No. _____

In the Supreme Court of the United States

GREG SKIPPER, WARDEN, PETITIONER

v.

CURTIS JEROME BYRD

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lafler* v. *Cooper*, 566 U.S. 156 (2012), the Court held that a defendant has the right to effective assistance of counsel in considering whether to accept a plea offer—even if the defendant was later convicted after a fair trial. The *Lafler* Court cautioned, however, that this right exists only "[i]f a plea bargain has been offered . . . . If no plea offer is made, . . . the issue raised here simply does not arise." *Id.* at 168 (emphasis added). The Sixth Circuit, with one judge strongly dissenting, nonetheless held here that the prisoner, who was convicted after a fair trial, was denied his Sixth Amendment right to effective assistance of counsel because his counsel failed to pursue plea negotiations—that is, where no "plea offer [was] made." *Id.* The court declined to explain how the state courts, in remedying this purported constitutional violation, could determine what hypothetical plea offer he would have received and whether a state court would have accepted the hypothetical plea offer. The question presented is:

> Does the Sixth Amendment right to effective assistance of counsel include the right to a plea offer that was never made?

PARTIES TO THE PROCEEDING

Petitioner, Warden Greg Skipper, was appellee in the court below. Respondent, Curtis Jerome Byrd, was the appellant in the court below.

RELATED PROCEEDINGS

- *People* v. *Byrd*, Wayne County Circuit Court, Docket No. 10-003258-02-FC, Judgment issued November 12, 2010 (Judgment of Sentence).

- *People* v. *Byrd*, Michigan Court of Appeals, Docket No. 301322, Order issued May 10, 2012 (affirming circuit court decision).

- *People* v. *Byrd*, Michigan Supreme Court, Docket No. 301322, Order issued September 4, 2012 (denying appeal).

- *Byrd* v. *Bauman*, United States District Court, Eastern District of Michigan, Docket No. 15-cv-13528, Order issued September 15, 2017 (granting evidentiary hearing).

- *Byrd* v. *Bauman*, United States District Court, Eastern District of Michigan, Docket No. 15-cv-13528, Judgment issued August 22, 2018 (denying writ of habeas corpus).

- *Byrd* v. *Skipper*, United States Court of Appeals, Sixth Circuit, Docket No. 18-2021, Judgment issued October 8, 2019 (reversing and remanding).

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JURISDICTION

The judgment of the court of appeals was entered on October 8, 2019, App. 44a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

INTRODUCTION

This case is an ideal vehicle to resolve a conflict on a question of national importance concerning the Sixth Amendment right to effective assistance of counsel. Despite the views of its sister circuits and several state high courts, the Sixth Circuit held that the right to effective counsel encompasses plea offers that were never made. That ruling wrongly extends this Court's decisions in *Lafler* v. *Cooper*, 566 U.S. 156 (2012), and *Missouri* v. *Frye*, 566 U.S. 134 (2012). And it creates a right with no feasible remedy.

In *Lafler* and *Frye*, a sharply divided Court held for the first time that a criminal defendant's Sixth Amendment rights can be violated by counsel's performance during plea negotiations—even if the defendant is convicted after a fair trial or pleads guilty without the benefit of a plea deal. *Lafler* held that defendants are entitled to effective assistance "[d]uring plea negotiations," that is, "in considering whether to accept" a plea offer. 566 U.S. at 162, 168; *Frye*, 566 U.S. at 144. *Frye* held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea." 566 U.S. at 145.

Both decisions were premised on the prosecutor formally making a plea offer to the defendant. See *Lafler*, 566 U.S. at 168 ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."); *Frye*, 566 U.S. at 145. By contrast, "[i]f no plea offer is made, . . . the issue raised here simply does not arise." 566 U.S. at 168.

The Sixth Circuit nevertheless held that the right to effective assistance of counsel can be violated where

no plea offer was made. In its view, counsel's failure to approach the prosecution to enter into plea negotiations can form the basis of a Sixth Amendment ineffective-assistance-of-counsel claim. That new rule goes far beyond what *Lafler* and *Frye* adopted and would create insurmountable remedial problems.

Lafler and *Frye* recognized that the right to effective plea negotiations raises troublesome remedial issues. We may not know, years later, whether a defendant would have accepted the plea offer, whether the prosecutor would have rescinded the offer, and whether the trial court would have approved it (assuming it were accepted and not rescinded). See *Lafler*, 566 U.S. at 172; *Frye*, 566 U.S. at 150. But at least in *Lafler* and *Frye* there was an actual plea offer that could form the basis for those questions.

The remedial problems become untenable where no plea deal was offered in the first place. Does the prosecutor speculate as to what plea deal the prosecutor's office might have offered years earlier? What if any plea deal would have been premised on the defendant's cooperation in another case? Would the defendant have expressed a willingness to accept responsibility for his or her actions? And how can we know whether the trial court would have accepted a plea deal whose terms we can only speculate?

The only remedy that might conceivably be applied without the benefit of these crucial factors is a new trial, the remedy the court below applied. But that remedy is the very one this Court expressly rejected in *Lafler*, when it explained why a new trial should not be the outcome of a Sixth Amendment claim raised at the plea stage. 566 U.S. at 170–71.

Not surprisingly then, most circuits have refused to extend *Lafler* and *Frye* beyond formal plea offers. In the words of then-Judge Gorsuch, "[b]ut there was no plea offer made here, and there's no right to a plea offer." *United States* v. *Rendon-Martinez*, 497 F. App'x 848, 849 (10th Cir. 2012) (citing *Lafler*, 566 U.S. at 168). This Court should not countenance the Sixth Circuit's dramatic and unwarranted expansion of the Sixth Amendment right to counsel.

STATEMENT OF THE CASE

A. Curtis Byrd's involvement in the planned robbery at a bank ATM, which resulted in a man being fatally shot

Respondent Curtis Byrd hatched the idea of robbing an ATM, secured a gun, and, with his then-girlfriend, set the plan in motion. They attempted to rob a man at a bank ATM. Upon arrival at the bank, Byrd told his girlfriend he was not going to go through with the plan. It is unclear whether his girlfriend took the gun or Byrd gave it to her, but while armed, his girlfriend approached the man and asked him to hand over his money. The man resisted, a struggle ensued, the gun went off, and the man suffered a fatal wound to the head. The girlfriend returned to the car and Byrd drove them away. Byrd eventually turned himself in to the police. App. at 3a.

Both Byrd and his girlfriend were charged under Michigan law with first-degree premeditated murder, first-degree felony murder, assault with intent to rob while armed, and possession of a firearm while committing a felony. App. at 3a.

B. State-court proceedings

Byrd's girlfriend pled guilty and received a sentence of 30 to 50 years in exchange for providing testimony in Byrd's trial. App. at 4a. Byrd's trial counsel never initiated plea negotiations with the prosecutor's office, and the prosecutor exercised his discretion not to reach out and offer a plea deal. App. at 5a. Later, the prosecutor testified that he might have had an "incentive" to offer a plea deal. App. at 5a, 39a.

At trial, Byrd's trial counsel relied—perhaps overrelied—on an abandonment defense, App. at 7a, and also misunderstood Michigan law on accomplice liability, which does not require an aider or abettor to intend the commission of the crime, App. at 8a (citing Mich. Comp. Laws § 767.39; Michigan Model Criminal Jury Instruction 8.1(3)(c)). Also, in Michigan, proving a felony-murder charge required proving only that Byrd knew of his girlfriend's intention to rob the victim, not that she intended to kill him. App. at 8a (citing Mich. Comp. Laws § 750.316(1)(b); Michigan Model Criminal Jury Instruction 16.4(3)).

The abandonment defense failed and Byrd was convicted of first-degree felony murder, assault with intent to rob, and felony firearm. App. at 8a. He was sentenced to life imprisonment without the possibility of parole. App. at 8a. Michigan appellate courts denied Byrd's direct appeal of his conviction and rejected his motion for post-conviction relief. App. at 8a–9a. Byrd never challenged the constitutionality of his trial. App. at 25a.

C. Federal habeas proceedings

Byrd filed a writ of habeas corpus in the federal district court, on various grounds including ineffective assistance of counsel based on his counsel's alleged misunderstanding of the law and failure to effectively represent him at the plea-bargaining stage. The district court reviewed the habeas petition de novo because the state courts did not address the merits of the ineffective assistance claims that Byrd raised in his post-conviction motion. App. at 10a. The district court denied all Byrd's claims except the ineffective assistance claim, on which the court held an evidentiary hearing.

Although describing it as a "close, and tough, call," the district court ultimately held that Byrd could not show prejudice because it was not clear that he would have accepted a plea. App. at 58a–60a. The district court noted that Byrd's testimony during the evidentiary hearing "raised real doubt" about whether he ever asked his attorney to seek a plea deal and would have accepted a plea deal. App. at 56a–57a. At the evidentiary hearing, Byrd repeatedly insisted he was innocent—even with knowledge of his counsel's errors. App. at 57a. The district court denied habeas relief but granted a certificate of appealability.

D. Sixth Circuit proceedings

A divided panel of the Sixth Circuit reversed. The court held that Byrd's claim fell within the scope of the Sixth Amendment, citing caselaw from this Court recognizing that the Sixth Amendment right to effective assistance of competent counsel extends to pretrial plea negotiation.

The Sixth Circuit majority did not believe that *Lafler* and *Frye* foreclosed habeas relief on the facts of this case, and concluded that "Byrd was deprived of the opportunity to negotiate a plea." App. at 22a. The Court proceeded to analyze whether the district court was correct in holding that Byrd could not establish prejudice. Applying the three-pronged inquiry from *Lafle*r and *Frye*, the majority held that Byrd had established a reasonable probability that, but for counsel's errors, he would have received a plea offer; that Byrd would have accepted it; and that the trial court would not have rejected it. App. at 21a–22a. The majority described the inquiry as "uniquely cut-and-dried," App. at 20a, relying in part on testimony that the culture in Wayne County, Michigan is that the prosecutors wait for defense counsel to "show[ ] interest in negotiating pleas," App. at 22a. It concluded that Byrd had "suffered constitutionally ineffective assistance of counsel in the pretrial stage of his proceedings," and reversed the district court's denial of a writ of habeas corpus "unless state court proceedings consistent with this opinion are reopened within 180 days of the issuance of this court's mandate." App. at 22a.

Judge Griffin dissented. He began by recognizing that there is no constitutional right to plea bargain, and by noting *Lafler*'s language that "[*i*]*f* a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." App. at 23a (Griffin, J., dissenting) (quoting *Lafler*, 566 U.S. at 168 (emphasis added)). "That is a big if," the dissent said, in this case where plea negotiations never began. App. at 23a (Griffin, J., dissenting).

The dissent further noted that both *Frye* and *Lafler* critically rely on the same premise: the existence of a prior plea offer. And the dissent noted that prior Sixth Circuit decisions (both published and unpublished), decisions of sister circuits, and state appellate courts have long agreed that the existence of a plea offer is a threshold requirement to an ineffective-assistance claim arising out of the plea process. App. at 25a–33a (Griffin, J., dissenting).

Finally, the dissent discussed the problems in fashioning a constitutionally permissible remedy where a plea was never offered. Most importantly, the dissent noted that the very remedy Byrd proposed here—vacating a constitutionally sound trial and ordering the State to commence pretrial proceedings anew—is the one that *Lafler* forbids. App. at 35a (Griffin, J., dissenting). And the dissent explained that, given the lack of an initial plea offer, neither resentencing nor requiring the prosecution to reoffer the plea proposal—the two remedial scenarios that *Lafler* proposed once a criminal defendant had satisfied *Strickland* in the plea-offer context—would apply. App. at 35a–38a (Griffin, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. The decision below wrongly expands this Court's decisions in *Lafler* and *Frye* and creates a right without a feasible remedy.

A. Together, *Lafler and Frye* make clear that the Sixth Amendment right to effective assistance of counsel at the plea stage is conditioned on the existence of a plea deal.

This Court's decisions in *Lafler and Frye*, decided the same day, both rely on the premise that the prosecutor offered a plea deal. And these decisions contain language indicating that the absence of a plea offer forecloses a plea-related ineffective-assistance-of-counsel claim.

Both cases involved a formal plea offer. In *Lafler*, defense counsel advised his client of a formal, favorable plea deal, but advised his client to reject the deal, which the defendant eventually did. 566 U.S. at 160, 161. At trial, the defendant was convicted on all counts and received a significantly greater mandatory minimum sentence than the one offered in the plea deal. *Id.* at 161. In *Frye*, the prosecutor had sent the defendant's counsel a letter offering two possible plea bargains, both of which expired without counsel ever having conveyed the offers to his client. 566 U.S. at 139. The defendant later pled guilty on terms more severe than either of the initial two offers. *Id.* at 139–40.

The key cases on which *Lafler* and *Frye* relied, *Hill* v. *Lockhart*, 474 U.S. 52 (1985), and *Padilla* v.

Kentucky, 559 U.S. 356 (2010), likewise involved plea offers that actually had been made. In *Hill*, the defendant's counsel had informed him of the plea deal but misinformed him of the amount of time he would serve prior to eligibility for parole. 474 U.S. at 60. Similarly, in *Padilla*, defense counsel had informed his client of the plea deal but misinformed his client of the immigration consequences of a conviction. 559 U.S. at 359.

Not only did each of those opinions involve formal plea offers, the holdings in *Lafler* and *Frye* expressly spoke to the need for an offer to exist. In *Frye*, this Court held that "as a general rule, defense counsel has the duty to communicate *formal offers* from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." 566 U.S. at 145 (emphasis added). The Court described this as "establish[ing] the minimum requirements of the Sixth Amendment as interpreted in *Strickland*." *Id*. at 150. Although the Court did not decide whether it would extend the right to informal plea offers, it discussed the virtues of a formal offer as the basis for the duty: (1) It can be documented so that the negotiation process becomes more clear if challenged; (2) It avoids later misunderstandings or fabricated charges; and (3) It becomes part of the record, thus ensuring that a defendant has been fully advised before either a subsequent plea proceeding or a trial commences. *Id*. at 146.

Lafler's language is even stronger, conditioning the right on the actual existence of a plea offer: "*If* a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering

whether to accept it." 566 U.S. at 168 (emphasis added). And *Lafler* explained that "[*d*]*uring* plea negotiations defendants are 'entitled to effective assistance of competent counsel.' " *Id*. at 162 (emphasis added) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970)). As the dissent below pointed out, *Lafler* did not say defendants are entitled to effective assistance of counsel "[*b*]*efore and* during plea negotiations." App. 39a (Griffin, J., dissenting). Of course, "defendants have 'no right to be offered a plea . . . nor a federal right that the judge accept it.' " *Lafler*, 566 U.S. at 168 (quoting *Frye*, 566 U.S. at 148). But as *Lafler* explained, "[i]n the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise." *Lafler*, 566 U.S. at 168.

Tellingly, too, both *Lafler* and *Frye* discussed the Sixth Amendment right to counsel during the plea process in terms of the *negotiation* of a plea bargain. See *Lafler*, 566 U.S. at 162 (noting that criminal defendants require effective counsel "during *plea negotiations*.") (emphasis added); *Frye*, 566 U.S. at 141 (quoting *Padilla*, 559 U.S. at 373 (" '[T]he *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.' ") (emphasis added).

The word negotiate is defined as "to confer with another so as to arrive at the settlement of some matter" and "to arrange for or bring about through conference, discussion, and compromise." Merriam-Webster's Collegiate Dictionary (11th ed. 2006); see also *Frank* v. *Blackburn*, 646 F.2d 873, 875 (5th Cir. 1980)

(emphasis added) ("Plea bargaining is a process of negotiation in which the prosecutor, trial judge, or some other official in the criminal justice system, offers the defendant certain concessions in exchange for an admission of guilt."). Clearly then, a negotiation involves an exchange between parties, which cannot occur where there is nothing on the table about which to confer.

The Sixth Circuit therefore dramatically expanded the Sixth Amendment right to counsel far beyond what *Lafler* and *Frye* envisioned. Both *Lafler* and *Frye* began with the presence of a formal plea offer and only then set forth how a petitioner could establish *Strickland* prejudice in the plea context. App. at 26a (Griffin, J., dissenting) (citing *Lafler*, 566 U.S. at 163; *Frye*, 566 U.S. at 147). And both cases noted that there was no constitutional right to a plea offer, to the prosecutor's maintenance of a plea offer, or to a judge acceptance of a plea offer. *Id*. (citing *Lafler*, 566 U.S. at 168; *Frye*, 566 U.S. at 148–49).

B. The right to ineffective assistance of counsel in the absence of a plea deal would create unmanageable remedial problems.

Another factor that strongly militates against expanding the right to effective assistance of counsel to an unoffered plea is that it would be difficult, in most cases impossible, to fashion an appropriate remedy. How should the trial court calculate the "benefit" a criminal defendant lost, when there never was a benefit to consider? The prosecutor might, for example, have chosen not to offer a plea unless a defendant

agreed to cooperate. And what would the terms of the bargain have been had one been struck? Those thorny question did not arise in *Lafler* or *Frye* because in both cases a plea offer had been made.

Even with a concrete offer on the table, both *Lafler* and *Frye* recognized that their holdings created troublesome remedial issues. *Lafler*, 566 U.S. at 170; *Frye*, 566 U.S. at 150–51. For a variety of reasons, the prosecution might have crafted a plea deal that did not meet the defendant's demands at the time. The prosecutor might also have withdrawn the plea offer. See *Frye*, 566 U.S. at 149 (noting that in some States the prosecution has discretion to cancel a plea agreement to which the defendant has agreed). And the judge may not have accepted a guilty plea. See *id.* (explaining that trial courts have some leeway to accept or reject plea agreements). This is especially true in States such as Michigan that do not accept *Alford* pleas. In these States, prior to accepting a guilty plea, the trial judge will make an effort to determine that defendants are entering the plea by their own choice and that there is a factual basis for the pled-to conduct. See *North Carolina* v. *Alford*, 400 U.S. 35, 37 (1970). All of these considerations must be assessed years later, at the habeas stage: "The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they [previously] occupied." *Lafler*, 566 U.S. at 172.

Lafler in particular went into detail as to possible remedies, 566 U.S. at 170–172, and its discussion illuminates just how unmanageable it would be to create a remedy where no plea offer exists.

Where a criminal defendant has satisfied the *Strickland* test in the plea-offer context, *Lafler* offered two possible remedial paths. *Id.* at 170–71. The first path is resentencing. If the defendant shows a reasonable probability that but for counsel's errors he would have accepted the plea offered by the government, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Id.* at 171. The second path, utilized where resentencing alone will not fully redress the constitutional injury (as where the plea offer not taken was to lesser charges), is to "require the prosecution to reoffer the plea proposal," at which point the judge "can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

Neither of these solutions works in the context of a plea deal that never existed. Indeed, *Lafler* makes the existence of an offer a key piece in the trial court's exercise of its discretion in fashioning a remedy. *Id.* at 171. As the dissent below noted, both remedies require the trial court to " 'weigh various factors,' " including the " 'defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions' " and "post-plea-offer factual developments about the crime." App at 36a (Griffin, J., dissenting) (quoting *Lafler*, 171–72). Those inquiries presume that an offer was once on the table.

More specific to the second remedial option, reoffering the plea deal, a federal court cannot, as Justice Ginsburg has cautioned, require a prosecutor to

" 'renew' a plea proposal never offered in the first place." *Burt* v. *Titlow*, 571 U.S. 12, 27 (2013) (Ginsburg, J., concurring). A judicial order that a prosecutor make an offer that might have been contemplated but never made would eliminate the prosecutor's discretion. As the dissent below noted, "Whether to offer fewer or lesser charges in exchange for not burdening the state with the risks and expenses associated with trial (and appeal and collateral proceedings as well) is a matter purely reserved to prosecutorial discretion." App. at 37a (Griffin, J., dissenting). Thus, it would offend basic separation-of-powers principles to permit the judiciary to direct the formal creation and extension of a plea offer, a prosecutorial decision that is firmly committed to the executive branch. See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (internal citations omitted) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.") (internal citations omitted).

On top of all that, requiring that a never-before-offered plea be "reoffered" would undermine state laws that give crime victims rights during the plea process. Many States give victims the opportunity to be apprised of a plea deal, provide input into the prosecutor's terms or possible rescission, or influence the judge's acceptance or rejection of the plea.[1] But where

[1] Although a plea offer is ultimately up to the prosecutor, Michigan and many other States require prosecutors to obtain the victim's views concerning the proposed plea. See, e.g., Mich. Comp. Laws § 780.756(3). Other States require only that victims are notified, informed, or advised of a plea bargain or agreement that has already been reached but not yet presented to the court. Some States require the prosecutor to inform the court of the

no plea deal had ever been on the table, victims never had the opportunity to invoke these rights.

Nor is ordering a new trial—which the Sixth Circuit's remedial order would permit—a viable remedy. A retrial after the criminal defendant has already had a constitutionally sound trial would "needlessly squander" precious resources already invested in the trial. *Lafler*, 566 U.S. at 170 (internal citation omitted); see also *id*. (quoting *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986)) ("The reversal of a conviction entails substantial societal costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already taken place[.]").

On this point, *Lafler* is definitive: a new trial should never be the outcome of a Sixth Amendment claim raised at the plea-negotiation phase. Indeed, while noting the difficulty of restoring the defendant and the prosecution to the precise positions they occupied prior to rejection of the plea offer, this Court cautioned that a remedy should avoid "*requir*[*ing*] *the prosecution to incur the expense of conducting a new trial*." *Lafler*, 566 U.S. at 172 (emphasis added). The decision below does just that—by placing the case back in state court in a pretrial posture.

Given these insurmountable difficulties in fashioning a remedy, it is not surprising that this Court

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victim's position on the plea agreement. See generally National Conference of State Legislatures, "Victims' Pretrial Release Rights and Protections," online at https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-victims-rights-and-protections.aspx (last visited February 1, 2020).

has never expanded *Lafler* and *Frye* to include the right to effective assistance of counsel on a plea offer that was never made. Nor is it surprising that the majority of circuits have never contemplated doing so.

II. The decision below creates a circuit split on an important issue.

The Sixth Circuit's decision directly conflicts with a decision by the Tenth Circuit, albeit an unpublished one, which expressly ruled that the Sixth Amendment right to effective counsel is not implicated by an unoffered plea. See *United States* v. *Rendon-Martinez*, 497 F. App'x 848, 849 (10th Cir. 2012) (Gorsuch, J.).

Additionally, most circuits and several state supreme courts have premised a finding of *Strickland* prejudice on the existence of a plea offer—some requiring a formal plea offer, consistent with *Frye*. Until the decision below, only one circuit, the Fourth, had—post-*Lafler*—expressly held that the right to effective assistance of counsel might include, under certain circumstances, the right to the *opportunity* to plea bargain. The decision below widens this uncertainty and creates a circuit split on this important issue.

A. The Tenth Circuit's approach directly conflicts with the decision below.

As a circuit judge in the Tenth Circuit and writing in *Rendon-Martinez*, now-Justice Gorsuch recognized that the right to an unoffered plea would be an expansion of *Lafler* and *Frye*. *Rendon-Martinez*, 497 F. App'x at 849 (Gorsuch, J.).

In *Rendon-Martinez*, the Tenth Circuit noted that it could grant a certificate of appealability only if the criminal defendant made a substantial showing that he had been denied a constitutional right. *Id.* The court then explained that the defendant's claim that his trial counsel was deficient "by failing to request a favorable guilty plea" was a "novel" reading of *Lafler* and *Frye*. *Id.* The court noted that those cases "require defense counsel to communicate favorable formal plea offers" and held that "a court may find ineffective assistance when counsel advises the petitioner to reject a favorable plea offer and go to trial, even if the ensuing trial is fair." *Id.* (citing *Lafler*, 566 U.S. at 164–65). The court then distinguished the no-plea-offer situation: "But there was no plea offer made here, and there's no right to a plea offer." *Rendon-Martinez*, 497 F. App'x at 849. The Court therefore denied the defendant's request for a certificate of appealability and dismissed the appeal. *Id.*

Likewise, the Tenth Circuit in *United States* v. *Kalu*, 683 F. App'x 667, 669 (10th Cir. 2017), explained that a defendant has no right to be offered a formal plea deal and rejected the defendant's argument that his counsel was ineffective for failing to pursue an offer after initial discussions). Cf. *United States* v. *Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012) (holding that "under even the *Frye* test" the defendant's arguments "c[a]me up short" because counsel was not ineffective for failing to negotiate a plea agreement).

The Tenth Circuit's decisions directly conflict with the Sixth Circuit's rulings here, that *Lafler* and *Frye* "do not establish a threshold requirement of a more

favorable plea offer," App. at 12a; and that even in the absence of a plea offer, a petitioner can demonstrate prejudice by, in part, "establish[ing] a reasonable probability that but for counsel's errors, the petitioner *would have* received a plea offer," App. at 14a (emphasis added). Indeed, the parties below agreed that a plea offer had never been made, yet the Sixth Circuit held that Byrd met his burden of demonstrating that his counsel's deficiencies prejudiced him. App. at 15a.

B. Other circuits and several state supreme courts have held that a criminal defendant cannot satisfy *Strickland*'s prejudice prong without the actual existence of a formal plea offer.

Even circuits that have not expressly ruled that an unoffered plea does not implicate the Sixth Amendment right to effective counsel have premised satisfaction of the prejudice prong of the *Strickland* analysis on the existence of a plea offer. To find prejudice, they require some indication in the record that an offer was made. Some of those circuits, consistent with *Frye*, require a formal plea offer. Those holdings cannot be reconciled with the Sixth Circuit decision here, which found ineffective assistance of counsel absent any plea offer, let alone a formal one.

For example, the Eighth Circuit required a formal plea offer in *Ramirez* v. *United States*, 751 F.3d 604, 607–08 (8th Cir. 2014). There, the court noted that the defendant could not establish the "requisite prejudice under *Strickland* and *Frye*" because he "received at most an informal plea offer—one that expressly contained no promises or assurances." 751 F.3d at 608

(internal footnote omitted). Ramirez failed to show "that a reasonable probability existed that the government would have extended a plea offer." *Id*. If an informal offer or discussions do not suffice, an unoffered plea clearly would not.

Third Circuit, relying on language in *Lafler*, likewise noted in *Herrera-Genao* v. *United States* that "if no plea offer was made," "this issue 'simply does not arise' " and the defendant cannot demonstrate prejudice. 641 F. App'x 190, 192 (3d Cir. 2016) (quoting *Lafler*, 566 U.S. at 168). There, the criminal defendant's counsel had sought a plea agreement and had had discussions with the lead prosecutor about a particular agreement that would have resulted in 45 years' imprisonment. *Id*. at 191. But there was never a formal offer because it was contingent on all defendants agreeing to it and on the approval of the United States Attorney, the FBI, and the family of the agent killed during the incident in which the defendant was apprehended. *Id*. The Third Circuit rejected the claim on this basis, noting that Herrera-Genao "did not show that he was presented with a definite plea offer, and he did not demonstrate a reasonable probability that he would have accepted the 45-year plea even if had been offered." *Id*. at 193.

The Ninth Circuit has similarly premised satisfaction of *Strickland* on the existence of a plea. E.g., *Sanchez* v. *Pfeiffer*, 745 F. App'x 703, 705–06 (9th Cir. 2018) (denying application for a certificate of appealability on the claim that the defendant would have accepted a particular plea deal where a reasonable juror could conclude that there was ample evidence that "no offer was made").

And the Eleventh Circuit in *Osley* v. *United States* characterized as "wholly speculative" the defendant's argument that the prosecutor would have re-offered a new deal amenable to him and the trial court would have accepted a plea agreement on the record in the case, distinguishing the rejected plea deal in *Lafler* and the expired plea offers in *Frye*. 751 F.3d 1214, 1225 (11th Cir. 2014).

State supreme courts, too, have recognized post-*Lafler* that prejudice cannot be established if a plea offer was never made. In *Sutton* v. *State*, for example, the defendant argued, among other things, that his trial counsel rendered ineffective assistance by not securing and communicating a plea offer. 759 S.E.2d 846, 851 (Ga. 2014). But the Georgia Supreme Court held, "To suggest that counsel should have obtained a deal is pure speculation which is insufficient to satisfy the prejudice prong of *Strickland*." *Id*. at 852. See also *Fast Hors*e v. *Weber*, 838 N.W.2d 831, 840–41 (S.D. 2013) (rejecting the criminal defendant's argument that his counsel was ineffective for failing to obtain a plea bargain and noting that *Lafler* and *Frye* were "distinguishable" because they both "involved undisputed plea offers," with *Lafler* involving a "*rejection of a plea offer*" and *Frye* having been limited to "written plea offer"); *State* v. *Long*, 814 N.W.2d 572, 583 (Iowa 2012) (quoting *Frye*, 566 U.S. at 148, and noting that even if the criminal defendant "had offered evidence that he would have sought a plea bargain, the State is under no obligation to engage in plea bargaining 'because a defendant has no right to be offered a plea' "); *Bell* v. *State*, 71 A.3d 458, 463 (R.I. 2013) (explaining that postconviction relief "cannot rest on such a tenuous basis" as the supposition that a plea offer would have been made).

C. Consistent with the Sixth Circuit's reasoning, the Fourth Circuit has found a right to the opportunity to engage in plea negotiations.

The Fourth Circuit in *United States* v. *Pender*, an unpublished decision issued post-*Lafler*, held that if the criminal defendant could show, as he had alleged, "that there was no reasoned strategy to his attorney's decision not to pursue a plea bargain, we conclude that [he] would have satisfied the first *Strickland* prong and shown that his attorney's actions were unreasonable." 514 F. App'x 359, 361 (4th Cir. 2013). The court acknowledged that counsel does not have a general duty to initiate plea negotiations, but was nevertheless swayed by the circumstances of the case, namely that (1) there was no evidence that counsel was acting reasonably or strategically; (2) the decision to forgo plea bargaining exposed the defendant to a mandatory life sentence; and (3) the government had conceded that a plea bargain with a beneficial sentence would have been offered had counsel pursued it. *Id*. The court remanded for further development of the record. *Id*.

Thus, the Fourth Circuit, like the Sixth below, expanded *Lafler* and *Frye* when it held that prejudice could be established even if a plea offer was never made. These two decisions conflict with the many federal court of appeals and state supreme court decisions just discussed.

III. This case presents a recurring question of national importance.

This issue is an important one. The Sixth Circuit's expansion of the Sixth Amendment right to effective counsel to an unoffered plea allows fair trials to be undone, contrary to *Lafler*. Byrd's jury verdict was constitutionally sound (a point he does not contest), yet the Sixth Circuit "reset" his state criminal case back to the pretrial stage—"all because they conclude[d] Byrd's counsel 'would have negotiated a more favorable outcome' during plea negotiations that never occurred." App. at 23a (Griffin, J., dissenting). Byrd's constitutionally sound trial involved the State expending "considerable resources," *Lafler*, 566 U.S. at 170, including court costs, attorney time, and the gathering and production of evidence and witnesses at trial. The jurors, a cross section of the community, put their lives and work on hold to listen to evidence presented by both sides. In the end, the jury rendered an impartial verdict, finding Byrd guilty of the offenses for which he was charged. The parties agree that Byrd's trial did not deprive him of any substantive or procedural right to which the law entitles him. He got basic justice—a trial whose result was "reliable." *Strickland* v. *Washington*, 466 U.S. 688, 687 (1984). The Sixth Circuit's rule undoes that just result and ignores the costs involved. It also undercuts the collective juror wisdom that underpins our jury system and severely diminishes the importance of the "gold standard of American justice—a full-dress criminal trial." *Lafler*, 566 U.S. at 186 (Scalia, J., dissenting).

The Sixth Circuit's decision also puts trial courts in an impossible position with respect to fashioning remedies that respect executive prerogatives. Despite

Lafler and *Frye*'s recognition of the Sixth Amendment right to counsel during plea negotiations, this Court has been consistent in recognizing the independence of the prosecution. By continuing to recognize that criminal defendants have "no right to be offered a plea," *Lafler*, 566 U.S. at 168; *Frye*, 566 U.S. at 142, this Court has implicitly recognized the import of prosecutorial discretion in this area. Recognizing a Sixth Amendment right to a plea offer, and then venturing into speculation or after-the-fact discussions about what might have been the result had plea negotiations occurred, is an incursion into that prosecutorial discretion.

Finally, this issue is likely to recur. In his *Lafler* dissent, Justice Scalia prophesized that the decision "opens a whole new field of constitutionalized criminal procedure: plea-bargaining law." 566 U.S. at 175 (Scalia, J., dissenting). At least, though, the States could take comfort in knowing that this new field of law kicked in only when the prosecution offered a plea bargain in the first place. If *Lafler* and *Frye* are expanded as occurred below, even that limitation disappears and still more trial-based convictions will be subject to second-guessing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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