No. 19-992

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

REPLY BRIEF

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INTRODUCTION

Byrd would have this Court believe that *Lafler* v. *Cooper* and *Missouri* v. *Frye* support his desired outcome, that there is no circuit split on the issue presented in the petition, and that this case is an anomaly—a unique set of facts not likely to recur. None of these is true.

Contrary to Byrd's brief in opposition, neither *Lafler* nor *Frye* extended the Sixth Amendment right to counsel to a plea deal that, as here, was never even on the table. Both cases involved a plea offer, and to the extent *Lafler* mentioned the unoffered plea context, it specifically cautioned 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). What Byrd advocates for, and what the court below did in accepting his invitation, is an expansion of *Lafler* and *Frye*. What is sorely needed is not this expansion, but rather a reaffirmation that *Lafler* and *Frye* do not extend to cases where pleas were never offered.

There is a circuit split here. In no uncertain terms, the Tenth Circuit rejected the idea that *Lafler* and *Frye* extended the Sixth Amendment right to effective assistance of counsel to an unoffered plea. That directly conflicts both with the decision below and with existing precedent in the Fourth Circuit. Byrd's argument that neither *United States* v. *Rendon-Martinez* nor the state supreme court cases the petition cites are factually similar to his case does not change the fact that none of those decisions is reconcilable with the Sixth Circuit's expansion of *Lafler* and *Frye*.

Finally, this issue will recur. Perceived misadvice, miscommunications, and lost opportunities are the sum and substance of ineffective-assistance-of-counsel claims. And it is not uncommon for someone to go to trial where there has been no discussion of a plea offer—either on or off the record. The underlying question—whether there is a Sixth Amendment right to effective counsel with regard to plea bargains that prosecutors never offered—is potentially relevant in myriad cases, as appellate court cases demonstrate.

ARGUMENT

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

The Sixth Circuit's holding that the right to effective counsel encompasses plea offers that were never made wrongly extends this Court's decisions in *Lafler* v. *Cooper*, 566 U.S. 156 (2012), and *Missouri* v. *Frye*, 566 U.S. 134 (2012). As the petition explains, this Court's decisions in *Lafler and Frye* both rely on the premise that the prosecutor offered a plea deal. And both decisions contain language indicating that the absence of a plea offer forecloses a plea-related ineffective-assistance-of-counsel claim. Pet. at 9. The Sixth Amendment does not extend as far as the Sixth Circuit stretched it.

A. Byrd misreads *Lafler* and *Frye* and the petition.

Byrd does not view the decision below as stretching *Lafler* and *Frye*. But that is because his argument

rests on a faulty premise—that the Sixth Circuit decision is faithful to *Padilla*, *Lafler*, and *Frye*. Br. in Opp. at 4. It is not, and Byrd misreads these cases. For starters, he makes a critical omission: he does not acknowledge or explain how to deal with the fact that *Padilla*, *Lafler*, and *Frye* each involved an offered plea. See *Padilla* v. *Kentucky*, 559 U.S. 356, 359, 370 (2010); *Frye*, 566 U.S. at 139; *Lafler*, 566 U.S. at 160, 161. The Sixth Amendment right attached to negotiations regarding the offer that had already been made.

For example, Byrd analogizes the facts of his case to those of *Lafler*, which, according to him, also "hang[s] on counsel's misadvice." Br. in Opp. at 12. But he skirts a key fact: the misadvice in *Lafler* was as to several *actual offers* that the criminal defendant rejected after his attorney convinced him that the prosecution would be unable to establish his intent to murder. 566 U.S. at 161. The misadvice was not about a speculative offer.

Most critically, Byrd misreads *Lafler*'s holding. He claims that 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." Br. in Opp. at 12. This is a fundamental misreading of *Lafler*. What *Lafler* held was 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." Pet. at 2 (quoting *Lafler*, 566 U.S. at 168 (emphasis added)); see also *Frye*, 566 U.S. at 145. And as the petition explains, *Lafler* also said that "[i]f no plea offer is made, … the issue raised here simply does not arise." Pet. at 2, 11 (quoting *Lafler*, 566 U.S. at 168).

Just as Byrd misunderstands the *Lafler*/*Frye* framework, he also misunderstands the Warden's position. He reads the petition as contending that the Sixth Circuit created a new right—the right to have the prosecution offer a plea bargain. Br. in Opp. at 8. The petition asserts no such thing. In fact, the petition explains that there is no right to a plea bargain. Pet. at 4 (citing *United States* v. *Rendon-Martinez*, 497 Fed. App'x 848 (10th Cir. 2012)); Pet. at 12 (citing Pet. App. 26a (Griffin, J., dissenting)) (citing *Lafler*, 566 U.S. at 168 & *Frye*, 566 U.S. at 148–49). The Sixth Circuit acknowledges the same. Pet. App. 14a ("[T]here is no right to plea offer"). But the rub is that the Sixth Circuit transposes *Lafler*'s analysis on whether there is a reasonable probability that the criminal defendant would have accepted the offer, 566 U.S. at 163–64, to whether "he [may] establish a reasonable probability that but for counsel's errors, the petitioner *would have received a plea offer*." Pet. App. 14a (emphasis added). That is altogether new.

Byrd also misreads the petition as asserting that the *Lafler* and *Frye* decisions "conditioned the right to the effective assistance of counsel upon the offer of a *formal* plea bargain." Br. in Opp. at 10 (emphasis added). What the petition actually states is that both decisions conditioned the right upon the existence of a plea offer and that *Frye* noted it should be a formal plea bargain. Pet. at 10. And Byrd misses the point—if an informal offer or discussions do not suffice, an unoffered, wholly speculative plea clearly would not. Pet. at 20.

The reasons for a formal plea offer are not "profoundly illogical," as Byrd states. Br. in Opp. at 10.

They make sense, as this Court explained in detail in *Frye*. 566 U.S. at 146 (discussing how a formal plea provides documentation if challenged, avoids later misunderstandings, and ensures that the defendant has been fully advised).

Byrd also errs in equating defense counsels' ethical responsibilities to their clients with the scope of the Sixth Amendment right to counsel. Byrd discusses at length the ABA Standards for Criminal Justice, Br. in Opp. at 10–11, assuming that every ethical duty translates into a constitutional right. It does not. A trial attorney's ethical duty to be open to possible negotiated dispositions does not translate to a Sixth Amendment right to engage in pre-offer plea discussions.

The fact that there is not a Sixth Amendment right to an unoffered plea does not mean, however, that criminal defense counsel should shirk their duty to be proactive in engaging the prosecutor in discussions about a plea deal where appropriate. But by the same token, defense attorneys should not be pressured or encouraged to dog prosecutors for plea deals just to insulate themselves from constitutional challenge. In other words, the courts should not effectively require that plea discussions become an automatic part of every criminal case.

In sum, this Court's existing framework—as reflected in *Lafler*, *Frye*, and the caselaw foundation on which those cases rest—does not support the holding below. The Sixth Circuit dramatically expanded the Sixth Amendment right to counsel far beyond what *Lafler* and *Frye* envisioned. Pet. at 12.

B. Byrd does not adequately address the remedial problems caused by speculating about what never occurred.

The petition explains how the Sixth Circuit holding creates a right with no feasible remedy. Pet. at 13–17. Byrd pushes against this, positing that *Lafler* and *Frye* provide an adequate framework for resolving the remedial issues the Petitioner raises. Br. in Opp. at 4, 9. But they do not. The petition outlines both the lingering questions engendered by a non-existent offer and the reasons why the possible remedies set forth in *Lafler* do not work in the context of a plea deal that never existed. Pet. at 14–16.

Byrd minimizes these difficulties, but they cannot be wished away. Just because the prosecutor testifies, after the fact, that he *would have* considered a plea deal, does not mean that the contours of, or conditions on, that agreement could ever be known. Byrd reiterates what he believes would have happened in this case. Br. in Opp. at 16. And he says he "would have accepted the offer if one had been made."[1] *Id*. But these statements do not fully answer the matter, as even Byrd appears to acknowledge, Br. in Opp. at 15 ("A thorny problem occurs where no plea was offered"), which is why the *Lafler* rubric requires more specificity.

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[1] The question whether Byrd actually wanted a plea is not at all certain—at least not in the assessment of the district judge who was present at the evidentiary hearing and was able to judge his credibility. She 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. Pet. App. 56a–57a.

It asks, for example, whether the defendant would have accepted responsibility for his actions, and whether he "would have accepted *the* guilty plea." *Lafler*, 566 U.S. at 174 (emphasis added). Years later, a court cannot confidently say what a prosecutor would have done in a hypothetical plea negotiation, even where the prosecutor expresses in hindsight some willingness to have offered a plea. The details matter, which is why a concrete plea offer must be the starting point for the Sixth Amendment right to counsel in the plea context. The only measure of specificity Byrd offers in his situation is that the prosecutor may have offered a plea for second-degree murder. Br. in Opp. at 16. But the crime to be pled to is only a fraction of the equation. The length of the sentence also matters—and here the length of Byrd's hypothetical sentence remains unknown.

Byrd also ignores the fact that an unoffered plea can never be "reoffered." That is because we do not know what the terms of the offer would have been. And he erroneously suggests that it creates no separation-of-powers problems for a court to tell a prosecutor to offer a plea it never offered in the first instance. Br. in Opp. at 17–18. Allowing a defendant to withdraw a plea, as occurred in *Santobello* v. *New York*, 404 U.S. 257, 263 (1971), is fundamentally different than ordering the prosecution to offer a plea it never offered—the very circumstance Justice Ginsburg cautioned against in her concurring opinion in *Burt* v. *Titlow*, 571 U.S. 12, 27 (2013).

The unmanageability of applying the *Lafler* remedies creates a vacuum that is likely to be filled by doing just what the court below did: returning the case

to state court and resetting to its pre-trial posture—with all the attendant burdens, expenses, and problems created by the passage of time. This is a remedy that *Lafler* expressly eschewed. *Id*. at 172. Thus, at a minimum, the decision here extends *Lafler* and *Frye*, underscoring why this case is cert-worthy.

Byrd now asserts that he deserves this new trial because his trial was unfair. And he takes issue with the Warden's argument that Byrd did not challenge the constitutionality of his trial. Br. in Opp. at 2. But Byrd is unable to point this Court to anything in the record indicating that he made that argument below. Indeed, the Sixth Circuit's analysis was premised on Byrd having had a constitutionally sound trial. Pet. App. 25a (Griffin, J., dissenting).

Byrd also too quickly discards—in fact, labels it as a "canard"—the petition's argument that offering a plea that had never been offered before would undermine state law that allows crime victims certain rights during the plea process. Br. in Opp. at 18. He argues that if a plea was offered on remand, the victims would still be consulted. *Id*. But *when* that happens is important. In some States, like Michigan, the victim and the victim's family have the right to offer input into the *process*—as the prosecutor is deciding whether to offer a plea, and if so, what the scope of a plea should be—not just the right to be advised of the offer that has already been made. Pet. 15–16. Byrd's argument also discounts the passage of time, assuming that victims' family members can later be located. The same concerns that underlie this Court's concern about finding witnesses years later, see *United States* v. *Marion*, 401 U.S. 307, 322 n.14 (1971), hold true for

individuals close to the victim who could speak to the impact of the defendant's crime.

A final misconception is Byrd's minimizing the import of the law on *Alford* pleas on the dubious process of speculating about what never occurred. Br. in Opp. 18–19. In States like Michigan, a factual basis for a plea is required. Mich. Ct. Rule 6.302. One must make out the factual elements even if one claims to be "innocent." One cannot deny the factual elements and ask to take a no-contest plea. See *People* v. *Butler*, 204 N.W.2d 325, 330 (Mich. App. 1972). This is important, because it means a court's acceptance of a guilty plea cannot be assumed—yet another reason why speculation about what *would have* occurred is problematic.

In sum, the remedial problems are legion and unmanageable. Try as he might, Byrd cannot diminish them. And neither can the courts, as the Sixth Circuit did here. These remedial problems are an insurmountable barrier to the new Sixth Amendment right the Sixth Circuit has created.

II. The decision below creates a circuit split.

The Sixth Circuit's decision directly conflicts with an unpublished Tenth Circuit decision that expressly ruled that the Sixth Amendment right to effective counsel is not implicated by an unoffered plea. Pet. at 17 (citing *United States* v. *Rendon-Martinez*, 497 F. App'x 848, 849 (10th Cir. 2012) (Gorsuch, J.)). Byrd provides a litany of *Rendon-Martinez*'s infirmities—including that it "has no precedential value" (a point the petition acknowledged, Pet. at 17) and that the "record below is exceedingly thin." Br. in Opp. at 21–

22. But for all Byrd's efforts to flyspeck the details of *Rendon-Martinez*, in the end the Tenth Circuit was clear that a Sixth Amendment right to an unoffered plea would be an expansion of *Lafler* and *Frye*—the main point of the petition.

In a similar way, Byrd tries to minimize the state supreme court cases on which the petition relies, arguing that they, too, are factually distinguishable. In Byrd's view, no case supports the petition unless it is virtually identical to what he says are the facts of his case, replete with both counsel misadvice and a local practice of counsel initiating plea-bargaining. Br. in Opp. at 24. But the point of citing *Sutton* v. *State*, 759 S.E.2d 846, 851 (Ga. 2014), and *Fast Horse* v. *Weber*, 838 N.W.2d 831, 840–41 (S.D. 2013), was not to show that these cases were identical or nearly identical to Byrd's situation. It was to show that state supreme courts have also recognized post-*Lafler* that prejudice cannot be established if a plea offer was never made. Pet. at 21.

Federal and state courts alike have refused to extend the Sixth Amendment right to effective assistance of counsel to unoffered pleas.

III. This is a recurring question of national importance.

Byrd paints this case as a one of factual aberrations and procedural quirks that undermine its certworthiness. Br. in Opp. at 3–4. Yet the facts here are not so unusual. To be sure, they may not always recur in this particular combination. But criminal defendants do not typically file ineffective assistance of

counsel claims where their attorney has been adequate and attorney-client communications have been sufficient, or where they do not believe a plea deal would have improved their position. They file such claims in a broad array of circumstances where they perceive that advice or communication has gone awry in a way that has prejudiced them. Accordingly, this issue is likely to recur. Indeed, any time defense counsel does not pursue a plea deal and the defendant is convicted after a fair trial, this issue will likely be presented.

The lower courts, the government, defendants, and defense counsel are entitled to know what rule of law governs the situation presented here. If the Sixth Amendment right to counsel extends to plea negotiations that never took place, this Court ought to be the one to declare it. Preferably, though, this Court should grant certiorari and provide clear guidance that *Lafler* and *Frye* do not extend to create the Sixth Amendment right fabricated by the Sixth Circuit in this case

The importance of not extending *Lafler* and *Frye* to unoffered pleas cannot be overstated. The Sixth Circuit rule allows fair trials to be undone; puts trial courts in an impossible position with respect to fashioning remedies; and demeans executive prerogatives (contrary to separation-of-powers principles).

CONCLUSION

For these reasons and those stated in the petition, this Court should grant the petition.

Respectfully submitted,

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