No. 19-992

In The

Supreme Court of the United States

GREG SKIPPER, WARDEN,

Petitioner,

v.

CURTIS JEROME BYRD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Sixth Amendment right to counsel during the plea bargaining stage of the criminal proceedings include the reasonable advice of counsel on whether to enter into negotiations?

PARTIES TO THE PROCEEDING

Petitioner, Warden Greg Skipper, was appellee in the Sixth Circuit. Respondent, Curtis Jerome Byrd, was the appellant in the Sixth Circuit Court of Appeals.

RELATED PROCEEDINGS

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

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

People v Byrd, Michigan Supreme Court, Docket No. 145311. Order issued September 4, 2012 (denying leave to 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 issues October 8, 2019 (reversing and remanding).

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The opinion of the Sixth Circuit, Pet. App. 1a-43a, is reported at 940 F.3d 248. The opinion of the district court, Pet. App. 45a-60a, is not reported but is available at 2018 WL 4005549, The order of the Michigan Supreme Court is available at 819 N.W.2d 871. The Michigan Court of Appeals opinion and order is unpublished but available at 2012 WL 1649788. The Circuit Court order is unpublished but available at 2010 WL 8753132.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 2019, Pet. App. 44a.

The petition for a writ of certiorari was filed on February 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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

Petitioner posits that the court below erroneously held that the accused has a right to be offered a plea bargain as part of the right to the effective assistance of counsel and that an offer is a condition precedent to the protections of the Sixth Amendment. It then argues that this decision from the Sixth Circuit is in conflict with an unpublished opinion from Tenth Circuit.

This summary of the holding is wrong. The court, in fact, found that whether the right to a plea offer existed was irrelevant to the resolution of this case. Instead, it applied the decisions in *Frye v Missouri*, 566 U.S. 134 (2012), *Lafler v Cooper*, 566 U.S. 156 (2012), and *Padilla v Kentucky*, 559 U.S. 356 (2010), to the very unique factual and procedural circumstances of this case to find that Respondent had been denied his right to the effective assistance of counsel during plea negotiations because counsel's advice was incompetent and unreasonable.

It is also this quality of uniqueness which guarantees that this issue is neither likely to recur nor become an issue of national importance. This Sixth Circuit described the case thusly,

> In this specific habeas action with its unusual combination of factual and procedural circumstances, Byrd's attorney failed his client from the very outset of his case. On the basis of a thoroughly unreasonable misunderstanding of the law, Byrd's counsel advised him incorrectly, dismissed his inquiries about a plea bargain, and single-mindedly pursued a

> near-impossible chance at acquittal. As a result of this incompetency, Byrd was deprived of the opportunity to negotiate a plea when sworn testimony confirmed the typicality of the prosecutor awaiting defense counsel's showing interest in negotiating pleas and the legitimacy of the expectation that the judges of that court would accept a reasonable plea. Pet. App. 22a.

This conclusion was compelled by the two companion cases which along with *Padilla* hold that every defendant is entitled to the effective assistance of counsel during plea negotiations. Effective assistance means that counsel's advice is reasonable and competent.

The Petitioner's proposed split with the Tenth Circuit involves an unpublished opinion with a very thin record. *United States v Rendon-Martinez*, 497 Fed. App'x 848 (10th Cir. 2012).

The record is thin not just because the defendant was *pro se* and there was no hearing in the district court, but also because the issue was first raised on the collateral appeal as an add-on to other ineffective assistance of counsel claims. Defendant also waived his right to a jury trial, so he consented to a strategy that excluded the desire to plead guilty. Premising a split in the Circuits on this case hardly brings the issue into sharp relief nor makes it the ideal vehicle to resolve any questions.

The procedural quirk where defense counsel is responsible for initiating plea negotiations coupled with

a prosecutor willing to bargain, a defendant willing to plead, and a blatantly incompetent attorney unwilling to do anything but go to trial on a dead-bang loser makes it highly unlikely that similar cases will follow.

Because of the unique factual and procedural circumstances of the case at bar, because the holding creates no new right, and because the decision is faithful to *Padilla, Frye* and *Lafler*, there is no recurring question of national importance.

STATEMENT OF THE CASE

Curtis Byrd, a fifty-seven-year old recent retiree from General Motors, entered into a romantic relationship with Charletta Atkinson in which they used his pension money to get high. One day, when the money ran out, he suggested robbing someone at an ATM. Once at the ATM, Mr. Byrd told Atkinson, "I can't do this. This is not for me." She obtained the gun and exited the car. She approached a man who was re-entering his car. Ms. Atkinson demanded his money stating "I don't want to have to shoot you." The man rolled up his car window, but Atkinson had already stuck her hand in and the gun went off with fatal results. She ran back to the car. Byrd, who had moved into the driver's seat, pulled her into the car, put her into the passenger seat, and then drove to a place of safety.

Mr. Byrd turned himself into the police and made a statement similar to the above recitation of facts. He also said that Atkinson grabbed the gun from him.

Atkinson also made a statement in which she repeated Mr. Byrd's words that he could not commit the crime. Her statement deviated from Byrd's statement only in the detail of how she got the gun. She stated that Mr. Byrd gave her the gun.

Attorney Marvin Barnett[1] was retained. He first met with Respondent at the jail the night before the preliminary examination. The visit lasted one half hour. Barnett told Mr. Byrd that he couldn't be convicted because he had abandoned the crime. He promised that he was going to hit a home run for him. The second time they talked, Byrd called Barnett from jail. In that call, Barnett informed him that Atkinson was pleading guilty and would testify against him at trial but that it would help him. The third time they met was the night before the trial. This occurred at the jail. This meeting, too, lasted approximately a half hour. Pet. App. 5a.

On the second day of trial, Barnett told the court that he did not want the jury instructed on lesser included offenses. Mr. Byrd was convicted of murder in the first degree for which the only penalty was mandatory life in prison, no parole.

Appellate Process

After his first degree murder conviction was affirmed on direct appeal, Mr. Byrd collaterally

[1] Mr. Barnett has since been disbarred based on numerous ethical and alleged criminal violations. Pet. App. 6a fn4.

challenged it. The main issue was whether he had been denied the effective assistance of counsel, one instance of which was his attorney's failure to enter into plea negotiations.

Upon the unsuccessful completion of the state appellate process, Mr. Byrd filed a petition for a writ of a habeas corpus pursuant to 28 U.S.C. § 2254 raising the issue of his attorney's ineffectiveness. An evidentiary hearing was held in the United States District Court for the Eastern District of Michigan.

District Court Evidentiary Hearing

The trial prosecutor, David Braxton, now a judge of the Wayne County Probate Court, testified that once the principal has pleaded guilty, prosecutors have more incentive to reach plea agreements with the accomplices. He was waiting for Barnett to approach him which was the usual procedure in Wayne County Circuit Court. He further testified that Wayne County judges rarely reject plea agreements. Pet. App. 4a-5a, 20a-21a.

The appellate attorney representing Mr. Byrd on his first appeal testified that he believed that Mr. Byrd was a little slow to understand things especially nuanced issues of law. He felt that extra time was needed to explain things to him. His suspicions were confirmed once he read the brief filed in support of the collateral appeal.

Barnett, who at the time of the hearing was only suspended from the practice of law, testified that he still believed that Mr. Byrd was innocent of the crime because he had abandoned the criminal act. He further claimed that the offense of robbery armed was not a continuing crime meaning that Byrd after backing out of the robbery would not be liable for the death of the victim.

Mr. Byrd testified that he was not familiar with criminal law. His source of legal knowledge came from Barnett. Had he known that it didn't matter how much help he gave the principal, he could still be convicted as an aider and abettor, he would have asked his attorney to get him a plea. Had he known that the facts of his case did not fit the definition of abandonment, he would have asked his attorney to get him a plea. After hearing that Atkinson was going to plead, he asked Barnett to see about an offer. Barnett told him they were going to trial. Pet. App. 6a.

The district court found this to be a close call, but denied relief.

Sixth Circuit Court of Appeals

A divided panel of the court reversed the district court and found that the Sixth Amendment right to the effective assistance of counsel extends to all critical stages of the criminal proceeding including pretrial plea negotiation. It pointed out that the Supreme Court has never limited that right to negotiations that take place only after an offer has been made. Pet. App.

11a. Further, decisive to its resolution of the issue were the unique facts and circumstances of this case. Pet. App. 22a.

ARGUMENT

I. THE COURT BELOW FOUND THAT ON THE UNIQUE FACTS OF THIS CASE, CURTIS BYRD WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA BARGAINING STAGE.

Petitioner contends that the Sixth Circuit Court of Appeals erroneously created a new constitutional right, the right to have the prosecution offer a plea bargain. If this were so, Respondent would lose. Instead, the court below took pains to point out that it agreed that there was no right to a plea offer, but it found that the absence of such a right did not create a bar to a *Strickland*[2] claim. Pet. App. 14a fn8. It pointed out that it was counsel's very ineffectiveness that foreclosed the possibility that the prosecutor would make an offer. Pet. App. 11a. On the facts of this case, the failure to explore the possibility of an offer where the prosecutor was willing to make one met the first prong of the *Strickland* test, the deficient performance prong.

In the companion cases of *Lafler v Cooper*, 566 U.S. 156 (2012) and *Missouri v Frye*, 566 U.S. 134 (2012),

[2] *Strickland v Washington*, 466 U.S. 688 (1984).

and along with the decision in *Padilla v Kentucky*, 559 U.S. 356, 373 (2010), the Court found that plea bargaining is a critical stage of the criminal proceedings to which the right to counsel attaches. In so holding, the *Frye* Court acknowledged that 97% of federal convictions and 94% of state convictions are the result of guilty pleas. It noted that "[t]o a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; **it is the criminal justice system**." *Frye*, 566 U.S. at 144 quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (emphasis added). Thus, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a majority of defendants. *Frye, supra* at 144.

Because of this evolution in the practice of criminal law, "defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id.*, at 143.

A. The Sixth Circuit did not expand the holdings in *Frye* and *Lafler* to create a right to a plea offer.

Contrary to Petitioner's claim, the Sixth Circuit did not hold that there is a right to a plea bargain. It found that "whether such a right exists simply is not

relevant. Pet. App. 11a. Instead, it relied on *Frye, Lafler*, and *Hill v Lockhart*, 474 U.S. 52, 57 (1985), to find that the "ineffectiveness of Byrd's counsel foreclosed the possibility that the prosecution under the unique facts of this case, could exercise [its] discretion" to offer a plea.

In *Hill*, the Court held "the quality of counsel's performance in advising a defendant whether to plead guilty stemmed from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.'" quoting *McMann v Richardson*, 397 U.S. 759, 771 (1970). In this regard, the Court in *Padilla v Kentucky*, 559 U.S. 356, 370 (2010), found that counsel's performance had been deficient where he did not advise Padilla of the immigration consequences of pleading guilty. The Court found that counsel's act of omission, the failure to advise, was just as egregious as an act of commission. *Id.*, at 370

Petitioner argues that the *Frye* and *Lafler* decisions conditioned the right to the effective assistance of counsel upon the offer of a formal plea bargain. There is something profoundly illogical in such an argument. The right to be effectively represented by counsel cannot depend on the conduct of the adversary, the prosecutor. This view is inconsistent with *Strickland* which describes counsel's duty to her client to advocate his cause as "overarching." *Strickland*, 466 U.S. at 688. This is also inconsistent with ABA Standards for Criminal Justice, Continuing Duties of Defense Counsel 4-1.3 which reads in pertinent part:

> Some duties of defense counsel run throughout the period of representation, and even beyond. Defense counsel should consider the impact of these duties at all stages of a criminal representation and on all decisions and actions that arise in the course of performing the defense function. These duties include:
>
> > (g) a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution.

This ABA standards are recognized by this Court as a guide to determining what constitutes reasonableness. *Padilla, supra* at 366. Thus, an advocate for the accused may not remain passive at any stage of the proceedings.

Rather than finding a plea offer as the triggering mechanism for the effective assistance of counsel, the companion cases merely identified two different ways in which counsel failed their client during the plea bargaining stage. In *Missouri v Frye*, 566 U.S. 134, 143-145 (2012), where counsel failed to inform his client of a plea offer, the Court stated that defense counsel has certain duties and responsibilities during the plea bargaining process, one of which is to convey formal plea offers to the defendant. The court did not discuss other responsibilities during plea bargaining noting that "it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. This case presents neither the necessity nor the

occasion to define the duties of defense counsel in those respects, however." *Id.*, at 145. In *Lafler*, the court found that counsel must offer reasonable advice on whether to seek a bargain or to accept one that has been offered.

Consequently, as between the parties, it is defense counsel who must be proactive because he or she is obligated to provide effective assistance. Neither this Court in the companion cases, nor the court below, placed any obligation on the prosecutor to offer a plea. Nor did they recognize a threshold requirement before the right to the effective assistance of counsel kicks in because the duty to provide effective assistance is always present from the start of the relationship and even after the formal representation has ceased. See preamble to Continuing Duties of Defense Counsel 4-1.3, *supra.*

The circuit court's opinion in this case was compelled by that long line of cases starting with *Strickland* and *Hill* and running through *Padilla*, *Frye*, and *Lafler*. The *Lafler* case is the more obvious antecedent because it too hangs on counsel's misadvice. Lafler's attorney told his client that he could not be convicted of assault with intent to commit murder because shooting someone below the waist does not show an intent to kill. Lafler chose to forgo a plea offer and proceed to trial where he was speedily convicted. Counsel's advice was contrary to state law which is based on the intent with which the accused acted and not on how well he can aim a pistol.

The attorney's performance in Respondent's case was even more egregious. Barnett advised him that his on-the-scene statement alone to the principal, that he could not go through with the robbery, meant that he could not be convicted of felony murder or of robbery. This advice completely ignored the fact that Mr. Byrd brought the gun to the scene of the crime; that he did not stop the principal from grabbing the gun (or he gave it to her); that he stayed on the scene (arguably acting as a lookout); that after the gun went off and she ran back to the car, he grabbed her and put her in the car; and that he then drove them to a place of safety. Because of the definition of malice in second degree murder, because of the accomplice liability doctrine, and because of the felony murder doctrine, these facts easily established first degree murder. Pet. App. 3a-4a.

Further, the jury instruction on the defense of abandonment, that trial counsel bet his client's liberty on, guaranteed a conviction. It charges the jury that "If the defendant started something that could not be stopped, he cannot claim that he abandoned the crime." M. Crim. J.I. 9.4(5); *People v Akins*, 675 N.W.2d 863, 873 (Mich. Ct. App. 2003). The Sixth Circuit described Barnett's reliance on the abandonment offense as "reflecting his confusion about – and possibly his abject ignorance of – the law." Pet. App. 6a.

Trial counsel was determined to go to trial. In fact he insisted that they go to trial because he would "hit a home run" for Mr. Byrd and assured him that he would be going home instead of to prison. Pet. App. 5a. Despite these assurances, Respondent did ask his

attorney about a plea bargain after he learned that the co-defendant had received a bargain. But trial counsel told him a plea was not in his interests. Pet. App. 6a.

So, like *Lafler*, the deficient performance was the gross misadvice of counsel which caused Respondent to be deprived of the effective assistance of counsel during the plea bargaining stage. *Strickland*'s second prong – that of prejudice – is shown because the Respondent proved at the hearing that the prosecutor would have offered a plea if his attorney had been competent, that he would have accepted an offer, and that the judge would have accepted the plea. *Delatorre v United States*, 847 F. 3d 837, 846 (7th Cir. 2017); Pet. App. 14a.

B. Remedies available to the courts are tailored to the facts of each case.

Petitioner argues that there is no remedy available where the attorney failed to make a reasonable strategic decision during the plea bargaining stage of the criminal proceedings. Significantly, Petitioner claims that *Lafler* definitively said that "a new trial should never be the outcome of a Sixth Amendment claim raised at the plea-negotiation phase." Pet. Brief 16. But the *Lafler* Court never used the word "never." Instead it stated:

> The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can

> be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Lafler, 566 U.S. at 172. So a new trial as a remedy might be disfavored but in some instances, incurring the "societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence." *United States v Mechanik*, 475 U.S. 66 (1986); (exclusion of African-Americans from the grand jury was prejudicial). The remedy of a new trial is applied where a substantial right of the defendant was affected. *Vasquez v Hillery*, 474 U.S. 254 (1986).

This Court has offered guidance on Sixth Amendment remedies stating that they should be "tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." *Lafler, supra* at 170. The Court left the choice of remedy to the lower court because it is in a better position to decide which remedy fits the injury. Possible remedies include agreeing to the term of imprisonment the government offered in the plea; imposing the sentence he received at trial; or something in between. *Id.*, at 171. *Lafler* also recognized that there might be some instance where resentencing alone would not fully redress the constitutional injury and that the court would order the prosecution to re-offer the plea.

A thorny problem occurs where no plea was offered leaving the Court with mere conjecture. At first

blush, one might think this was the case full of thorns. But evidence offered at the hearing in the district court showed that the trial prosecutor would have engaged in plea bargaining if he had been approached by trial counsel and that he would have been willing to offer a second degree murder plea. Byrd testified that he would have accepted the offer if one had been made. The court below noted that by pointing to the plea offered to Atkinson, the principal, Mr. Byrd demonstrated that an available plea would have been favorable. Under *Rodriguez-Penton v United States*, 905 F.3d 481, 488 (6th Cir. 2018), such evidence establishes prejudice, the second prong of *Strickland.* Pet. App. 17a.

The prosecutor further testified that he would not have rescinded the plea and that based on past practices, the trial court would have been willing to accept the plea bargain. Pet. App. 16a. The prosecutor admitted that he was less certain about whether he would have offered a robbery armed plea[3]. From these facts, a remedy tailored to the injury can be fashioned. It would be reasonable to remand this matter back to the trial court to explore a plea offer with the prosecution.

The Petitioner argues that ordering the prosecution to offer a plea bargain implicates separation of

[3] In Michigan, first degree murder carries a mandatory non paroleable life sentence. M.C.L. 750.316. Second degree murder and robbery armed both carry a paroleable life sentence or any term of years. M.C.L. 750.317 and M.C.L. 750.529. These life sentences would be paroleable. The guidelines for these two offenses would also propose different sentencing ranges.

powers' concerns citing to Justice Ginsburg concurring opinion in *Burt v Titlow*, 571 U.S. 12, 27 (2013). In the opinion, the Justice "cautioned that a federal court cannot require a prosecutor to 'renew' a plea proposal that was never offered in the first place." But the Justice based her critique not on the separation of power's clause, but on contract law. The Justice wrote:

> Once Titlow reneged on that half of the deal, the bargain failed. Absent an extant bargain, there was nothing to renew . . . ("Although the analogy may not hold in all respects, plea bargains are essentially contracts . . . Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1953 (1992)) ("When defendants promise to plead guilty in return for government concessions and then do so, they are legally entitled to the concessions. At the same time, if the defendant fails to perform, the prosecutor need not perform either." (footnote omitted)). In short, the prosecutor could not be ordered to "renew" a plea proposal never offered in the first place.

Id., 26-27. So Titlow accepted the plea bargain, then claiming innocence reneged on her part of the bargain. She fired her attorney and went to trial with new counsel. She broke the contract which is why there was no plea offer to renew.

In other instances where the Court ordered the prosecution to fulfill a plea bargain, no separation of powers argument was made. For example in *Santobello v New York*, 404 U.S. 257, 263 (1971), the prosecution promised, in conjunction with a plea bargain, to make

no recommendation at the time of sentence. In finding that the prosecution reneged on the promise, the majority ordered the judgment vacated and the case remanded for either specific performance or to allow the defendant to withdraw his plea. So past practice establishes that the Court can order the prosecution to take certain actions without running afoul of the separation of powers clause.

Petitioner also argues that offering a plea that had never been offered before would undermine state law which allows crime victims certain rights during the plea process. This is a canard. If a plea was offered on remand, the victims would still be consulted. In fact, Michigan's victim right's statute requires the victim to keep the prosecuting attorney informed of his or her current address and phone number "until final disposition or completion of the appellate process, whichever occurs later." M.C.L. 780.756(4)(a). Thus, the only time limit found in the statute addresses Petitioner's concern.

Petitioner's last strawman concerns *Alford* pleas. It argues, without citation, that Michigan does not accept *Alford*[4] pleas and, therefore, a defendant contending he is innocent cannot plead guilty. Pet. Brief 13. But in Michigan, a guilty plea may be accepted by the court even if accompanied by protestations of innocence. *People v Booth*, 414 Mich. 343, 359-360 (1982); *People v Mauch*, 397 Mich. 646, 667 (1976) (defendant can protest his innocence and yet plead guilty if his

[4] *North Carolina v Alford*, 400 U.S. 35 (1970).

plea, under all the circumstances, is an informed and voluntary choice of the alternatives that confront him). Petitioner makes no attempt to identify any other state which allegedly does not accept *Alford* pleas.

C. A fair trial does not cure all errors occurring prior to trial, but even if it did, Respondent's trial was not fair.

The Petitioner repeatedly argues that a fair trial cures any error and that Mr. Byrd's trial was fair. Pet. Brief 16 and 23. It also contends that Mr. Byrd never challenged the constitutionality of his trial. Pet. Brief 23. Both of these assertions are wrong for two reasons.

First, an otherwise fair trial does not remedy errors occurring before trial particularly where a substantial right of the defendant has been affected. *Vasquez v Hillery*, *supra* (new trial granted where defendant was prejudiced by the exclusion of African-Americans from his grand jury). The *Lafler* Court also specifically rejected the notion that a fair trial cures ineffective assistance of counsel arising during the plea bargaining stage. *Lafler, supra* at 169-70. Nor is an error by counsel excused where the defendant subsequently enters a knowing, voluntary, and intelligent plea. *Padilla v Kentucky*, 559 U.S. 356 373 (2010); *Frye*, 566 U.S. at 143-144. So subsequent proceedings, even if fair, do not cure Sixth Amendment error.

Second, contrary to Petitioner's assertion that the trial was fair, Respondent's trial was prejudicially unfair. No trial is constitutionally sound where the

defense attorney did not understand the law concerning the crime charged, nor understand the law concerning the defense deployed. In fact, the majority below never found that the trial was fair. It found that "Barnett manifested a shocking lack of comprehension regarding the pertinent law in Byrd's case. This ignorance coupled with the inaccurate advice he gave his client about the likelihood of his acquittal is sufficient to deem Barnett's performance constitutionally inadequate." Pet. App. 15a. This is hardly the hallmark of a fair trial and Respondent's arguments in all of the courts challenged that fairness of his trial.

Where, as here, the trial is marked by counsel's deficient performance the verdict is not only unreliable, but may result in the complete forfeiture of a proceeding itself. *Lee v United States*, 137 S. Ct. 1958, 1965 (2017) (quoting *Roe v Flores-Ortega*, 528 U.S. 470, 483 (2000)). Pet. App. 33a. In *Flores-Oretga*, the defendant asked counsel to file a notice of appeal, but counsel did not and so lost his right to appeal. As in that case, so in this one. Respondent asked his attorney to see about a plea bargain and counsel refused because he was going to hit a home run. Here, the proceeding forfeited was the opportunity to explore a plea bargain.

So, far from curing the error, trial counsel compounded the error first by an act of omission, the failure to explore a plea bargain, and then by the acts of commission, the trial itself, a sham trial repeatedly marked by counsel's incompetency. "[I]f the right to counsel . . . is to serve its purpose, defendants cannot

be left to the mercies of incompetent counsel." *McMann v Richardson*, 397 U.S. 759, 771 (1970).

II. THERE IS NO SPLIT AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

Petitioner cites to two unpublished decisions, one from the Tenth Circuit and one from the Fourth, to argue that there a split in the circuits worthy of this Court's attention.

In *United States v Rendon-Martinez*, 497 Fed. App'x 848, 849 (10th Cir. 2012), an unpublished order denying a certificate of appealability, the Court rejected the defendant's contention that his attorney was ineffective for failing to enter into plea negotiations because no plea offer was made and there was no right to a plea offer. It also found that any prejudice under the second prong of *Strickland* would be merely speculative since defendant received a two-level reduction in the guidelines for his acceptance of responsibility.

Rendon-Martinez was a *pro se* appellant who had not raised this issue in the trial court either on his direct appeal or in his 28 U.S.C. § 2255 petition although he made other allegations of ineffective assistance of counsel in both. He raised the issue for the first time in the Court of Appeals. He offered neither affidavits nor exhibits to support his argument. And he complicated the argument by also claiming a due process right to a plea bargain, a right rejected by every court that has been confronted with the issue. So not only does this unpublished case lack precedential value, but

the record below is exceedingly thin. Case #12-cv-00388, 2012 U.S. Dist. LEXIS 76402; 2012 WL 1977954. There is no evidence that Rendon-Martinez wanted to plead guilty. One can conclude that he never objected to the strategic choice of a bench trial because a waiver of the right to a jury trial must be in writing and, if he objected, his signature would not be on the waiver. FRCrP 23(a)(1). Since Rendon-Martinez obtained a two-level reduction in the guidelines, the strategic choice of a bench trial appears reasonable. Further, unlike this case, there was no evidence that, under local practice, prosecutors made plea offers only if defense counsel initiated the discussion and there was no evidence that counsel advised the defendant incorrectly on the law.

The Fourth Circuit case bears some similarity to the case at bar. In *United States v Pender*, 514 Fed. App'x 359, 361 (4th Cir. 2013), the defendant alleged that his attorney failed to pursue a plea bargain even though the evidence against him was strong and he faced a mandatory life sentence. The government argued that he was offered a plea bargain but he refused it, thus setting up a *Frye* violation. The Court held that the matter should be remanded for a hearing because a question of fact had been created. The Court acknowledged that the decision to seek a plea bargain is a matter of trial strategy. Thus, counsel must be a reasonably effective advocate regarding the decision to seek one. The Court concluded that if defendant shows that his attorney's strategic choice not to pursue a plea

bargain was unreasonable, he would satisfy the first prong of *Strickland.*

Circuit cases decided subsequent to *Frye* and *Lafler*, and cited by Petitioner, are not on point because counsel entered into plea negotiations but the defendants, suffering buyer's remorse, complained. *United States v Kalu*, 683 Fed. App'x 667 (10th Cir. 2017) (defendant rejected the offer because he wanted time served); *United States v Moya*, 676 F.3d 1211 (10th Cir. 2012) (defendant not satisfied with the plea because it did not preserve a right to appeal the denial of a suppression motion); *Ramirez v United States*, 751 F.3d 604 (8th Cir. 2014) (defendant rejected a plea bargain because he refused to cooperate). In these cases, the attorneys cannot be found to be ineffective because factors not within their control prevented them from obtaining an offer.

In hot pursuit of a split, Petitioner also cites to cases from the Third, Ninth, and Eleventh Circuit, but to no avail because there is no allegation that counsel failed to enter into plea negotiations. In *Osley v United States*, 751 F.3d 1214 (11th Cir. 2014), there was a plea offer which counsel relayed so counsel did enter into plea negotiations. There was misadvice of counsel but the Court ultimately held that the defendant failed to show prejudice. In the other two cases, the defendants alleged a plea offer which the prosecution denied. In *Herrera-Genao v United States*, 641 Fed. App'x 190, 193 (3d Cir. 2016), the defendant contended that there was a 45-year offer on the table. The government denied that there was any offer made in the case which

involved the murder of an agent. The Court found that even if there had been the 45-year offer he couldn't show that there was a reasonable probability that had the discussed offer been formal, he would have taken it. In *Sanchez v Pfeiffer*, 745 Fed. App'x 703 (9th Cir. 2018), the defendant said he rejected the plea offer because the sentence was too long but had he been properly advised of the penalty, he would have taken the offer. His claim failed because the prosecution denied making an offer and because the Court found that the alleged offer of 39 years was longer than the sentence he ultimately received of 32 years, so there could be no showing of prejudice.

Finally, the state case cited by Petitioner does not support the idea that there is a split between state and federal jurisdictions because, again, the facts are distinguishable from the case at bar. In that case, *Fast Horse v Weber*, 838 N.W.2d 831 (S.D. 2013), trial counsel was not found to be ineffective where the prosecutor told her there would be no plea offer and the defendant told her that he did not want to plead. Thus, there were factors beyond her control.

Lafler holds that if the absence of the plea bargaining process is driven by counsel's grossly erroneous misunderstanding of the law, then a deficient performance has been shown. That is what happened in the case at bar. That may have been what happened in *Pender* but the record as it stands is incomplete. That is not what happened in *Rendon-Martinez* where the appellant, in hindsight, just didn't like the strategy adopted by his counsel. That is not what happened in

the other cases discussed above where either the offers were not to the defendant's liking or factors outside counsel's control resulted in no plea discussions.

No court has found counsel effective where 1) defense counsel's advice was premised on a blatant misunderstanding of the law and 2) defense counsel's failure to initiate plea bargaining, given local practice, prevented his client from receiving an offer. Nor has any circuit acknowledged a split on this question. The Fourth Circuit, like the Sixth and did not decide the case on the basis of a right to a plea bargain. And neither did the Tenth. There is no split.

But, even if there was a detectable split on this issue, it is much too shallow to predicate a conflict such that this Court should take up the cudgel. It is neither straight forward nor ripe for resolution. In the absence of a deeply entrenched split, this Court should deny the petition.

III. THIS CASE DOES NOT PRESENT A RECURRING QUESTION OF NATIONAL IMPORTANCE.

The court below found that because of the unusual combination of factual and procedural circumstances, including defense counsel's grossly erroneous legal analysis, Respondent's right to the effective assistance of counsel during plea bargaining was violated. Pet. App. 22a. The facts and circumstances, unique to this case, keep it from being one of national importance, one which presents a recurring problem.

Trial counsel's almost total misunderstanding of the law would be hard to match in any other case. He did not understand that because of the interplay of the law of accomplice liability and the felony murder doctrine, a person who aids in the commission of robbery armed, will also be held responsible for any murder occurring during the robbery. He did not understand that bringing a gun to a robbery, even if it is not used by the accomplice, is enough proof of malice for a felony murder conviction. He did not understand that robbery is a continuous crime, i.e., one that does not end until a person arrives at a place of safety. He did not understand that the comment "I can't do it," does not support a defense of abandonment where his client gave up the gun to the principal, remained on the scene during the bungled robbery and the killing, and then drove the getaway car. Trial counsel, even in the face of a request by Respondent to enter into plea negotiations, "single-mindedly pursued a near-impossible chance at acquittal" Pet. App. 4a-8a, 22a.

The prosecutor testified to the local practice of the prosecution waiting for defense counsel to initiate plea negotiations. He testified that he was willing to enter into plea discussions with trial counsel even on the day of trial because the principal had already pled guilty. He would have offered a second degree murder plea and, based on his knowledge of the judge, the judge would have accepted it. The prosecutor also testified that based on Respondent's lack of a criminal record

and his 30-year work history, the judge would be sympathetic at the time of sentence. Pet. App. 4a-5a.[5]

In this case, there was a willing prosecutor, a willing defendant, and an unwilling defense counsel. This is not the usual line-up of actors in *Lafler/Frye* cases. It was counsel's unreasonable unwillingness to enter into plea discussions which deprived Respondent of effective counsel at this critical stage of the proceeding. Thus, the Sixth Circuit's decision was compelled by *Hill, Padilla, Lafler*, and *Frye* and is not an extension of them.

Because of the procedural quirk found here, this issue is neither frequently encountered nor has it been extensively addressed by the courts below. Petitioner even had difficulty finding cases upon which to predicate a split. The unique aspects of this case also make it unlikely that the issue presented will recur.

Amici are asking this Court to step back from its holdings in the companion cases. It argues that this Court's right to counsel cases are a series of just one unthinking extension of the right after another. But the *Frye* and *Lafler* decisions are not departures from precedent. They are deeply rooted in this Court's right to counsel jurisprudence. The requirement that counsel be effective can be traced all the way back to *Powell v Alabama*, 287 U.S. 45, 71 (1932), where the Court held that counsel must be able to give effective aid. That counsel also be effective during the plea

[5] Facts not mentioned in the opinion of the court below are taken from the transcript of the hearing held in the district court.

bargaining process is rooted in *Hill v Lockhart*, 474 U.S. 52, 57 (1985). This was the first case to recognize that the negotiation of a plea bargain is a critical stage of the proceeding for purposes of the Sixth Amendment right to effective assistance of counsel. *Padilla*, 559 U.S. at 373. And lastly, *Padilla*, decided two years before the companion cases, recognized that, in order to be effective, counsel must offer competent, reasonable advice on both the direct and collateral consequences of pleading guilty. It cannot be said that the companion cases are demonstrably erroneous. *Stare decisis* compelled the decision in the court below. To adopt a more conservative approach to the doctrine is merely to change it to obtain a desired result. Either precedent controls or we reject it at whim to suit the legal fashion of the day.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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