19-7621

NO._____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ALLANAH BENTON,

Petitioner,

v.

SHAWN BREWER, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Allanah T. Benton #754842
In Propria Persona
Womens Huron Valley Correctional Facility
3201 Bemis Rd.
Ypsilanti, Michigan 48197
(734)572-9900

QUESTIONS PRESENTED

DID THE STATE AND FEDERAL COURTS VIOLATE MS. BENTON'S RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSELS IN VIOLATION OF U.S. CONSTITUTIONAL AMENDMENT SIX AND CONSTITUTIONAL ART. 1 § 17, 20?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

PETITION APPENDIX INDEX

VOLUME I

VOLUME II

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions, Statutes and Court Rules

Other

PETITION FOR A WRIT OF CERTIORARI

Petitioner Allanah Benton respectfully prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court in a published opinion dated November 6, 2019. This Opinion appears at Appendix A and is cited at Benton v. Brewer, 942 F.3d 305, 2019 U.S. App. LEXIS 33166 (6th Cir. Mich., Nov. 6, 2019).

The United States Court of Appeals for the Sixth Circuit appointed counsel for purposes of oral argument, pursuant to 18 U.S.C. § 3006A, on June 3, 2019. This order appears at Appendix B; Benton v. Brewer, No. 18-1869.

The United States Court of Appeals for the Sixth Circuit issued an order dated November 8, 2018, denying in part, but granting a certificate of appealability to Ms. Benton's ineffective assistance claim. This Order appears at Appendix C; Benton v. Brewer, No. 18-1869.

The United States District Court for the Eastern District of Michigan denied Ms. Benton's petition for writ of habeas corpus, denied a certificate of appealability, and granted leave to appeal in forma pauperis, in a published opinion and order dated June 29, 2018. This order appears at Appendix D and is cited at Benton v. Brewer, 2018 U.S. Dist. LEXIS 108956, WL 3207901 (E.D. Mich., June 29, 2018).

The Michigan Supreme Court denied Ms. Benton leave to appeal her motion for relief from judgment in an order dated September 27, 2016. This Order appears at Appendix E and is cited at People v. Benton, 500 Mich. 864, 885 N.W. 2d 278, 2016 Mich. LEXIS 1899 (Sept. 27, 2016).

The Michigan Court of Appeals denied Ms. Benton leave to appeal her motion for relief from judgment in an unpublished order dated December 21, 2015. This Order appears at Appendix F; People v. Benton, 329453.

The Genesee County Circuit Court denied Ms. Benton's motion for relief from judgment in an unpublished order dated April 13, 2015. This Order appears at Appendix G. People v. Benton, No. 09-24636-FC.

The Michigan Supreme Court denied Ms. Benton leave to appeal on direct appeal in an Order dated May 11, 2012. This Order appears at Appendix H and is cited at People v. Benton, 491 Mich. 917, 813 N.W.2d 286, 2012 Mich. LEXIS 619 (May 11, 2012).

The Michigan Court of Appeals affirmed Ms. Benton's conviction and sentence in an appeal of right from her state court judgment in a published opinion dated September 22, 2011. This Order appears at Appendix I and is cited at People v. Benton, 294 Mich. App. 191, 817 N.W.2d 599, 2011 Mich. App. LEXIS 1643 (Sept. 22, 2011).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its final judgment on November 6, 2019, affirming the judgment of the district court. [App. A]. This Court has jurisdiction under 28 U.S.C.S. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defence." The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.Ed 2d 799 (1963).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner Allanah Benton was charged with three counts of first-degree criminal sexual conduct. Ms. Benton taught sixth grade in October 2007, and was accused of having sex acts with student Q.J.. Ms. Benton, 41 at the time, had no criminal history, taught at Flint Community Schools for ten years, and was well-regarded by her colleagues. The jury found Ms. Benton guilty of two of the three original counts. Ms. Benton was sentenced on February 11, 2010, to concurrent terms of 25-38 years in prison. She requested the appointment of appellate counsel. On February 25, 2010, a claim of appeal was filed, and the State Appellate Defenders Office (SADO) appointed Attorney Michael A. Faraone (P45332).

B. PROCEDURAL HISTORY

Ms. Benton filed a timely brief on appeal with the Michigan Court of Appeals, presenting three arguments. On September 22, 2011, the court of appeals affirmed Ms. Benton's conviction and sentence. [App. I]. The Michigan Supreme Court subsequently denied leave to appeal on May 11, 2012. [App. H].

Ms. Benton's family retained her court appointed appellate attorney Michael A. Faraone. On November 15, 2012, Ms. Benton filed her first and only motion for relief from judgment in the Genesee County Circuit Court, under sub-chapter 6.500 of the court rules. Ms. Benton presented one argument; that she was denied the effective assistance of trial counsel during plea negotiation, under facts that called for relief under this Court's then recent decision in Lafler v. Cooper, 566 US 156, 132 S.Ct. 1376 (2012). Ms. Benton requested an evidentiary hearing in the trial court to present the factual predicates of her claim.

This argument is the sole claim being addressed in Ms. Benton's petition for writ of certiorari.

On April 13, 2015, over two years after Ms. Benton filed her motion for relief from judgment, the circuit court denied the motion. [App. G]. Ms. Benton sought leave to appeal the circuit court denial. The Michigan appellate courts subsequently denied leave to appeal. The court of appeals on December 21, 2015, [App. F], and the supreme court on September 27, 2016. [App. E].

Ms. Benton then filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Michigan, on October 10, 2016, essentially raising all the grounds raised in the state courts. On June 29, 2018, the district court denied Ms. Benton's petition, denied a certificate of appealability, and granted leave to appeal in forma pauperis. [App. D].

On November 8, 2018, the Court of Appeals for the Sixth Circuit issued an order denying in part, but granting a certificate of appealability to Ms. Benton's ineffective assistance of trial counsel claim. [App. C]. Ms. Benton filed a pro se brief with the sixth circuit on December 21, 2018. After receiving the respondent brief, filed on February 22, 2019, Ms. Benton filed a reply brief on March 15, 2019.

Ms. Benton requested that the sixth circuit grant oral argument and appoint counsel to argue her appeal. On June 3, 2019, the United States Court of Appeals for the Sixth Circuit appointed counsel for purposes of oral argument pursuant to 18 U.S.C. § 3006A. [App. B].

On October 22, 2019, the United States Court of Appeals for the Sixth Circuit held oral arguments in this matter. Attorney Anna R. Rapa argued on Ms. Benton's behalf. On November 6, 2019, the sixth circuit filed its opinion affirming the district courts order, denying Ms. Benton's writ of habeas corpus. [App. A].

The sixth circuit stated in its opinion, "Benton alleges that her defense attorney's bad advice made her pass up a favorable plea deal. But she did not timely raise her claim and has not offered a good excuse for not raising it." [App. A]. The cause to excuse the procedural default is that the state appointed appellate attorney failed to raise the issue in Ms. Benton's direct appeal. He stated as much in filing Ms. Benton's motion for relief from judgment, [App. M], and again in the form of an offer of proof [App N]. This was a substantial argument, and Ms. Benton requested an evidentiary hearing in every state and federal court to determine the facts of ineffectiveness but was denied.

Ms. Benton asserts that she is entitled to proceed on appeal to the Supreme Court of the United States. The Sixth Circuit Court of Appeals has decided the important question of Ms. Benton's appeal in a way that conflicts with relevant decisions of this Court, and violated her Sixth Amendment right to effective assistance of counsel. She petitions this Court for permission to proceed.

REASON FOR GRANTING THE PETITION

THE STATE AND FEDERAL COURTS, IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, PRECLUDED MS. BENTON FROM BEING SUBJECT TO FURTHER FACT-FINDING ON HER PLEA NEGOTIATIONS CLAIM BY FAILING TO RECOGNIZE THAT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL COULD SERVE AS CAUSE TO EXCUSE THE PROCEDURAL DEFAULT OF HER INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM.

The sole issue Ms. Benton is arguing in her petition is that her trial counsel was ineffective during the plea negotiations process. The court first noted that Ms. Benton failed to raise the claim on direct appeal. The trial court found that Ms. Benton had established good cause, but failed to meet the burden of establishing actual prejudice. The sixth circuit determined that Ms. Benton had not offered a good excuse for not raising her claim timely, and without cause there was no need to consider if Ms. Benton had shown prejudice.

MS. BENTON HAS DEMONSTRATED CAUSE TO EXCUSE THE ALLEGED PROCEDURAL DEFAULT.

According to 28 U.S.C.S. §2254, the court may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim...resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.S. §2254(d)(2).

The Sixth Amendment right to effective assistance of counsel extends to the first appeal as of right. Evitts v. Lucey, 469 US 387, 83 L.Ed 2d 821 (1985).

Ms. Benton was appointed appellate counsel by the State

Appellate Defenders Office (SADO); attorney Michael Faraone (P45332). Once the court appointed counsel for Ms. Benton she was entitled to competent counsel who would represent her based upon an acceptable level of independent judgment, professional skill and diligence. Pough v. United States, 442 F.3d 959 (6th Cir. 2006). If the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claim. Martinez v. Ryan, 566 US 1, 132 S.Ct. 1309, 182 L.Ed. 2d 272 (2012). Pursuant to Martinez you have a constitutional right to effective assistance of counsel on what amounts to your first and only chance to file a state habeas corpus petition based on evidence that was not in the trial record. The one year plea offer that Ms. Benton shared with Faraone before her direct appeal was filed was not in the trial record.

Ms. Benton was only entitled to file one motion for relief from judgment. MCR 6.502 (G)(1). Filing a successive motion is only permitted under two circumstances...retroactive change in law that occurs after the first motion for relief from judgment, or a claim of new evidence that was not discovered before the first such motion. MCR 6.502 (G)(2). People v. Swain, 288 Mich. App. 609 (June 2010). The United States Supreme Court...has acknowledged that in certain circumstances counsels ineffectiveness in failing properly to preserve the claim for review in state court will suffice [as cause to excuse a procedural default of a habeas corpus claim]. Edwards v.

Carpenter, 529 US 446, 451, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000). Ms. Benton's claim of ineffective assistance of appellate counsel has not been preserved because it was not an argument in her only available motion for relief from judgment, and does not qualify as grounds for a successive 6.500 motion. Though the state does not suggest that Ms. Benton has forfeited this claim [App A-4 (footnote)], at this point she has no viable avenue to present it.

Attorney Faraone presented three arguments in Ms. Benton's direct appeal; I. Benton was denied her right of confrontation and right to present a defense. II. The trial court improperly admitted misleading and unduly prejudicial hearsay testimony. III. The mandatory 25 year minimum term constitutes cruel and unusual punishment. The sole argument presented in Ms. Benton's motion for relief from judgment was; That ineffective assistance of counsel occurred during plea negotiations and this case is on-point with the Lafler v Cooper decision, and counsel will stipulate to ineffective assistance of appellate counsel. However, Faraone **did not** brief as issue two: Ineffective assistance of appellate counsel for failure to present the Lafler issue timely in Benton's direct appeal. This would have reasonably preserved the issue and prevented the procedural default.

The ineffective assistance during plea negotiations argument was clearly stronger and obvious had Faraone chose to apply his professional skill and diligence in exploring this off the record claim. Appellate attorney's are expected to select the most promising issues for review. Jones v. Barnes, 463 US

745, 752-53, 103 S.Ct. 3308, 77 L. Ed 2d 987 (1983). If Faraone, by failing to explore it, abandoned a non frivolous claim that was both "obvious" and "clearly stronger" than the claim that he actually presented, his performance was deficient, unless his choice had a strategic justification. Smith v. Robbins, 528 US 259, 288, 120 S.Ct. 746, 145 L.Ed. 2d 756 (2000). An appellate attorney has an obligation to raise meritorious arguments during the first appeal of right. The sixth circuit determined that reasonable jurists could debate the district court's assesment of Ms. Benton's final claim based on Lafler v. Cooper, 566 US 156, 163 (2012). [App C-2]. Their determination indicates there exists a reasonable probability that absent the procedural default, this claim was meritorious.

LAFLER TIMING ISSUE FURTHER EVIDENCE OF INEFFECTIVE APPELLATE COUNSEL.

The sixth circuit stated that novelty of Lafler does not amount to cause, because the legal basis was reasonably available at the time of default. Effective counsel would have had "the tools to construct [Ms. Benton's] claim in her 2011 appeal" [App A-4].

There were available cases at the time of Ms. Benton's direct appeal which held that defendants have a right to counsel during the plea bargaining process. See: Hill v. Lockhart, 474 US 52, 57, 106 S.Ct. 366 (1985). Arredondo v. United States, 178 F.3d 778, (1999), Magana v. Hofbauer, 263 F.3d 542 (2001), Smith v. United States, 348 F.3d 545 (2003), Griffin v. United States, 330 F.3d 733 (6th Cir. 2003), Turner v. Tennessee, 940

F.2d, 1006 (1991).

As this Court explained in Evitts:

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that like a trial is governed by intricate rules that to a lay person would be hopelessly forbidding. ...nominal representation on an appeal of right like nominal representation at trial does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. Evitts at 396.

A procedural default will not bar a federal habeas court from hearing an ineffective assistance claim if, in the initial-review-collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. Martinez at 1.

> When a petitioner contends that his appellate counsel was ineffective because counsel overlooked a meritorious argument, we first examine the record to see whether the appellate attorney in fact omitted "a significant and obvious" issue. Suggs v. United States, 513 F.3d 675, 678 (2008). If so we then compare the neglected issues to those actually raised; if the ignored issues are "clearly stronger" than those raised, appellate counsel was deficient (thereby satisfying the first prong of the Strickland test). Lee v. Davis, 328 F.3d 896, 900-901 (7th Cir. 2003).

MS. BENTON WAS PREJUDICED BY APPELLATE ATTORNEY'S DEFICIENCY.

To establish prejudice, the other component of the Strickland test petitioner must show that there is a reasonable probability that, but for the deficient performance of his

attorney, the result of the appeal would have been different. Strickland v. Washington, 466 US 668, 694, 104 S.Ct 2052, 80 L.Ed. 2d 674 (1984).

A defendant whose lawyer does not provide him with effective assistance on direct appeal, and who is prejudiced by the deprivation is thus entitled to a new appeal. Mayo v. Henderson, 13 F.3d 528, 537 (2nd Cir. 1994). When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue we look to the merits of the omitted issue. Hooks v. Ward, 184 F.3d 1206, 1221 (10th Cir. 1999).

Where an attorney failed to adequately brief an issue on direct appeal, appellant must show initially that the appeal would have had with reasonable probability, a different outcome if the attorney adequately addressed the issue. Jones v. Jones, 163 F.3d 285, 300, 302 (5th Cir. 1998). In Neill v. Gibson, 278 F.3d 1044, 1057 (10th Cir. 2001), The relevant questions are whether appellate counsel was "objectively unreasonable" in failing to raise the prosecutorial misconduct claims on direct appeal and if so, whether there is a "reasonable probability" that , but for his counsel's "unreasonable failure" to raise these claims, Neill "would have prevailed on his appeal".

Ms. Benton has made diligent attempts to develop the facts supporting her claim in the state and federal court proceedings. She has repeatedly requested an evidentiary hearing in an attempt to answer the questions posed by the courts.

"Did all this happen?" [App A-2]

TRIAL COUNSEL WAS INEFFECTIVE

On the morning of December 2, 2009, before Ms. Benton's trial began, Attorney Michael Cronkright informed her for the first time of a one year plea offer. The plea was for one year in the county jail. Ms. Benton asked Cronkright, "If I accept the offer will I lose my twins?" Cronkright told her, "You might be able to visit them; Ms. Benton, I'm ready to fight your case".

The state and federal courts decided that my account of the events of the morning of trial were incredible. My friend, Ms Gist, who had a similar recollection was also deemed untrustworthy, for no other reason than her recall of the morning of December 2, 2009, the morning Ms. Benton's trial began. [App J-1]; [App K].

Ms. Benton has continued diligently to develop the factual basis of her claim as the burden of proof is on the petitioner. She now attempts to make a record of the plea offer with the attached affidavit of trial counsel, Michael Cronkright. [App L]. Ms. Benton has obtained affidavits from three of the four people who attended the plea negotiations meeting on the morning of December 2, 2009.

Before dismissing facially adequate allegations short of an evidentiary hearing ordinarily a district judge should seek at a minimum to obtain affidavits from all persons likely to have first hand knowledge of the existance of any plea agreement. When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful. Blackledge v. Allison, 431 US 63 (1977). A defendant is entitled to an opportunity to substantiate habeas

claims at an evidentiary hearing where the allegations relate primarily to purported occurences outside the courtroom, and are not so vague or conclusory as to permit summary disposition. Diligence will require in the usual case that the prisoner, at a minimum seek an evidentiary hearing in state court in the manner prescribed by state law. Williams v. Taylor, 529 US 420, 120 S.Ct. 1479, 146 L.Ed 2d 435 (2000). A petitioner is entitled to an evidentiary hearing in federal court if he could show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from the failure. Keeney v. Tamayo-Reyes, 504 US 1, 112 S.Ct. 1715, 118 L.Ed 2d 318 (1992).

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO PUT THE PLEA ON THE RECORD

Ms. Benton has obtained an affidavit from trial counsel that verifies there was a plea offered on the morning of her trial; the plea offer was for a lesser charge, and for a one year term in the county jail. Attorney Michael Cronkright's affidavit is Ms. Benton's attempt to put the plea offer on the record, which satisfies in large part the prejudice prong of Strickland. Ms. Benton has been diligent in gathering evidence showing trial counsel was ineffective in representing her during her plea negotiations. Ms. Benton now requests the Court do its part in ordering an evidentiary hearing to prove ineffective assistance of counsel. Ms. Benton had one question when learning about the offer, would accepting it mean that her twin toddlers (one with down syndrome) would be taken from her. Trial

counsel responded that the State would end her parental rights. And, "That when I heard that my children would be taken from me, I stopped considering the offer. I have since learned that, if I had accepted the offer, there is a legal process the State would be required to satisfy before my parental rights would end, that I could have contested a parental rights termination, and that a court would decide the case". [App J].

Benton avers that if she had not been erroneously told that acceptance of the plea would mean her parental rights to her infant twins would be terminated, she would have entered into the plea agreement. [App J].

In a separate affidavit [App K], a witness to the conversation between Ms. Benton and trial counsel described it similarly and states, "That based upon my observation of defendant, she was terrified of the 25 year mandatory minimum and would have taken said offer to avoid the threat of a 25 year minimum until she was told definitely that her boys would be taken from her". In an offer of proof, [App N], appellate counsel notes that, even after a conviction as charged and sentence of 25 years, Ms. Benton's parental rights have not been terminated.

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 88 L.Ed 2d 674 (1984); US Const. Amends VI, XIV; Const. 1963, art 1, §§ 17, 20. The United States Supreme Court has long recognized that guilty pleas comprise an "essential component" of criminal proceedings in the United States. Santobello v. New York, 404 U.S. 257,

260; 92 S.Ct. 495, 498; 30 L Ed 2d 427 (1971). In Lafler the Court went further and held that a defendant is entitled to the effective assistance of counsel during the plea-bargaining process, as they are at trial. Lafler, supra.

A defendant seeking relief for ineffective assistance in this context must meet Strickland's familiar two-pronged standard by showing (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." Id. 132 S.Ct. at 1384. Where, as here, the prejudice resulting from counsel's ineffectiveness is that the defendant rejected a plea offer and stood trial.

> [A] defendant must show that but for the ineffective advice of counsel ther is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Id. 132 S.Ct. at 1385.

If the defendant satisfies the deficient performance prong, the showing of prejudice required under the second prong of Strickland is comparatively low. In such cases, the prejudice prong is satisfied if there exists a "reasonable probability" that defendant would have accepted a plea offer but for counsel's inadequate advice. Lafler, 312 S.Ct. at 1385; see also Hodges

v. Colson, 727 F.3d 517, 550 (6th Cir. 2013) (en banc) (citing Griffin v. United States, 330 F.3d 733, 737 (6th Cir. 2003), for the proposition that it is easier to show prejudice in the guilty plea context than in other contexts because the claimant need only show a reasonable probability that he would have pleaded differently). This is presumptively shown if the difference between the length of the sentence proposed in the plea offer and the sentence actually imposed after a trial-based conviction is substantial. United States v. Morris, 470 F.3d 596, 602-03 (6th Cir. 2006). Griffin at 737. The Lafler decision indicates that ineffective assistance during plea negotiations is offensive to the maintenance of a sound judicial system. In fact in Lafler this form of error caused this Court to reverse a trial-based conviction obtained in a Michigan state court.

Though the Lafler decision in 2012, was not so novel as to establish cause for Ms. Benton's procedural default, the decision proclaimed a "new rule" of federal constitutional procedure that should be applied retroactively, because it is so important as to constitute a "watershed rule of constitutional procedure implicating the fundamental fairness and accuracy of the criminal proceeding". Whorton v. Bockting, 549 US 406, 127 S.Ct. 1173, 167 L.Ed 2d 1 (2007).

Ms. Benton and petitioners similarly situated should not be denied the type of relief that the rule of constitutional procedure in Lafler calls for, since the decision represents a monumental change from previous decisions by this Court.

Ms. Benton avers that counsel's erroneous advice halted the plea discussion in its tracks, and forfeited her opportunity to learn more specific details about the prosecution's offer. She never learned what the prosecutions offer hinged on, or what would cause it to fail. A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentence exposure the defendant will face as a consequence of exercising each of the options available. Smith v. United States, 348 F.3d 545, 553 (6th Cir. 2003) (citing United States v. Day, 969 F.2d 39, 43 (3rd Cir. 1992). Regardless of whether a defendant asserts her innocence (or admits her guilt) her counsel must make an independent examination of the facts, circumstances, pleadings and law involved and then...offer his informed opinion as to what plea should be entered. Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed. 309(1948). "A defendant relies upon counsel's expertise so that the decision to go to trial is fully informed" Smith at 552-553. A defendant possesses the untimate authority to determine her plea, but a lawyer must abide by his client's decision in this respect only after having provided the client with competent and fully informed advice, including an analysis of the risks that the client would face

in proceeding to trial. Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 160, L.Ed 2d 565 (2004).

Returning to Strickland's standards, defendants must meet these two prongs by showing (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." Strickland at 1384.

Prong One of Strickland:

Ms. Benton submits that the trial court should have granted an evidentiary hearing. Under Strickland, trial counsel's performance, as described in the attached affidavits, was objectively unreasonable under prevailing professional norms. Ms. Benton's concern as she decided whether to accept the prosecution's December 2, 2009 offer was the effect that decision would have on her parental rights, and ultimately her minor twin sons. One of her twins has down syndrome and was attending physical therapy, and required additional support. Trial counsel told Ms. Benton that her parental rights would be terminated. This was erroneous advice and it caused Ms. Benton to reject the plea offer.

Even a cursory review of the law governing child protective proceedings reveals the due process rights Ms. Benton would have had before any action could be taken against her parental rights. See In re Brock, 442 Mich 101, 108; 499 NW2d 752 (1993) (The adjudicative phase is of critical importance because "[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation" of their parental rights).

Inadequate advice on the collateral consequences of a plea can constitute ineffective assistance of counsel. Padilla v. Kentucky, 599 US 356, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010).

Prong Two of Strickland:

Regarding the second prong of Strickland, Ms. Benton was prejudiced by counsel's erroneous advice. It is reasonably probable that if Ms. Benton had been properly advised, she would have accepted the prosecutor's offer. As previously noted, in the context of Lafler claims, the required showing is comparatively low. Prejudice is shown if there exists a "reasonable probability" that defendant would have accepted a plea offer but for counsel's inadequate advice. Lafler, at 1385. And the Sixth Circuit has held, as the district court recognizes, that a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecutions offer. Griffin, supra.

The trial court argued that Ms. Benton's repeated declarations of innocence are proof that she would not have accepted a guilty plea. The gap between the potential sentence if convicted and the plea offer is sufficient to merit an evidentiary hearing, Griffin at 738. "It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment". Guerrero v. United States, 383 F.3d 409, 419 (6th Cir. 2004).

MS BENTON IS ENTITLED TO AN EVIDENTIARY HEARING

In denying Ms. Benton's motion for relief from judgment, the trial court stated:

> Defendant cannot meet her burden to show an offer was formally made, as there are only general talks of an "unofficial offer", a "potential offer", and there are no definite terms of an offer alleged. Defendant merely mentions, "a lesser charge", "a year in the county" and "lifetime monitoring". APA Richardson never states terms of an offer on the record and conveyed there was no official offer. Because there was no official offer, Defendant cannot show but for the ineffective assistance of counsel, there is a reasonable probability that the plea offer would have been presented to the court.
> [App G].

The trial court also stated that the affidavits of Benton and Gist, "demonstrate an inconsistency as to when this alleged conversation [with counsel about a plea offer] occured," [App J, App K]. Attorney Cronkright, an officer of the court attests to when the plea conversation took place. [App L].

Ms. Benton submits that the only way to obtain answers to further questions that concern the Court is to conduct an evidentiary hearing.

At present well over three-fourths of the convictions in this country rest on pleas of guilty. Brady v. United States, 397 U.S. 742, 752; 90 S.Ct. 1463, 1471; 25 L.Ed 2d 747 (1970). Ms. Benton respectfully points out that the prosecution never argued that no plea offer was extended. Appellate attorney's offer of proof also refers to a conversation with Cronkright who corroborated that: (1) he spoke with Ms. Benton on the morning of the first day of trial, December 2, 2009, and

(2) that he relayed to Ms. Benton a firm and official offer that morning. [App N].

Ms. Benton stresses, an evidentiary hearing in necessary. "When a plea offer has been rejected, however, no formal court proceedings are involved this underscores that the plea bargaining process is often in flux, with no clear standards or time lines and with no judicial supervision of the discussions between prosecution and defense", Missouri v. Frye, 566 U.S. 134, 143; S.Ct. 1399, 182 L.Ed 2d 379 (2012).

Ms. Benton contends that the trial court cited the Michigan Supreme Court case, People v. Douglas, 496 Mich 557, 597; 852 NW2d 587 (2014), and compared this case to Ms. Benton's. Arguing that Ms. Benton maintained her innocence and thus, "would not have been able to establish a factual basis for her plea without perjuring herself." [App G]. Unlike Ms. Benton Douglas was granted a hearing even after his protestations of innocence, in order for the Court to determine, "what circumstances would have led the defendant to accept a plea". Id. (See: People v. Ginther, 390 Mich. 436, 212 N.W. 2d 922 (1973)).

Ms. Benton contends that she cannot undo her trial testimony, however had she been correctly advised she would have made a free and rational choice to accept the plea. Considering also that Ms. Benton was not effectively advised of any potential relevant conduct provisions attached to the plea, and she was offered to plea to a "lesser charge". [App L]. The factual basis for the plea would presumably been shown by the state. North Carolina v. Alford, 400 US 25 S.Ct. 405 F.2d 340 (1970).

The trial court stated, "because she did not want her parental rights terminated she proceeded to trial. This belies the fact that once sentenced to 25 years, all of her children would be the age of majority once she is released, so there would be no parental rights to terminate." [App G-4]. Their conclusion was unreasonable and unsupported by the record. This line of thinking assumes that Ms. Benton began trial knowing she would be convicted. Attorney Cronkright said, "I'm ready to fight your case." [App- J]. Though he didn't say he was ready to "win", he may as well have, because that was the conclusion Ms. Benton drew from his preparation for trial.

As stated in the April 2012 volume of Criminal Law Reporter:

> Defense counsel must consider every plea bargain to be as important as trial. Certainly a defendant pleading guilty would expect such a commitment by defense counsel. Yet, for defense lawyers, pleas have long taken a back seat to trial preparation.
> With plea bargaining such a critical aspect of the criminal justice system, saying that a fair trial makes up for any deficiencies in counsel's conduct during the pretrial process ignores the reality of the substantial effect plea bargaining can have on a defendant's future.
> Defense counsel must keep clear records of not only the offers prosecutors present but also their expiration dates, how likely they are to be withdrawn, how and when the offers were presented to the client, and what changes are made in the offers. Criminal Law Reporter, BNA Insights, "Right To Counsel", Vol. 91, No.4, 141 (Apr. 25, 2012).

Ms. Benton avers that she took the advice of her trial counsel on all legal matters. She has shown that trial counsel's error affected the outcome of her case. If she had accepted the offer, she would have served significantly less than a 25-year minimum term.

Ms. Benton contends that the erroneous advice of trial counsel had an injurous effect on the outcome of her case. Ms. Benton placed particular emphasis on her parental rights to her then infant twins.

With the affidavits and the offer of proof from the appellate attorney, even with the existing record, Ms. Benton has met the standard of establishing clear and convincing evidence that a plea was offered and that counsel was ineffective in failing to advise her, which was further aggravated by erroneous advice.

Had counsel performed effectively, Ms. Benton would have accepted the one year plea offer and would have been home with her children years ago. Turning to the facts before us, it would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice. Cullen v. United States, 194 F.3d 401 (2nd Cir. 1999). Failure to give any advice concerning acceptance of a plea bargain was below the standard of reasonable representation. Id at 404. Ms. Benton avers that had she been given an informed opportunity to accept the plea offer, the evidence is overwhelming that she would have accepted it. Based on the affidavit of Attorney Cronkright, there's a reasonable probability that the court would have accepted the plea, as there's nothing on the record to support the court's rejection of the prosecutions offer. Also that there was a reasonable probability that the prosecution would not have withdrawn the offer, and the trial court would have accepted the plea proposed, as the trial court offered no evidence that the State was not prepared to approve the offer.

To remedy the constitutional injury of a rejected plea offer may require the prosecution to re-offer the plea proposal. Lafler, at 1389. As succinctly stated in Magana, as noted in Turner, a remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests". (quoting United States v. Morrison, 449 US 361, 364, 66 L.Ed 2d 564, 101 S.Ct. 665 (1981).) The remedy for a Sixth Amendment violation should "neutralize" the constitutional deprivation suffered by the defendant, a new trial was an inappropriate remedy for a defendant who had constitutionally deficient counsel during the plea negotiation process. Id at 1208. Instead, we held that as a remedy, the prosecution was free to offer the defendant another plea bargain, but that any plea offer in excess of the original offer must overcome a rebuttable presumption of prosecutorial vindictiveness. Id at 1209.

Ms. Benton's right to effective assistance of counsel on her first appeal of right was violated. Her right to effective assistance of trial counsel was violated. Ms. Benton contends that she made her appellate attorney aware of the one year plea offer before he filed her direct appeal. It was his job to explore to determine why Ms. Benton would turn down the one year offer. Ms. Benton has established cause to excuse the procedural default of her claim and has described the prejudice suffered as a result of the default. She has established that her trial counsel's representation fell below an objective standard of reasonableness, and that there's a reasonable probability that but for counsel's errors the result of the

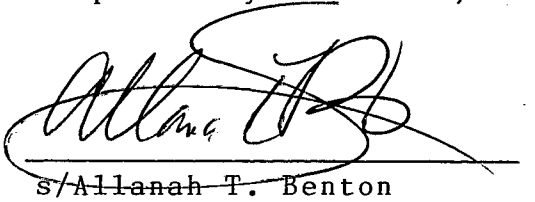
proceeding would have been different.

Ms. Benton has made a diligent attempt to develop the facts of her claim, and has requested an evidentiary hearing to substantiate her claims.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Petitioner Allanah Benton respectfully asks this Honorable Court to grant the petition for writ of certiorari.

Respectfully submitted,



Dated: February 3, 2020

s/~~Allanah T.~~ Benton
In Propria Persona
Womens Huron Valley Correctional Facility
3201 Bemis Rd.
Ypsilanti, Michigan 48197
(734)572-9900