NO. 19-7621

IN THE SUPREME COURT OF THE UNITED STATES

ALLANAH BENTON,

Petitioner,

v.

SHAWN BREWER, WARDEN,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Allanah T. Benton #754842
In Propria Persona
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PARTIES TO THE PROCEEDING

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EXPLANATION FOR DELAYED REPLY BRIEF

Petitioner Benton asserts that she tested positive for Covid-19 on May 13, 2020, and was moved into a quarantined housing unit on May 20, 2020, where she spent three weeks. She received Respondent's Brief in Opposition on June 1, 2020 while under quarantine. [App. G].

With the Michigan government's ordered lock-downs, the Womens Huron Valley Law Library closed on March 28, 2020. The Law Library recently resumed operation on July 9, 2020 under strict scheduling and social distancing protocol. [App. E].

This explains the reason Petitioner's Reply Brief was delayed.

REASON FOR GRANTING THE PETITION

I. IN THE INTEREST OF FAIRNESS AND JUSTICE THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE ON ITS OWN THAT EVIDENCE PETITIONER HAS PRESENTED TO SUPPORT HER CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS SUFFICIENT TO ESTABLISH GOOD CAUSE TO EXCUSE THE PROCEDURAL DEFAULT OF HER CLAIM.

II. IN THE INTEREST OF FUNDAMENTAL FAIRNESS PETITIONER IS ENTITLED TO CAREFUL CONSIDERATION, PLENARY REVIEW, AND AN OPPORTUNITY TO PRESENT THE RELEVANT FACTS OF HER CLAIM.

There are enough compelling facts to excuse the procedural default of Petitioner's ineffective appellate counsel claim. The state presented only conjecture to disprove Ms. Benton's claim. The state offered nothing substantial to weigh against Ms. Benton's evidence. They only sought to discredit her and object to her request for a fact-finding hearing.

Ms. Benton explained in her petition, and will expound on her explanation based on the questions by the government.

THE LAFLER NOVELTY QUESTION

Petitioner Benton's court appointed appellate attorney Michael Faraone asserted in the brief attached to her motion for relief from judgment that "This case is on-point with Lafler". He also incorrectly asserted that "Lafler constitutes a change in law". [App. A, p. 7]. An effective attorney would have recognized that Lafler did not represent a new rule of law, but a specific application of the Strickland standard as applied to the context of pre-trial plea negotiations. Lafler v. Cooper, 566 U.S. 156 (2012).

Petitioner Benton a lay person at the time her direct appeal was filed, was eluded by attorney Faraone's representation on

her behalf. She trusted his legal judgment and assumed that the arguments he selected for her appeal were based on his expertise in appellate law. Ms. Benton told Faraone about the one year plea offer prior to his filing her direct appeal. She did not dispute the effectiveness of the issues he presented.

The Sixth Circuit opinion that, "Lafler novelty does not establish cause", supports Ms. Benton's ineffective assistance of appellate counsel claim.

Faraone argued that the novelty of Lafler cured the procedural default of her claim. [App. A, p.6].

An effective inquiry during Petitioner's direct appeal would have shed light on this meritorious claim, thus extinguishing the procedural default by arguing ineffective assistance of trial counsel at that time. It is reasonably probable that the Michigan Court of Appeals would have conducted a Ginther hearing, during which the prosecutor could have been asked to put the terms of that offer on the record. The circuit court could then have heard from attorney Cronkright, attorney Freeman, and their consultant Kim Hart, as well as Ms. Benton and her witness Carolyn Gist while all of these questions that the courts have had could have been answered, while the case was still relatively fresh.

APPELLATE ATTORNEY NEGLECTED TO INVESTIGATE

Appellate attorney Faraone failed to explore the November 30, 2009 pretrial hearing transcripts. He failed to assess the on the record conversation between prosecutor Richardson and

defense attorney Freeman [App. C]. He failed to inquire about the docket entry on the same date, which highlighted that, "Plea offers were exchanged". [App. B, entry 33].

These facts along with Petitioner alerting Faraone about the one year offer was sufficient evidence to have put a reasonable attorney on notice. His attention should have been focused most specifically, on the part of the November 30, pretrial transcript conversation between defense counsel Freeman, the Court, and prosecutor Richardson; Freeman's assertion on the record regarding the "one concern that my client had." He stated, "**And I have [NOT] communicated that to my client.**" [App. C, pp. 3-4]. The very next statement from Freeman starts, "Which I...". The remainder of Freeman's conversation is "indiscernible", he was not at the microphone [App. C, p. 4]. The "indiscernible" conversation immediately after Mr. Freeman states that he had NOT communicated the concern to his client, represents a significant void about the plea offer being communicated to Ms. Benton. Moreover, it bolsters the credibility of Petitioner Benton, and her witness Carolyn Gist, inter alia, as to the **terms** of the plea offer being communicated on the morning of Ms. Benton's trial.

Attorney Faraone should also have weighed the significant disparity between the 25-year sentence Ms. Benton received after trial, and the one year offer that she shared with him. This should have prompted an inquiry into the reasons why that offer was not accepted by Petitioner and the Court.

Faraone was aware of the fact that, "the overwhelming majority of criminal convictions rest on pleas of guilty",

Missouri v. Frye, 566 U.S. 134 (2012).

However Faraone did not inquire prior to briefing Ms. Benton's direct appeal, as to what those circumstances were that caused Ms. Benton to risk a 25-year minimum prison sentence after being offered a jail term plea that would have amounted to 10-months.

Petitioner Benton asserts that, appellate attorney Faraone stated that he had spoken to defense attorney Cronkright, prior to filing Ms. Benton's direct appeal with the Michigan Court of Appeals. While he neglected to investigate the pretrial transcripts, he also failed during his conversation with Cronkright to make any inquiry about the opportunity or possibility of a plea in this case, while being aware of this 25-year mandatory minimum sentence. He should have inquired considering that the third and last issue that he argued in Benton's direct appeal was that the 25-year mandatory minimum was cruel and unusual punishment.

Ms. Benton asserts that she asked Faraone if she should do legal research in the facility law library to aid in her appellate filing. He assured her that, "it was not necessary for her to take on that burden, and that he would go over her transcripts with a fine toothed comb".

Petitioner Benton with her narrow understanding of the law and contrary to the suggestion of attorney Faraone, she read the Lafler ruling as well as family law cases in the law library. Ms. Benton asserts this is when she learned from a Michigan family law case that, "Incarceration alone is

insufficient to terminate parental rights in Michigan. In re Mason, 486 Mich. 142, 782 N.W. 2d 747 (Mich. 2010). Also that it was unlikely that she would lose her twin sons as a result of accepting the one year jail term offer.

After meeting with Petitioner for the second time (Sept. 2012), Faraone mentioned the option of filing the motion for relief from judgment in the circuit court. Petitioner asserts that Faraone stated that he was "optimistic" about the merits regarding the plea negotiations claim,

Benton agreed that her plea negotiations claim was "on-point", as Faraone put it, with what she'd read in Lafler. She believed that the argument in her 6.500 motion was sufficient to meet the requirements of "good cause" that she needed to establish to prevail.

Limited in her understanding, a lay person, and proceeding on her own pro se, Petitioner Benton asserts that she forged forward in the appellate process, arguing the exact same way, using the exact same legal basis that Faraone had presented in her 6.500 motion,

Attorney Faraone's "meaningless" offer of proof failed to represent the factual basis upon which it was written. Faraone erred by failing to present who he spoke to about the factual predicates of the plea offer, Cronkright or Freeman, when he spoke to them, or what the facts were that they corroborated.

Attorney Faraone failed to get affidavits from any of the professional parties that knew about the plea offer, though

he stated in his offer of proof that Cronkright, "short of stipulating to ineffective assistance" corroborated the factual predicates of Benton's claim. Attorney Faraone should have at least obtained an affidavit about the details of the offer, even if Cronkright chose not to corroborate the details that were asserted by Ms. Benton and Ms. Gist regarding Benton losing her boys.[1] Though those facts would be difficult to dispute at an evidentiary hearing, in front of a judge.

This would have quashed the trial courts clandestine characterization and misrepresentation of the validity of the prosecutor's plea offer. It also would have affirmed the credibility of Petitioner and her witness, as all three of the affidavits Benton presented in her petition refer to a plea meeting the morning of trial, with the plea terms being mentioned for the first time that morning.

The trial and district courts based their entire opinion on the fasle assertion that Petitioner and Gist were untrustworthy. The trial court committed a clear error in judgment. When there is an underlying issue of credibility, though affidavits are not conclusive they are helpful. Blackledge v. Allison, 431 U.S. 63 (1977). The courts would then have been left to only argue the merits of the ineffective assistance of trial counsel claim. This would have changed the outcome of Petitioner's appeal. Therefore Ms. Benton was prejudiced by Mr. Faraone's representation.

[1] Benton asserts that in a letter from Faraone dated 9-24-2015, he states that Cronkright and Kim Hart would not provide the kind of statements in an affidavit that were worth pursuing.

Faraone requested in Ms. Benton's motion for relief from judgment that the trial court appoint substitute counsel to look over his work and the trial record. Stating that "[He] might have an apparent conflict of interest". [App. A] Faraone continued to represent Petitioner to brief her ineffective assistance of trial counsel claim with the Michigan Court of Appeals. Good cause for failure to raise ineffective on appellate counsel is "An appellate attorney cannot be expected to raise his own ineffective assistance of counsel." Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000). Petitioner asserts and Faraone alleged that his performance was constitutionally ineffective. Counsel's failure to raise a particular claim on appeal is to be scrutinized under the cause and prejudice standard when the failure is treated as a procedural default by the state court. Murray v. Carrier, 477 U.S. 478 (1986). Petitioner Benton, unlike Carrier, has not disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. See Evitts v. Lucey, 469 U.S. 387 (1985). Id. Adherence to the cause and prejudice test "in the conjunctive", will not prevent federal habeas courts from ensuring the fundamental fairness [that] is the central concern of the writ of "habeas corpus". Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

This case presents a compelling reason for review. Under these circumstances Ms. Benton respectfully requests consideration.

TRIAL COUNSEL'S DEFICIENT PERFORMANCE

Petitioner has clearly asserted sufficient facts that if proved, would show that she was prejudiced by her defense

attorney's error and entitled to relief. No reasonable finder of fact would have considered her trial counsel's representation constitutionally effective. It is critical that this Court seek to review the facts that prove Ms. Benton has satisfied the deficient performance prong of the Strickland test.

Petitioner has never alleged that she would not have accepted the plea offer. She **only** had two questions for Cronkright when he told her about the prosecutor's plea offer the morning of trial, both involved her children. Ms. Benton avers that she asked Cronkright: (1). "Can I call my oldest son?" He replied, "You don't have time, you only have 20 minutes to decide." and (2). If I take this plea will I lose my twins?" He replied, "You might be able to visit them; I'm ready to fight your case." The only other legal professional in the court conference room at that time was legal consultant Kim Hart, who stated, "You'll probably lose them because they're boys." To date Petitioner asserts that she still has a bond and regular communication with her children, as well as her parental rights. [App. F] It is well established that parents have a significant interest in the companionship, care custody, and management of their children. This interest has been characterized as an element of "liberty" to be protected by due process. Due process applies to any adjudication of important rights. In re LaFlure, 48 Mich. App. 377, 210 NW2d 482 (1973). Cronkright would not be able to deny the facts of Ms. Benton's claim. He had an incisive awareness of her particular emphasis on the custody of her twins. He presented this very issue in his opening remarks on December 3, 2009. [App. D]

Ms. Benton's attorney failed her. His representation fell below an objective standard of reasonableness Strickland, supra.

No reasonable jurist would have found Cronkright's representation to have been effective.

The state and district court argued that Ms. Benton's protestations of innocence affected the advice that Cronkright gave. That would assume that attorney Cronkright decided that because of her protestations of innocence that he was not legally duty-bound to **correctly** and fully explain the benefits as well as the consequences of her decision in deciding to accept of reject the prosecutor's plea offer. It is held

> that a plea of guilty admits all facts well pleaded in an indictment, and that after entry of a plea and imposition of sentence, a judgment is not subject to attack upon the ground that, as a factual matter the accused was not guilty of the charged offense. Adam v. United States, 274 F.2d 880, 883 (10th Cir. 1960).

Ms. Benton was faced with analyzing in 20 minutes, the incorrect advice about losing her toddler twins weighed against going to trial. When the consequences are from the defendants perspective similarly dire, even the smallest chance of success at trial may look attractive. Lee v. United States, 137 S.Ct. 1958, 198 L.Ed 2d 476 (2017). However, unlike Lee, Benton was convinced by attorney Cronkright that she had far more than just a small chance of success. Since she trusted Cronkright's advice, she assumed he would have discouraged her from going to trial if it was unlikely that she would be successful, and

likewise would have encouraged her to take the plea if it was in his professional opinion, the best circumstance for her and her children.

Petitioner Benton asserts that attorney Cronkright never made any attempts to be certain, based on the only question she asked, if she **understood** her risk.
When she asked, "if she would lose her boys", and Cronkright responded, "You **might** be able to visit them", he never questioned whether he understood what she was asking him, or she **understood** his reply. Ms. Benton understood "lose" to mean she would lose custody as well as rights, as she was the custodial parent of the twins at the time,

Petitioner Benton has established that the state court's adjudication of the merits of her claim resulted in a decision that was based on an unreasonable determination of the facts, in light of the unrebutted evidence that was presented to the state court. The prosecutor never filed a responsive affidavit.

Therefore, she has met the requirements of AEDPA 28 U.S.C. § 2254(d)(2). Ms Benton has demonstrated that she would have accepted the plea offer given competent advice. It was established on the record, that she had expressed definite willingness to consider the offer, which was the prosecutor's requirement for making the plea "official". [App. C, p. 3]. It was established off the record, as stated in Ms. Benton's affidavit, when she asked Cronkright about her children.

Contrary to the implication formed by the district court, the more logical conclusion, considering also that there is no docketed activity on December 1, 2009, [App B], indicating

a scheduled hearing or an absent defendant, is that the prosecutor was prompted to extend the plea offer to the morning of December 2, 2009.

The Respondent speculated that the prosecutor implied no formal offer existed, and that even if Benton expressed willingness to accept the offer, her office was not bound by the terms and could proceed to trial regardless.

The record evidence points to a different conclusion than Respondent asserts.

In fact, the court was ready to accept the plea that was proposed. The prosecutor **did not** want to go to trial, because the evidence was not strong, therefore the prosecutor was ready to accept the offer and not withdraw it in light of intervening circumstances (there were none). It is illogical that she would make a "**generous**" jail term plea offer, extend the expiration date of the offer, attest on the record that, "[She] hate[s] bringing kids in here if I don't need to", and the Court state, "I'm prepared to pick a jury tomorrow. I'm sure Ms. Richardson would rather not [App. C, pp. 10-11], and then upon the defendant knowingly and willingly accepting the offer, waste state resources, and "proceed to trial regardless".

Moreover, the same hearing transcript and the on the record inquiry by the Court as to, "What the best offer was?" [App. C, p. 3], demonstrates a reasonable probability that the Court would have accepted the terms of the offer. Attorney Cronkright's affidavit indicates possibly the reduced charge of CSC II.

Therefore, Petitioner meets her burden of establishing that the trial court would have accepted both the reduced sentence of one year, as well as the reduced charge of CSC II.

Even without the facts of Cronkright's affidavit it is clear the state improperly applied Lafler when they objected to a hearing, based on the misrepresentation of the prosecutor's offer.

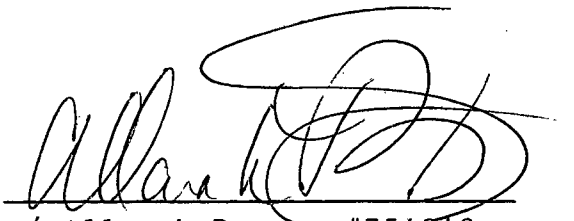
Petitioner has shown that the determination by the state court was unreasonable based on the evidence presented to them. The court proceeded on the theory that Benton was untrustworthy, and did not undertake to correctly resolve the claim. This prevented the Michigan Court of Appeals from addressing the ineffective trial counsel claim. It is reasonably probable that a plenary review would have rendered a different outcome in Petitioner's appeal. Where the record contains enough detail concerning the deficiencies in representation to permit resolution of the claim, an appellate court may address the issue. People v. Armendarez, 188 Mich. App. 61 (1991). The Michigan Supreme Court held evidentiary hearings in cases with Lafler claims. In People v. Douglas, 469 Mich. 557, 852 NW 2d 587, (2014), and in People v. Hobson, 500 Mich. 1005, 895 NW 2d 549 (2017), for a defendant who rejected a prosecutor's plea offer 25 years ago, the case was remanded back to the trial court. Ms. Benton has alleged facts that would entitle her to relief; the state courts denied repeated requests for a hearing, and the critical facts were not apparent in the record. Plummer v. Jackson, 491 Fed.Appx. 671 (6th Cir. 2012), she is entitled to an evidentiary hearing. Federal evidentiary hearings remain appropriate where the state court did not resolve a claim on the merits (i.e. rejected the claim for purely procedural reasons). Cullen v. Pinholster, 131 S.Ct. 1388 (2011).

For the reasons stated above Petitoner respectfully requests an evidentiary hearing to review the facts of her claim.

CONCLUSION AND RELIEF SOUGHT

The judgment of the court of appeals should be reversed.

Respectfully submitted,



Date: August 4, 2020

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