARE HIGHLY FACT-SPECIFIC AND DEPENDENT ON THE TRIAL COURT'S DISCRETION AS TO REMEDY, IT WOULD NOT BE APPROPRIATE FOR THIS COURT TO REVIEW THIS PARTICULAR ITERATION OF A *LAFLER* REMEDY. MOREOVER, MICHIGAN IS FREE TO ADOPT A RULE OF RETROACTIVITY THAT MAY BE BROADER THAN WOULD BE ALLOWABLE FOR FEDERAL COURTS WHEN REVIEWING ITS OWN STATE CONVICTIONS.

1. The relevant holdings of *Lafler v Cooper* and the trial court's application of these holdings.

Lafler held that the Sixth Amendment requires trial counsel to provide effective advice during pretrial proceedings, and that if he fails to do so, he acts deficiently, under the well-known test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Court held that when a defendant can show that he is prejudiced by counsel's ineffectiveness in the plea context (for example by rejecting a favorable plea offer) a trial court must

"remedy" the taint of ineffectiveness in the plea context by exercising discretion as to what remedy should be applied.

> In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. 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.

Lafler v. Cooper, 566 U.S. 156, 163–64, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012).

Here, Juan Walker established that his trial counsel failed to convey a favorable plea offer to him (plead to second degree murder, with a sentence of 25-50 years) and he therefore went to trial and was convicted of a more serious offense (first degree murder). The trial court found that there was a reasonable probability that Defendant would have accepted the offer had he known about it. Thus, the trial court found Defendant had been "prejudiced" under this standard. And, the Michigan Supreme Court in its November 21, 2018 Order upheld the finding of "prejudice." Petitioner's Appendix 23A-24A.

> [I]n 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."

Lafler held that the question of "remedy" must be tailored to the particular case in front of the court, but that even if a subsequent trial is free from constitutional error, a defendant may still have been "prejudiced."

> 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.

This Court outlined a variety of remedies for one who has suffered ineffective assistance of trial counsel in the plea-bargaining context, including a new trial, resentencing, or re-offering the plea offer, and this Court made clear that the question of remedies is referred to the trial court's "discretion."

> In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice.... In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.
>
> In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. (Internal citations omitted).

Lafler v. Cooper, supra at 171, 132 S. Ct. at 1389. And, this Court approved of the specific remedy ordered by the Michigan trial court in this case – ordering the prosecution to reoffer the original plea agreement:

> As a remedy, the District Court ordered specific performance of the original plea agreement. ***The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement.***

Lafler, supra at 174, 132 S. Ct. at 1391(Emphasis supplied).

2. Proceedings in the Michigan courts.

In this case, on remand, the trial court presided over four days of post-conviction hearings, including two days of evidentiary hearings, a special pretrial, and a plea and sentence. It was after these hearings that Judge Jackson in his "discretion" -- *Lafler*, supra at 171, 174 – ordered that the prosecution should re-offer the plea agreement to Defendant. This was an entirely proper exercise of Judge Jackson's discretion to craft a remedy, and one that has already been approved by the Michigan Supreme Court in its November 21, 2018 Order. Appendix 23A-24A.

Keep in mind, also that during the four days of trial level proceedings. Judge Jackson took testimony from multiple witnesses, who were both examined and cross-examined. The trial judge bifurcated the proceedings – the first portion of the proceedings were dedicated to the issue whether trial counsel had performed deficiently, the first *Strickland* factor. He authored a fairly lengthy opinion. Respondent's Appendix 3, Pages 36B-41B. Then, Judge Jackson had to decide what specific remedy to craft, and he decided that the remedy would require the prosecution to re-offer its original plea.

This case has been up and down the Michigan trial and appellate ladder for many years. Many judges have had the opportunity to examine the specific facts of the case in light of the

guiding principles of *Strickland* and *Lafler*. It would be decidedly imprudent for this Court to weigh in at this very late stage.

Moreover, one additional factor that Petitioner has failed to bring to this Court's attention: this Court has already ruled that the state courts are free to adopt their own rules of retroactivity when reviewing their own state convictions! *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S. Ct. 1029, 1042, 169 L. Ed. 2d 859 (2008)("In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*.").

III.

LAFLER v COOPER APPLIES TO RESPONDENT'S CASE, WHICH BECAME FINAL IN 2005, BECAUSE IT DID NOT ANNOUNCE A NEW RULE.

Even assuming that this Court wishes to examine the question presented by Petitioner, this case does not involve a question of "retroactivity" at all. The question of "retroactivity" of a legal rule or holding is only at issue when a court's holding involves a "new" rule. If there is a "new" rule of criminal law, the question arises whether the new rule applies only to cases then pending on direct review, or also to long-final cases and to cases on collateral review. This is the correct framing of an issue of "retroactivity." But, if court's holding merely applies an "old" rule, there is no question of "new legal jurisprudence" having been created. By definition, an old rule has been around for a while and there is no need to ask whether it is "retroactive." Now, a defendant may or may not benefit from application of an old rule for a variety of reasons -- either on direct review or on collateral review – but it is not a question of whether the old rule is "retroactive" or not.

The rule at issue in Defendant's case was a straightforward application of *Strickland v. Washington* and *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Did trial counsel perform deficiently in failing to convey a plea offer? And, was Juan Walker prejudiced? There is nothing new or novel about these principles. There was no "new rule" involved in Respondent's case. Both cases had been decided many years before Respondent's offense, trial and conviction. Both *Strickland* and *Hill* established the right to effective assistance of counsel in both trial and plea contexts. There is nothing at all unusual about the holdings of either case as applied here. *Lafler v. Cooper* merely applied *Strickland* to a fact-specific plea bargaining context and holds that a defendant who can show prejudice in the context of a plea may be entitled to some sort of remedy that will excise the taint of his counsel's ineffectiveness.

This conclusion is surely self-evident, and it is notable that the prosecution can find only one case (from the Supreme Court of Utah) to support its current claim that *Lafler* does not apply to Respondent on collateral review. Every other court which has considered the issue has held that *Lafler* was simply a clarification of existing law as explained in *Strickland* and *Hill.*

The procedural context of *Lafler* establishes that this Court was not recognizing a new right. The case was decided in the state courts, and a federal court may only grant relief on collateral review of a state decision if that decision violated "clearly established federal law." 28 U .S.C. § 2254(d)(1). Lafler himself was proceeding on collateral review, and he would not have been able to obtain any relief whatever if the Court's holding had not been mandated by "clearly established Federal law." New and retroactively applicable rules do not satisfy the "clearly established federal law" requirement. See *Williams v. Taylor*, 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)("In *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final.")

Since *Lafler* was decided, virtually every court, including every federal circuit court of appeals, to have addressed the question has held that *Lafler* did not create a new constitutional right to be applied retroactively to cases on collateral review. *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012)("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 v. Lockhart*..."); *In re Perez,* 682 F.3d 930, 933–34 (11th Cir. 2012); *Miller v. Thaler*, 714 F. 3d 897, 902 (5th Cir. 2013)("We have previously held, and now reiterate, that *Frye* did not announce a new rule of constitutional law because it 'merely applied the Sixth Amendment right to counsel to a specific factual context."); *In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012)("we agree with the Eleventh Circuit's determination in *In re Perez* ... that *Cooper* 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."); *In re Liddell*, 722 F. 3d 737, 738 (6th Cir. 2013) (per curiam) (citing cases); *Hare v. United States*, 688 F. 3d 878, 879 (7th Cir. 2012); *Gallagher v. United States*, 711 F. 3d 315, 315–16 (2d Cir. 2013)("Neither *Lafler* nor *Frye* announced "a new rule of constitutional law": Both are applications of *Strickland*..."); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir. 2013)("We agree with every other circuit to have considered the issue that neither *Frye* nor *Cooper* established a "new rule of constitutional law.").

In *Wert v. United States*, 596 F. App'x 914, 917 (11th Cir. 2015) the Eleventh Circuit said: "*Lafler* did not announce a new rule of constitutional law because it merely was an application of the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context... This Court further reasoned that the Supreme Court had long recognized that *Strickland*'s two-part standard applied to ineffective assistance claims arising out of the plea process. Id. Applying *Teague*, this Court concluded that *Lafler* did not break new ground or impose new obligations on either the

State or federal government, and its holding was dictated by *Strickland*. Id. at 933." (Internal citations omitted).

CONCLUSION

As we said below to the Michigan Supreme Court, "There may be a future case in which the "retroactivity" of *Lafler v Cooper* may properly be raised, but this case is not it." (Respondent's Appendix 1, Page 24B).

The Petition should be DENIED.

Date: June 23, 2020

/s/ Mary A. Owens
Mary A. Owens P-33896
124 E. Fulton, Ste. 100
Grand Rapids, Michigan 49503

Case No. 19-1330

IN THE

SUPREME COURT OF THE UNITED STATES

PEOPLE OF MICHIGAN,

Petitioner,

v

JUAN WALKER,

Respondent.

APPENDIX OF EXHIBITS