No. 19-7621

In the Supreme Court of the United States

ALLANAH BENTON, PETITIONER

v.

SHAWN BREWER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to decide whether the petitioner has presented enough evidence to show that her appellate counsel was ineffective or has otherwise demonstrated good cause to excuse the petitioner's undisputed procedural default?

2. If the default is excused, should this Court review the underlying ineffective-assistance-of-trial-counsel claim, even though the claim was not ruled on by the U.S. Court of Appeals for the Sixth Circuit, does not involve any disputed legal principles, and only asks this Court to reweigh the evidence?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Allanah Benton, a Michigan prisoner. The named respondent is Shawn Brewer, the warden of the Women's Huron Valley Correctional Facility, where Benton is being held in custody.

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The Sixth Circuit's opinion affirming the district court's denial of habeas relief, Pet. App. A, is reported at 942 F.3d 305 (6th Cir. 2019). The district court's opinion and order denying the habeas petition is unreported but available at 2018 WL 3207901.

The Michigan Supreme Court's order denying Benton's application for leave to appeal the denial of her motion for relief from judgment, Pet. App. E, is reported at 885 N.W.2d 278 (Mich. 2016). The Michigan Court of Appeals' order denying Benton's application for leave to appeal the denial of her motion for relief from judgment, Pet. App. F, is not reported. The Genesee County Circuit Court's order denying Benton's motion for relief from judgment, Pet. App. G, is not reported.

JURISDICTION

The State agrees that this Court has jurisdiction to consider the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) 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.

INTRODUCTION

This petition involves a state criminal defendant's run-of-the-mill claim that counsel was ineffective, along with a standard, undisputedly applicable procedural bar that forecloses that claim in this habeas action. There are no legal disputes, no circuit splits, and no questions of jurisprudential significance.

Petitioner Allanah Benton seeks relief on her claim that counsel was ineffective by giving her wrong advice that led to her rejecting a favorable plea deal. But a procedural default stops this claim in its tracks. Benton failed to raise the claim on direct appeal in the state courts, and she acknowledges her shortcoming. She says that she has good cause to excuse the default, but the only reason she currently says amounts to good cause involves a fact-bound question: Did she provide enough evidence to prove her appellate counsel was ineffective for failing to raise the claim on direct appeal? That question is not worthy of review in this Court.

And neither is the question of the validity of the reason she gave in the court below. Benton argued that she could not have known that she could obtain relief on a claim that counsel's ineffectiveness led to a *rejection* of a plea offer because such a claim was not recognized by this Court until it decided *Lafler* v. *Cooper*, which was after her appeal of right concluded. But it is clear that *Lafler* did not establish a new rule of constitutional law. Thus, this reason is similarly not sufficiently compelling to allow for review of the undisputed procedural default.

And even ignoring the default, Benton's underlying arguments involve mundane factual disputes. Benton claims that before her trial for sexually assaulting a minor, her trial counsel discussed a plea deal that the prosecutor had offered whereby

she would plead to "a lesser charge" and receive only one year in jail. Though she wanted to avoid the 25-year mandatory minimum sentence that was imposed after her jury-trial conviction, Benton contends that she declined the plea because her counsel advised her that her parental rights to her two infant children would necessarily be terminated. According to Benton, had she known that she would have received a hearing to determine the fate of her parental rights, she would have accepted the plea deal. She now argues that the incorrect advice she received amounted to ineffective assistance of counsel.

This argument is uncompelling. The only point of disagreement among the parties is whether the facts underlying the claim actually happened—*i.e.*, whether the extremely favorable plea deal was actually offered, and whether counsel actually gave the incorrect advice that her parental rights would necessarily be terminated. Benton seeks error correction, by reevaluating the evidence supporting her factual claims. Such a claim does not merit this Court's review. And there was no error in an event, because under the highly deferential standard of review proscribed in 28 U.S.C. § 2254, the Michigan courts reasonably rejected Benton's claim.

Because neither the applicable procedural default nor the underlying claim warrant review, this Court should deny certiorari.

STATEMENT OF THE CASE

As a result of her Genesee County jury-based convictions of two counts of first-degree criminal sexual conduct (CSC) involving a child under 13 years of age, Mich. Comp. Laws § 750.520b(1)(a), the State now holds Benton in custody in the Michigan

Department of Corrections. Benton is currently serving a sentence of 25 to 38 years' imprisonment for her convictions.

A. Trial facts

Benton's convictions stem from her sexual assaults on a 12-year-old boy that occurred in October 2007. The Michigan Court of Appeals accurately summarized the facts adduced at trial as follows:

> Defendant, a former elementary school teacher, was convicted of engaging in sexual intercourse with a 12-year-old former student from her sixth grade class. The victim had academic and behavioral problems and was suspended from school for fighting with another student at the beginning of the 2007-2008 school year. Defendant intervened on the victim's behalf and persuaded the school principal not to expel the victim from school. After the victim returned to school, defendant invited him to religious activities at her masjid (mosque) and to her home, purportedly to offer him guidance and help him with his anger and academic problems. The victim was subsequently expelled from school after a second fighting incident. After his expulsion, he spent more time with defendant at her home, with his mother's permission.
>
> According to the victim, he and defendant progressed from hugging, to holding hands, to kissing, before eventually engaging in sexual intercourse. The victim testified that he and defendant had sexual intercourse on two different evenings in October 2007. After the second incident, the victim called defendant from his home and inadvertently recorded the call. During the recorded call, the victim referred to defendant as his girlfriend and stated that he was proud to be involved with a grown woman. The victim's mother heard the recording and reported it to the school. The school board later terminated defendant from her teaching position and that decision was upheld by the tenure commission.

People v. *Benton*, 817 N.W.2d 599, 602–03 (Mich. Ct. App. 2011).

B. State court appellate proceedings

Following her conviction and sentence, Benton filed a claim of appeal in the Michigan Court of Appeals, which raised three claims not at issue here. The Michigan Court of Appeals affirmed Benton's conviction in a published opinion. Pet. App. I.

Benton subsequently filed an application for leave to appeal in the Michigan Supreme Court, which raised the same three claims as in the Michigan Court of Appeals. The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed by the Court. Pet. App. H. Two of the state justices would have granted leave to appeal. *Id*.

Benton returned to the trial court and filed a motion for relief from judgment, which contained the ineffective-assistance-of-counsel claim at issue here. In support of her claim, Benton attached two affidavits and an "offer of proof" to her motion. One of the affidavits was her own, in which she stated that on the morning of the first day of trial, her attorney, Michael Cronkright, told her "for the first time" that the prosecution offered that she could plead " 'to a lesser charge, and do a year in the county.' " Pet. App. J, ¶ 1. According to Benton, she asked Cronkright whether "the State would take [her] children from [her]," and Cronkright responded that "the State would end [her] parental rights." (*Id*.) Benton averred that upon learning that her parental rights would necessarily be terminated if she accepted the plea deal, she did not consider the offer. (*Id*. at ¶ 2.) She also claimed in her affidavit that she has since learned that her parental rights would not have automatically been terminated following the plea and that, had she known this, "there is no doubt that [she] would have accepted" the offer. (*Id*. at ¶¶ 2, 3.)

In the second affidavit, Carolyn Gist averred that she was a friend of Benton's who attended the trial. Pet. App. K. Gist stated that she attended a meeting between Benton and Cronkright "[o]n the eve of the trial, just before trial began," where she heard Cronkright tell Benton that "she could plead to a lesser CSC felony and receive a jail term." (*Id*. at ¶ 2.) Gist also heard Cronkright acknowledge that accepting the plea "would mean the State would take her boys from her." (*Id*.)

Finally, Benton's appellate counsel provided a signed "offer of proof," in which he alleged that he "spoke with trial counsel and counsel at least broadly corroborated the factual predicates of the attached motion short of stipulating to ineffective assistance." Pet. App. N, ¶¶ 2–3. An affidavit from trial counsel was *not* submitted with the motion for relief from judgment.

In her motion, Benton contended that her counsel provided erroneous advice, that such advice was objectively unreasonable, and that—because she would have accepted the plea deal and received a substantially lesser sentence than the 25-year mandatory minimum sentence that she is currently serving—she was prejudiced by her counsel's performance. (11/13/12 Br. in Supp. of Mot. for Relief from J. at 4–7.) She gave two reasons for failing to raise this claim on direct appeal: (1) this Court's decision in *Lafler* v. *Cooper*, which applied *Strickland*'s prejudice prongs to situations where counsel's erroneous advice leads to a rejection of a plea offer, and (2) her

appellate counsel's failure to identify and raise the claim amounted to ineffective assistance of counsel.[1] (*Id*. at 6.)

The trial court denied the motion for relief from judgment. Pet. App. G, p. 5. The court first noted that Benton failed to raise the claim on direct appeal, as required by Michigan procedural rules. *Id*. at 2. The court found that there was good cause for failing to abide by the rule because the Supreme Court's decision in *Lafler* was not released until after the Michigan Court of Appeals denied Benton's appeal and because Benton's appellate counsel conceded that he performed ineffectively. *Id*. at 2. But it found that Benton did not suffer actual prejudice, meaning that she failed to meet the requirements of Michigan Court Rule 6.508(D)(3)(b). *Id*. at 3–5.

The trial court also held that Benton's ineffective-assistance claim was meritless. The court analyzed the claim in detail, determining that Benton failed to meet her burden under *Lafler* of showing that, but for counsel's deficient advice, she would have accepted the plea offer and it would have been presented to and accepted by the court. (4/14/15 Order Den. Def.'s Mot. for Relief from J. at 2–5.) Specifically, the court noted that there was no evidence that a formal offer was made and found incredible Benton's claim that she would have accepted the plea absent counsel's deficient advice. (*Id*.)

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[1] Benton was represented by counsel in her state-court post-conviction motion—the same counsel who represented her on direct appeal. Oddly, the post-conviction motion expressly stated that counsel was "stipulat[ing] to a finding of ineffective assistance of appellate counsel." (11/13/12 Br. in Supp. of Mot. for Relief from J. at 6.)

After the trial court denied the motion for relief from judgment, Benton filed an application for leave to appeal in the Michigan Court of Appeals. The court denied the application because Benton "failed to establish that the trial court erred in denying her motion for relief from judgment." Pet. App. F. Benton applied for leave to appeal this decision in the Michigan Supreme Court, but she was denied relief under Michigan Court Rule 6.508(D). Pet. App. E.

C. Federal habeas proceedings

Benton filed a habeas petition in the district court, in which she raised four claims, including the ineffective-assistance claim at issue here. In her petition, she again explained that she did not raise the ineffective-assistance claim on direct appeal because this Court's decision in *Lafler* had not yet been issued. (10/12/16 Pet. at 10.) She also attached a copy of a brief that she filed in a state court, in which she argued her appellate counsel was ineffective. (9/28/15 Def.-Appellant's Delayed Appl. for Leave to Appeal at 10–11, attached to 10/12/16 Pet., Doc. p. 38–39.) The court denied the petition.

Regarding the ineffective-assistance claim, the court found it without merit, highlighting discrepancies between the record and Benton's recollection of the plea offer, and questioning the credibility of her rendition of the advice that she relied on in making her decision to reject the purported deal. (6/29/18 Op. and Order Den. the Pet. for a Writ of Habeas Corpus at 26–32.) The court also denied Benton a certificate of appealability but granted her leave to appeal *in forma pauperis*. (*Id.* at 34.)

Subsequently, the court of appeals granted Benton a certificate of appealability, limited to her claim "that her counsel was ineffective in advising her that her parental rights would be terminated if she accepted a plea offer." Pet. App. C, p. 3. After briefs were filed, the court granted Benton's motion to appoint counsel, and it appointed counsel for purposes of oral argument. Pet. App. B. Ultimately, the court affirmed the district court's decision denying the petition. Pet. App. A.

The court's decision was solely a procedural one. After noting that it was undisputed that the underlying ineffective-assistance-of-trial-counsel claim was defaulted, the court considered both of Benton's proffered reasons for failing to raise the claim on direct appeal and found that they failed to amount to good cause.

First, addressing Benton's argument that she could not have raised the claim until after *Lafler* was decided, the court cited *Reed* v. *Ross*, 468 U.S. 1, 16 (1984), and noted that "[f]or novelty to amount to cause, the bar is a high one—the claim must have been 'so novel that its legal basis [was] not reasonably available' at the time of default." Pet. App. A at 4 (quoting *Reed*, 468 U.S. at 16). The court then found that *Lafler* did not meet the novelty requirement here, citing two of its own opinions decided before Benton's direct appeal: a 2001 decision that "lent an ear to defendants who claimed that their counsel's deficient advice caused them to reject favorable plea deals," and the 2010 decision from which the writ of certiorari in *Lafler* came from, which granted relief based on that same ground. Pet. App. A at 4.

Second, the court addressed Benton's alternative argument that appellate counsel was ineffective for failing to raise the claim on direct appeal. Pointing out

that the burden is on the petitioner to prove ineffective assistance, the court found that Benton provided no evidence of her appellate counsel's ineffectiveness (other than counsel's offer to stipulate to his own ineffectiveness, which is "meaningless") and therefore failed to satisfy her burden. Pet. App. A at 4–5. Because Benton could not establish cause to excuse the default, the court did not consider prejudice and affirmed the district court's decision denying habeas relief. Pet. App. A at 5.

REASONS FOR DENYING THE PETITION

I. The U.S. Court of Appeals for the Sixth Circuit correctly determined that Benton failed to demonstrate good cause to excuse the default, and Benton has not identified any conflict or other compelling reason why review of this straightforward procedural ruling is warranted.

There is no dispute that the underlying constitutional claim in this habeas action is procedurally defaulted. Benton maintains that she has shown good cause to excuse the default. The Sixth Circuit disagreed. For the reasons explained below, review of the this decision by this Court is not warranted.

A. Reviewing whether Benton's appellate counsel was ineffective involves an uncompelling factual issue, and the Sixth Circuit's ruling was correct in any event.

In her petition, Benton argues that she received ineffective assistance of appellate counsel when her counsel failed to argue on direct review that her trial counsel was ineffective for providing incorrect legal advice during the plea-bargaining process. But whether her appellate counsel was ineffective or not here involves purely fact-bound questions.

No doubt, Benton had a constitutional right to the effective assistance of appellate counsel on direct review. *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985). And a violation of that right can amount to good cause to excuse a procedural default on habeas review. *Edwards* v. *Carpenter*, 529 U.S. 446, 451–52 (2000); *McCleskey* v. *Zant*, 499 U.S. 467, 493–94 (1991). The Sixth Circuit's ruling, however, did not rest on an interpretation of these legal principles.

Rather, its ruling was fact-bound: by offering nothing more than a conclusory (and partially self-serving) concession from appellate counsel, Benton simply failed to provide enough evidence to demonstrate ineffective assistance. Pet. App. A at 4 ("And Benton cannot satisfy her burden with nothing—which is what the evidence of her appellate counsel's ineffectiveness amounts to."). Assessing whether that ruling is correct would involve nothing more than re-weighing the evidence that Benton has submitted. That does not amount to a compelling reason warranting review by this Court.

And, regardless, the Sixth Circuit's ruling was correct. Although Benton alleges that the default should be excused because her appellate counsel should have discovered and raised her ineffective-assistance-of-trial-counsel claim, Benton has failed to meet her burden of demonstrating constitutional ineffectiveness.[2] Notably, appellate counsel Michael Faraone's "offer of proof" does not establish error rising to the level of ineffective assistance. The document provides only vague allegations and conclusory statements. For instance, Faraone offers that he "spoke with trial counsel and counsel at least broadly corroborated the factual predicates of the attached motion short of stipulating to ineffective assistance." (Pet. App. N, ¶ 2.) Faraone does

[2] To the extent that the state trial court appeared to find "good cause" for purposes of Mich. Ct. R. 6.508(D)(3)(a) was established by appellate counsel's ineffectiveness, the Sixth Circuit correctly determined that the finding was irrelevant for purposes of whether Benton met the *federal* good-cause requirement. See *Murray* v. *Carrier*, 477 U.S. 478, 489 (1986) (noting that the question whether there is cause for a procedural default is "a question of federal law"). In other words, it is the job of the federal court to determine on its own whether "good cause" to excuse Benton's default of her claim can be established by the ineffectiveness of her appellate counsel.

not name which attorney he spoke with—Benton had two—nor does he expand on when he spoke with that attorney. For that matter, he never indicates whether Benton even relayed to him the circumstances of the purported off-the-record plea offer. The offer of proof does not provide any substantive facts enabling a court to find that Faraone should have been aware of this clandestine issue.

Furthermore, Faraone's offer to "stipulate" that he was ineffective on direct appeal does not necessarily mean that he was, in fact, ineffective. See, e.g., *Ebert* v. *Gaetz*, 610 F.3d 404, 414 (7th Cir. 2010) (approving state court's decision to not afford any weight to attorney's assessment of his own performance as constitutionally ineffective); *Walls* v. *Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998) ("[A]dmissions of inadequate performance by trial lawyers are not decisive in ineffective assistance claims."); *Harris* v. *Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989) ("[B]ecause ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive.") A vague assertion that Benton's factual allegations regarding trial counsel were "broadly corroborated," Pet. App. N, ¶ 2, along with a conclusory concession to deficient performance on appeal, *id.*, ¶ 3, does not amount to error rising to the level of ineffective assistance of counsel. Indeed, as the Sixth Circuit found, it is "meaningless." Pet. App. A. at 5. In other words, Benton provides no reliable evidence that her appellate counsel was ineffective.

Thus, Benton has neither shown her claim of cause to excuse her default was factually compelling, nor that it was correct. Review is not warranted.

B. In its alternative analysis, the Sixth Circuit used undisputed legal principles and correctly ruled that *Lafler* did not constitute a novel ruling that would amount to good cause.

When she filed her habeas petition in the district court, Benton asserted that the timing of this Court's decision in *Lafler* v. *Cooper*, 566 U.S. 156 (2012), serves as cause to excuse her failure to raise her ineffective-assistance claim on direct review. But she does not include any argument on this point in her petition to this Court. Thus, this argument is abandoned. And even if this Court considers the argument, the straightforward legal analysis that the Sixth Circuit employed to reject it does not warrant review.

According to Benton's argument, because *Lafler* was not decided until after the Michigan Court of Appeals affirmed her convictions and after she filed an application for leave to appeal in the Michigan Supreme Court, she had no opportunity to raise the claim. In essence, Benton argued that her claim was so novel that she had no reason to raise it at the time. It is true that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). But Benton's ineffective-assistance claim was not so novel. This Court held long ago that defendants have a right to counsel during the plea-bargaining process. See *Hill* v. *Lockhart*, 474 U.S. 52, 57 (1985). *Lafler*, then, did not establish a new rule, as the Sixth Circuit has recognized as well as the other circuits. See e.g., *In re Liddell*, 722 F.3d 737, 738–39 (6th Cir. 2013) (per curiam) ("neither *Frye* nor *Cooper* created a 'new rule of constitutional law' made retroactive to cases on collateral review by the Supreme Court"); see also *Gallagher* v. *United*

States, 711 F.3d 315, 315–16 (2d Cir. 2013) (per curiam) (same); *In re King*, 697 F.3d 1189 (5th Cir. 2012) (per curiam); *Hare* v. *United States*, 668 F.3d 878, 879, 881 (7th Cir. 2012) (same); *Williams* v. *United States*, 705 F.3d 293, 294 (8th Cir. 2013) (per curiam) (same); *Buenrostro* v. *United States*, 697 F.3d 1137, 1140 (9th Cir. 2012) (same); *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013) (per curiam) (same); *In re Perez*, 682 F.3d 930, 933–34 (11th Cir. 2012) (per curiam) (same).

Instead, this Court *applied* the *Strickland* test—and the holding in *Hill* extending the *Strickland* test to counsel's performance during the plea-bargaining stage—and found that counsel's advice that led to a client's decision to reject a plea offer met that test. See *Lafler*, 566 U.S. at 163 ("The question for this Court is *how to apply Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.") (emphasis added). That this Court had not yet been confronted with a specific set of facts whereby a defendant *rejected* a plea deal on counsel's advice does not mean that the rule announced in *Hill* did not apply to Benton's claim.

Indeed, the Sixth Circuit held long before Benton's appeal that "the right to the effective assistance of counsel extends to the decision to reject a plea offer." *Turner* v. *Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988) ("an incompetently counseled decision to go to trial appears to fall within the range of protection appropriately provided by the Sixth Amendment") (internal quotes omitted), *vacated on other grounds*, 492 U.S. 902 (1089), *reinstated on other grounds*, 940 F.2d 1000, 1002 (6th Cir. 1991); see also *Magana* v. *Hofbauer*, 263 F.3d 542, 547–48 (6th Cir. 2001). Other circuits ruled

in the same manner. *United States* v. *Gordon*, 156 F.3d 376, 380 (2nd Cir. 1998) (finding counsel ineffective for providing erroneous advice regarding sentence exposure that led to the defendant rejecting the plea offer); *Boyd* v. *Waymart*, 579 F.3d 330, 377 (3rd Cir. 2009) ("Where, as here, a petitioner alleges that counsel's ineffective assistance cost him the opportunity to take a plea, he must demonstrate a reasonable probability that, but for counsel's ineffective assistance, he would have accepted the foregone plea offer."); *Paters* v. *United States*, 159 F.3d 1043, 1046–47 (7th Cir. 1998) (holding that, to establish prejudice on a claim that counsel's advice resulted in the defendant's rejection of a plea offer, the defendant must show that "there is a reasonable probability that, but for counsel's inadequate performance, he would have accepted the government's offer"); *Williams* v. *Jones*, 571 F.3d 1086, 1092 (10th Cir. 2009) ("[E]ffective assistance is guaranteed for the whole plea process, not just in connection with accepting (but not rejecting) a plea agreement.")

In fact, this Court's *Lafler* decision arose from an opinion out of the Sixth Circuit, which was released before Benton filed her brief on appeal in the Michigan Court of Appeals. In that opinion, the Sixth Circuit held that counsel's deficient advice during the plea-bargaining process prejudiced the defendant by depriving him of the opportunity to plead guilty, and that the remedy for such a violation was the opportunity to accept the plea deal. *Cooper* v. *Lafler*, 376 Fed. App'x 563, 571, 573, 574 (6th Cir. 2010), *judgment vacated by Lafler* v. *Cooper*, 566 U.S. 156 (2012). And, more importantly, a Michigan appellate court had ruled in a similar fashion at the time Benton's direct appeal was filed. See *People* v. *McCauley*, 782 N.W.2d 520, 523–26

(Mich. Ct. App. 2010) (citing *Hill* and finding that counsel was ineffective for providing improper advice that led to the defendant rejecting a plea deal, and remanding the case "to allow the prosecution to reinstate its original plea offer").[3] Considering this binding caselaw, along with the numerous persuasive authorities from federal courts, Benton's claim was certainly "reasonably available" at the time of her direct appeal. Thus, the timing of the *Lafler* decision does not excuse her failure to raise the claim on direct appeal.

Because the court of appeals relied on undisputed legal principles and correctly determined that the holding of *Lafler* was not so novel as to excuse Benton's failure to raise her claim on direct appeal, the issue is not compelling and does not warrant review in this Court.

II. Benton's underlying claim—which was not ruled on by the court below—seeks only a reevaluation of the weight of evidence, and this run-of-the-mill claim has no merit.

Even if this Court were to review and reverse the Sixth Circuit's procedural ruling, it would not affect the outcome of the case. That is because Benton's underlying claim—that her trial counsel provided ineffective advice that led to her rejecting a favorable plea deal—has no merit and fails to overcome the highly deferential standard governing habeas review.

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[3] The Michigan Supreme Court later reversed the Michigan Court of Appeals' decision in *McCauley* and remanded the case to the trial court "for consideration of an appropriate remedy in light of *Lafler*." *People* v. *McCauley*, 821 N.W.2d 569 (Mich. 2012).

A. The underlying claim should not be reviewed by this Court because there is no ruling from the Sixth Circuit to review.

Preliminarily, with respect to Benton's underlying claim, this Court should not consider it. The Sixth Circuit's decision rested entirely on procedural grounds. Because it found that Benton's claim was precluded by an unexcused default, it did not reach the merits of the claim. Though the district court did rule on the merits, this Court should not consider it without first allowing the court below to address the arguments. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here."); *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) ("[I]t is generally unwise to consider arguments in the first instance.")

This Court's inability to review the underlying claim provides further reason to deny the petition, but otherwise makes clear that it should not be reviewed here in the first instance.

B. There being no dispute over the applicable law, review of the underlying claim would be nothing more than error correction.

Benton's underlying claim is not compelling. She claims that her counsel advised her that her parental rights to her two minor children would necessarily be terminated if she pleaded guilty to a lesser charge and that, had she known that she would have actually received a hearing to contest the termination, she would have accepted the offer. The last state court to issue a reasoned decision on the claim, after finding it defaulted, analyzed the claim under the framework that this Court

proscribed in *Lafler* and held that Benton could not meet her burden of establishing that counsel was ineffective. The district court, applying the deferential habeas standard of review, held the same.

In her petition in this Court, Benton does not identify any error of law; rather, she simply disputes *how Lafler* was applied to the facts of her case and asks this Court to assign the evidence supporting her claim more weight than the previous reviewing courts have. This amounts to nothing more than error correction that does not deserve certiorari review in this Court. See Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

C. The district court correctly determined that Benton failed to demonstrate entitlement to relief under *Lafler* and AEDPA.

Even if Benton alleged more than pure factual error in her petition for certiorari, her factual claims do not entitle her to relief. The district court reviewed the state court's decision in light of the stringent standard of review in habeas cases outlined in AEDPA and correctly determined that *Lafler* was properly applied.

It is undisputed that criminal defendants are entitled to the effective assistance of counsel during the plea-bargaining process. *Hill*, 474 U.S. at 57. "[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *Missouri* v. *Frye*, 566 U.S. 134, 140 (2012). In *Lafler*, this Court discussed "how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the

ensuing trial." *Lafler*, 566 U.S. at 163. The petitioner must show that "the outcome of the plea process would have been different with competent advice." *Id.* at 163.

Specifically, the petitioner must show that but for the ineffective advice of counsel there is a reasonable probability that (1) "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)," (2) "the court would have accepted its terms," and (3) "the conviction and 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.* at 164. When determining the remedy for ineffective assistance of counsel relating to defendant's rejection of a plea offer, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for her actions. *Id.* at 170–71.

And because this is a habeas action, Benton also must meet the stringent requirements of AEDPA. AEDPA prevents a federal court from granting habeas corpus relief based on any claim "adjudicated on the merits" in state court, unless the petitioner can establish that the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) 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. § 2254(d).]

Under the "contrary to" clause of § 2254(d)(1), the petitioner must establish that "the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decide[d] a case differently than [the

Supreme] Court has on a set of materially indistinguishable facts." *Metrish* v. *Lancaster*, 569 U.S. 351, 357 n.2 (2013) (internal quotation marks and citation omitted).

Under the "unreasonable application" clause of § 2254(d)(1), the petitioner must establish that, after "identif[ying] the correct governing legal principle from the Supreme Court's decisions, [the state court] unreasonably applie[d] that principle to the facts of [his] case." *Hill* v. *Curtin*, 792 F.3d 670, 676 (6th Cir. 2015) (en banc) (alteration omitted). "[T]he state court's decision must have been more than incorrect or erroneous[;]" rather, it must have been "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 520–21 (2003)). "[E]ven clear error will not suffice." *White* v. *Woodall*, 134 S. Ct. 1697, 1702 (2014). Again, the state court's determinations of law and fact must be "so lacking in justification" as to give rise to error "beyond any possibility for fairminded disagreement." *Dunn* v. *Madison*, 138 S. Ct. 9, 12 (2017) (per curiam) (quoting *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011)).

Under § 2254(d)(2), the "unreasonable determination" subsection, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Wood* v. *Allen*, 558 U.S. 290, 293 (2010). "[A] state-court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt* v. *Titlow*, 571 U.S. 12, 15 (2013) (internal quotation marks and citation omitted).

In rejecting Benton's claim under *Lafler*, the state court first found that Benton failed to meet her burden of showing that an accepted plea offer would have been presented to the court. This determination was not "so lacking in justification" as to give rise to error "beyond any possibility for fairminded disagreement." See *Madison*, 138 S. Ct. at 12 (quoting *Richter*, 562 U.S. at 103).

First, in finding that Benton would not have accepted the plea offer, the state trial court considered that she continually maintained her innocence throughout the proceedings and that a guilty plea would mean that she would have to provide perjured testimony in support of that plea. This Court has never clearly established that considering a defendant's protestations of innocence is inappropriate when determining whether that defendant would have accepted a guilty plea. In other words, the trial court's consideration of Benton's constant innocence proclamations was not contrary to or an unreasonable application of clearly established federal law. Given the trial court's finding, Benton cannot demonstrate a reasonable probability that she would have accepted the plea offer had she been given competent advice.[4]

[4] In finding that Benton would not have accepted the offer, the state court also concluded that Benton's concern about her parental rights was not credible because, once she was convicted and served a mandatory minimum of twenty-five years in prison, her children would no longer be minors. Admittedly, that reasoning ignores that Benton may have weighed the possibility of a not-guilty verdict as greater than the threat of her parental rights being automatically terminated. But habeas relief "should not be imposed unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel* v. *Lambert*, 565 U.S. 520, 525 (2012). As discussed, the state court had other reasonable grounds for denying relief.

Even if Benton could show a reasonable probability that she would have accepted the plea, she did not show that the prosecution would not have withdrawn the plea. This is so because, as the state court found, no formal offer was ever made. At a November 30, 2009 pretrial hearing, the state trial court asked the prosecutor about any plea offer, to which the prosecutor responded that "there's an *unofficial* offer out there—." (11/30/09 Hr'g Tr. at 3 (emphasis added).) The prosecutor added that her office would not extend an official offer until it was convinced that Benton was considering accepting the offer. (*Id.*) Put differently, the prosecutor was implying that no formal offer existed and that, even if Benton stated her willingness to accept the offer, her office was not bound by the terms and could choose to proceed to trial regardless. Given the indeterminable nature of the prosecution's formal position, Benton has not demonstrated a reasonable probability that the prosecution would have extended a *formal* offer and presented it to the court.[5]

Moreover, Benton has not demonstrated a reasonable probability that the court would have accepted the terms of the offer, the second prong announced in *Lafler*. Even in Benton's own self-serving affidavit, as the state court noted, there was

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[5] Within its finding that the prosecutor never presented a formal offer, the state trial court noted that Benton's affidavit was inconsistent with Gist's affidavit. The State acknowledges that Gist's attestation that the plea-offer conversation between attorney Cronkright and Benton occurred "on the eve of trial, just before trial began" was not necessarily inconsistent with Benton's assertion that the conversation occurred "[o]n the morning of the first day of trial." But, to the extent that this factual determination was unreasonable, the state court only briefly mentioned the inconsistency within its more-detailed finding that both affidavits were inconsistent with the record. Any mistake on this factual point, then, was not critical to the state court's ultimate determination.

no evidence of the terms of the supposed offer. She states only that her attorney informed her that she could plead " 'to a lesser charge, and do a year in the county.' " (Pet. App. J, ¶ 1.) There is no evidence of what the "lesser charge" would have been, or what facts Benton would have had to admit to in order to form a factual basis for the charge. See Mich. Ct. R. 6.302(D)(1) ("If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.") It was Benton's burden to establish that the trial court would have accepted the terms of the plea offer. *Lafler*, 566 U.S. at 164. By failing to provide any evidence of the offer's terms, Benton did not meet her burden.

The state court properly applied *Lafler* to the facts of this case. Benton has not shown that the decision denying relief was contrary to or an unreasonable application of *Lafler*, or of any other decision of this Court. Nor has she alleged any circuit split in the way *Lafler* is applied to cases like hers. As such, this case does not present a compelling reason for review.

D. Even if the district court's decision was incorrect, Benton would not be entitled to the relief she seeks, making this case a poor vehicle for review.

Every court to review Benton's ineffective-assistance claim has focused on the prejudice prong of the *Strickland* framework. But to succeed on her claim, Benton must also demonstrate that counsel's performance was deficient. She says that an evidentiary hearing should be held so that she can show that her counsel performed

deficiently. On the face of the affidavits she has submitted, however, it is clear that she would be unable to meet her burden.

In her affidavit, Benton asserted that she first learned that the prosecution offered a plea deal from "[her] attorney, Michael Cronkright," on the first day of trial, before it began. (Pet. App. J, ¶ 1.) She also contended that this conversation was "the only conversation that she had with attorney Cronkright that addressed plea negotiations and any offer by the prosecution." (*Id*., ¶ 4.) This assertion directly contradicts the record on two fronts—when she first learned of an offer, and from whom. Notably, Benton had *two* attorneys who assisted during trial, Cronkright, and Steven A. Freeman. Freeman represented Benton at a November 30, 2009 pretrial hearing where a plea offer was discussed on the record. At this hearing, which occurred two days before jury selection began, the prosecutor informed the trial court that an unofficial offer had been discussed. (11/30/09 Hr'g Tr. at 3.) When the court asked whether Freeman had discussed the offer with Benton, Freeman replied, "Yes, this very morning, as a matter of fact." (*Id*.) Thus, Benton's own attorney stated on the record that Benton was first informed of a potential plea offer through him—not Cronkright—as Benton now asserts.

Attorney Freeman also contended on the record that Benton first learned of the offer that day—two days before trial—not on the morning of the first day of trial. In fact, the prosecutor indicated on the record that the potential offer would only be available until the afternoon on December 1, 2009, the day before trial. (*Id*. at 10.) Given her attorney's acknowledgement that he had spoken with her two days before

trial, along with the prosecutor's statement that the offer would no longer be available on the day of trial, Benton's claim that she first heard of a plea offer on the first day of trial from her *other* attorney directly contradicts the record.

When and from whom Benton first heard of a potential plea offer is an important factual issue. But Benton's version of when she first heard of a potential offer is not credible, given that it is directly contradicted by the record. With an important allegation by Benton rendered untrustworthy, it stands to reason that her remaining allegations are also incredible. In other words, Benton's assertion that her counsel told her "that the State would end [her] parental rights," without explaining the legal process that would entail, is improbable. Considering her lack of credibility, Benton has not demonstrated that her trial counsel performed deficiently.

Moreover, Benton provided no credible evidence, other than her own self-serving affidavit, in support of her claim. She did provide an affidavit from Carolyn Gist and an "offer of proof" from her attorney on direct appeal, Michael Faraone. But those documents are of no help to Benton. Gist's affidavit provides the same information as Benton's, but she too had a vested interest in the outcome, as Benton's friend who supported her throughout the trial. And Faraone's "offer of proof" was little more than a vague attestation, developed through hearsay, that an unnamed trial counsel might have done something wrong in this case. Neither amounts to showing that counsel's performance was deficient.

Benton also provides to *this* Court an affidavit from Michael Cronkright, one of her trial attorneys. But that affidavit has never been presented to and considered

by any other court, state or federal. Because it was not in the state-court record, it cannot be considered on habeas review. *Cullen* v. *Pinholster*, 563 U.S. 170, 181 (2011). And because it was not considered by the federal courts below, it should not be considered by this Court. *Cutter*, 544 U.S. at 718, n.7.

Regardless, the affidavit does not support Benton's claim. Despite the fact that it was not signed until 7½ years after Benton first raised her claim (and nearly a decade after the events in question occurred), nowhere in the affidavit does the attorney corroborate the critical fact that forms the basis of the ineffective-assistance claim. Although the attorney provides detailed information about the alleged plea offer, he fails to include any details about his advice to Benton. So, even with this tardy, improperly included affidavit, the only evidence showing that counsel actually performed deficiently comes from the self-serving affidavits of Benton herself and a close friend.

"It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.' " *Burt* v. *Titlow*, 571 U.S. 12, 23 (2013) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984)). No evidentiary hearing was required to address a claim that is supported only by uncorroborated self-serving affidavits that contradict the record. Absent any credible evidence, Benton has failed to overcome the strong presumption that counsel performed reasonably. Consequently, Benton cannot meet the deficient performance prong of *Strickland*.

Because it is clear, even without an evidentiary hearing, that Benton cannot show that her counsel performed deficiently, this case presents a poor vehicle for review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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