No._____

IN THE SUPREME COURT OF THE UNITED STATES

ALAN STARR TROWBRIDGE, Petitioner,

v.

JEFFREY WOODS, Warden, Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: April 19, 2021

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Sixth Circuit Court of Appeals decide an important question of federal law in a way that conflicts with this Court's holding in *Strickland v. Washington?*

PARTIES TO THE PROCEEDINGS

Petitioner is Alan Trowbridge, a citizen of the United States of America. Respondent is Jeffrey Woods, Warden.

DIRECTLY RELATED PROCEEDINGS

Alan Trowbridge v. Jeffrey Woods, No. 19-1434. United States Court of Appeals for the Sixth Circuit. Judgment entered November 19, 2020.

Alan Trowbridge v. Jeffrey Woods, No. 2:15-cv-186. United States District Court for the Western District of Michigan. Judgment entered April 18, 2019.

Alan Trowbridge v. Jeffrey Woods, No. 2:15-cv-186. United States District Court for the Western District of Michigan. Report and Recommendation filed February 28, 2019.

Alan Trowbridge v. Jeffrey Woods, No. 146357. Michigan Supreme Court. Order entered April 17, 2015.

Alan Trowbridge v. Jeffrey Woods, No. 300460. Michigan Court of Appeals. Judgment entered September 25, 2012.

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Petitioner Alan Trowbridge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in docket number 19-1434 was issued on November 19, 2020 and it is unpublished. *Trowbridge v. Woods*, 835 F. App'x 100 (6th Cir. 2020). The opinion of the United States District Court for the Western District of Michigan in docket number 2:15-cv-186 was issued on April 18, 2019, and it is unpublished. *Trowbridge v. Woods*, No. 2:15-CV-186, 2019 U.S. Dist. LEXIS 66041 (W.D. Mich. Apr. 18, 2019). The report and recommendation of the magistrate judge of the United States District Court for the Western District of Michigan in docket number 2:15-cv-186 was issued on February 28, 2019. *Trowbridge v. Woods*, No. 2:15-cv-186, 2019 U.S. Dist. LEXIS 66122 (W.D. Mich. Feb. 28, 2019). The order denying the application for leave to appeal of the Michigan Supreme Court in docket number 146357 was issued on April 17, 2015. *People v. Trowbridge*, 497 Mich. 1002, 861 N.W.2d 624 (2015). The opinion of the Michigan Court of Appeals in docket number 300460 was issued on September 25, 2012 and it is unpublished. *People v. Trowbridge*, No. 300460, 2012 Mich. App. LEXIS 1862 (Ct. App. Sep. 25, 2012).

STATEMENT OF JURISDICTION

The district court had jurisdiction over Mr. Trowbridge's federal habeas petition under 28 U.S.C. § 2254. The district court entered a final judgment denying the habeas petition and granted a certificate of appealability. The Sixth Circuit had jurisdiction on appeal under 28 U.S.C. § 1291 and 2253.

The Sixth Circuit's opinion was filed on November 19, 2020. There was no petition for rehearing. The Sixth Circuit's mandate issued on December 14, 2020. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2254. On March 19, 2020, this Court issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment.

STATUTORY AND CONSTITUTIONAL AUTHORITY

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to…have the Assistance of Counsel for his defense."

28 U.S.C. § 2254 provides that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> * * *
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> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

STATEMENT OF THE CASE

State District and Circuit Court Trial Proceedings

On or about March 23, 2010, the Grand Traverse County Prosecutor charged Mr. Trowbridge with two counts of criminal sexual conduct in the first degree under MCL 750.520b(2)(c). (Appendix, 40a.) On May 6, 2010, at Mr. Trowbridge's preliminary examination and Circuit Court arraignment, the Grand Traverse County Prosecutor added three counts of criminal sexual conduct in the first degree under MCL 750.520b(2)(c). (R. 10-2, Preliminary Exam and Circuit Court Arr. Tr., PageID# 171); (R.10-15, Michigan Court of Appeals Case 300460 , PageID# 1424).[1] Counsel for Mr. Trowbridge waived a reading of the felony information at the arraignment believing incorrectly that he understood "what he's charged with and what the consequences and the penalties are." (R. 10-2, Preliminary Exam and Circuit Court Arr. Tr., PageID# 171). At no time prior to trial did Mr. Trowbridge's trial counsel, the prosecutor, or the Grand Traverse District and Circuit Court ever advise Mr. Trowbridge that he faced mandatory lifetime imprisonment if convicted without the possibility of parole if convicted. MCL 750.520b(2)(c). To the contrary, the charging documents state incorrectly that the penalties upon conviction were "life or any term of years," misleading Mr. Trowbridge to believe that the Court had discretion to

[1] Mr. Trowbridge was ultimately convicted of three counts because the victim did not testify sufficiently as to two of the counts at trial, and the prosecutor dismissed them.

sentence Mr. Trowbridge to some term of years less than life. (R.10-15, Michigan Court of Appeals Case 300460, PageID# 1420-25).

At the final pretrial conference on July 30, 2010, the government offered that in exchange for a guilty plea to two counts of criminal sexual conduct in the third degree as a habitual offender, the Court would not sentence Mr. Trowbridge to more than 22 ½ years in prison. MCL 750.520d, MCL 769.10(a) (R.10-14, Final Conf. Memo, PageID# 1351). Because the Court had advised him that he could still receive a sentence less than life without chance of parole, and believing that his sentencing guidelines would be less than 30 years, Mr. Trowbridge rejected the offer and chose to proceed to trial. (R. 10-9, Sentencing Tr., PageID# 1213; R.10-14, Final Conf. Memo, PageID# 1351.) Mr. Trowbridge believed based on the advice of his counsel, the prosecutor, and the court, that he could not receive a mandatory life sentence and that he would be eligible for parole even if convicted at trial. (*Id*.) MCL 750.520b.

On August 9, 2010, the first scheduled day of trial, the government offered, and Mr. Trowbridge accepted, to plead guilty to three counts of criminal sexual conduct in the third degree (without the habitual offender), which would have carried a maximum sentence of fifteen years. MCL 750.520d(2)(b). (R.10-11, Evidentiary Hearing Tr., PageID# 1259). The Circuit Court refused to accept his plea and advised Mr. Trowbridge that it was too late for him to plead to a reduced charge. (*Id*. at PageID# 1234). Mr. Trowbridge, left with no other option other than to plead guilty as charged and believing that he would not be subject to mandatory life imprisonment, proceeded to trial and was convicted on three counts of criminal sexual

conduct first degree on August 12, 2010. (R.10-1, Grand Traverse County Docket, PageID# 87).

At the time of the verdict, Mr. Trowbridge, his defense counsel, and the prosecutor remained ignorant of the mandatory life sentence that accompanied the convictions. (R.10-11, Evidentiary Hearing Tr., PageID# 1245). On September 10, 2010, the day scheduled for sentencing, Mr. Trowbridge learned for the first time that his conviction called for mandatory life imprisonment without parole. *(Id.*) Counsel for Mr. Trowbridge requested, and was granted, a brief adjournment until September 27, 2010, when the Court, by operation of law, sentenced Mr. Trowbridge to three terms of life imprisonment without the possibility of parole. At the time of sentencing, the Court ordered, "the mandatory sentence is life in prison without parole…[a]ll three counts are life in prison without parole." (R.10-9, Sentencing Tr., PageID# 1214-15).

State Post-Conviction Proceedings

Mr. Trowbridge appealed his conviction and sentence to the Michigan Court of Appeals, and the case was remanded for an evidentiary hearing on the issue of whether Mr. Trowbridge received effective assistance of counsel. (R. 10-15, Mich. Ct. App. Order, PageID#1463). Mr. Trowbridge's ineffective assistance claim was rejected by the trial court, and he renewed his appeal. (Appendix, 40a.) The trial court found that Mr. Trowbridge's counsel's performance was, in fact, deficient under the first prong of *Strickland v. Washington;* however, it held that Mr. Trowbridge had not satisfied the second prong -- that he was prejudiced by his counsel's deficient

performance -- as the Court found that Mr. Trowbridge would have rejected the plea offer, even if he had known about the risk of mandatory life in prison. (Appendix, 42a.) The trial court held that because a life sentence was possible, it did not matter that a life sentence was mandatory, especially where, as here, his chances of acquittal at trial were slim. *Id.*

Mr. Trowbridge appealed again to the Michigan Court of Appeals, and argued that the Circuit Court erred when it held on remand that his counsel's failure to properly advise him of the mandatory penalty he faced did not cause him prejudice. (R. 10-15, Defendant-Appellant's Brief, PageID# 1397, 1400). The Michigan Court of Appeals conceded that the performance of Mr. Trowbridge's trial counsel was deficient, but held that Mr. Trowbridge failed to establish prejudice as he had not shown that he would have accepted the July 30 plea offer, even if he had known about the mandatory life sentence. (Appendix, 45a.)

Mr. Trowbridge appealed the denial by the Michigan Court of Appeals to the Michigan Supreme Court, which declined to hear the appeal because it was "not persuaded that the question presented should be reviewed by this Court." (Appendix, 39a.)

Federal Habeas Proceedings

Having exhausted his State court remedies, Mr. Trowbridge brought a habeas petition in the Western District of Michigan under 28 U.S.C. § 2254, based upon a claim of ineffective assistance of counsel. Specifically, Mr. Trowbridge contended that his trial counsel's ignorance of the possible sentence was

constitutionally ineffective. Had Mr. Trowbridge known that he risked mandatory life in prison if he were convicted at trial, he would have accepted the plea offer made by the government on July 30, 2010, which would have carried a maximum sentence of 22 ½ years.

On or about May 31, 2017, undersigned counsel was appointed to represent Mr. Trowbridge pursuant to the Criminal Justice Act. On February 28, 2019, Magistrate Judge Timothy Greeley, after receiving briefs from both parties, submitted a report and recommendation to the district court, recommending that the district court grant Mr. Trowbridge's request for relief. (Appendix, 18a.) The magistrate judge recommended relief because he found that Mr. Trowbridge:

> did not have a basic understanding of the penalties he was facing because of ineffective assistance of counsel. Without this knowledge, Petitioner could not evaluate any plea offer or make an informed decision on an offer. This is a fundamental defect that prejudiced Petitioner. Petitioner did accept a plea offer the day of trial without knowing the actual penalty he was facing. This is clear evidence that he would have reached a plea deal much earlier had he known the penalty he was facing. Appendix, 35a.

On April 18, 2019, the district court issued an order rejecting the report and recommendation, and denying Mr. Trowbridge's habeas petition. (Appendix, 11a.) The court held that although Mr. Trowbridge's counsel's performance was deficient and satisfied the first prong of *Strickland*, the state trial court correctly applied the *Strickland* test because Mr. Trowbridge had failed to show that there was a reasonable probability that he would have accepted the July 30, 2010 plea offer if he had been properly advised of the mandatory life sentence, and therefore did not satisfy the second prong. (Appendix, 16a.) The district court based its decision on Mr.

Trowbridge's decision to proceed to jury trial, despite his counsel's advice that his chance of acquittal at trial was very slim, that if convicted at trial he would face a lengthy sentence that could exceed natural life and was unlikely to be paroled early, and the fact that Mr. Trowbridge attempted to accept the July 30, 2010 plea offer as a "no contest" plea, and then took the stand at trial to deny the allegations against him. (Appendix, 15a-16a.) The district court found that the trial court was not unreasonable in its application of *Strickland* because "state court factual findings are presumed correct…and Trowbridge has not offered clear and convincing evidence to rebut the trial court's finding that there was not a reasonable probability that Trowbridge would have accepted the July 30, 2010, plea offer if not for the deficient performance of defense counsel." (Appendix, 16a.) Because the district court rejected the report and recommendation, the district court granted a certificate of appealability. (Appendix, 16a.)

Mr. Trowbridge appealed the district court's decision to the Sixth Circuit Court of Appeals. On November 19, 2020, the Court issued an opinion denying Mr. Trowbridge's appeal. The Court held that "it was not objectively unreasonable for the Michigan Court of Appeals to find that there was no reasonable probability Trowbridge would have accepted a plea offer had he known he was facing a mandatory sentence of life without the possibility of parole," based on the disparity between the sentence Mr. Trowbridge thought he risked, and the one he actually faced, his counsel's advice that he was unlikely to be paroled early, and on Mr.

Trowbridge's assertions of innocence at trial. (Appendix, 8a.) The court concluded that:

> "our task under AEDPA review is not to decide whether the state court was correct, or whether we would have decided the case differently…[w]e must deny the writ unless the state court's decision was objectively unreasonable, meaning that there is no possibility for fairminded disagreement…[i]n this case, the Michigan Court of Appeals gave a reasoned explanation for its finding that there was no reasonable probability that, but for the deficient performance of his trial counsel, Trowbridge would have pled guilty. Based on the record before that court, we cannot say that its decision was objectively unreasonable." (Appendix, 9a-10a.)

REASONS FOR GRANTING THE PETITION

Mr. Trowbridge now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

I. The Appellate Court's Decision Conflicts with This Court's Precedent Regarding What Constitutes Prejudice Resulting from Counsel's Deficient Performance.

Mr. Trowbridge was prejudiced by his counsel's deficient performance under this Court's opinion in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), and *Lafler v. Cooper*, 566 U.S. 156 (2012). On or about August 12, 2010, in Grand Traverse County, a jury returned a guilty verdict against Alan Trowbridge on three counts of criminal sexual conduct in the first degree. Like most defendants charged with a felony crime in State court, Mr. Trowbridge was offered a plea deal prior to trial. In this case, the prosecution offered to cap Mr. Trowbridge's sentence at 22 ½ years in prison in exchange for a guilty plea on two counts of criminal sexual conduct in the third degree.

At the time of the plea offer, Mr. Trowbridge's counsel incorrectly advised him that he could receive parole even if he were convicted after trial on the original charges. Further, at critical stages of the proceedings, the court advised Mr. Trowbridge that he could be sentenced to "a term of years." (R.10-15, Michigan Court of Appeals Case 300460, PageID# 1420.) Believing his choice was between 22 ½ years in prison and a possibly greater period of years in prison with the chance of parole, Mr. Trowbridge elected to proceed to trial. A jury convicted Mr. Trowbridge. At sentencing Mr. Trowbridge learned, for the first time from anyone, that he faced

mandatory life in prison. Because he was not properly advised of the sentence he would receive if convicted, and because Mr. Trowbridge did not accept the plea offer as a result, Mr. Trowbridge's counsel's performance was deficient and he was prejudiced by his counsel's deficient performance.

To prevail on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-prong test set forth in this Court's decision in *Strickland v. Washington*: (1) that his trial counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has held that a counsel's performance is deficient if he makes errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and if the representation "fell below an objective standard of reasonableness." *Id.* The second prong, that the petitioner be prejudiced, is satisfied when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

This Court specifically addressed the issue of a defendant rejecting a plea offer based on bad advice from counsel in *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). In that case, the defendant rejected a plea offer upon inadequate advice from counsel, and was later convicted at trial. *Id*. The defendant argued that his lawyer was constitutionally ineffective because he failed to counsel him on the possible plea offers before he decided to go to trial. *Id*. at 161. When deciding whether the defendant had been prejudiced by his lawyer's bad advice, the Court considered whether "there is a

reasonable probability that (1) the defendant would have accepted the plea, (2) the prosecution would not have withdrawn it in light of intervening circumstances, (3) the court would have accepted its terms, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164.

1. It is undisputed that Mr. Trowbridge's counsel's performance was deficient.

Every court to consider the issue has found that Mr. Trowbridge's counsel's performance was deficient. (Appendix, 6a.) Indeed, at the evidentiary hearing regarding Mr. Trowbridge's ineffective assistance of counsel claim, the trial court, prosecutor, and appellate counsel for Mr. Trowbridge all conceded that the trial counsel's performance was below the acceptable standard, and that the first prong of *Strickland* was satisfied. (R.10-11, Evidentiary Hearing Tr., PageID# 1230). The trial court judge, prosecutor, and Mr. Trowbridge's trial counsel readily admitted that they were unaware of the law mandating a mandatory life sentence. (R.10-11, Evidentiary Hearing Tr., PageID# 1229, 1247, 1259, 1262, 1273). It was not until the day of sentencing when Mr. Trowbridge was first advised that his decision to go to trial would result in mandatory life in prison, should he be convicted. (R.10-11, Evidentiary Hearing Tr., PageID# 1229, 1247, 1259, 1262, 1273).

Mr. Trowbridge's counsel's lack of basic knowledge of a common criminal statute fell below any objective standard of reasonableness, rendering counsel's performance deficient under the first prong of *Strickland*. Mr. Trowbridge's trial counsel failed to read the statute that laid out the elements and penalties of the crime,

and mistakenly told Mr. Trowbridge that his sentence would be a term of years, and that he would someday be eligible for parole. (R.10-11, Evidentiary Hearing Tr., PageID# 1245, 1250, 1262). Mr. Trowbridge's counsel unquestionably had a duty to his client to inform him of the possible sentence he would face; here, a task made easier by the fact that the mandatory life sentence was clearly explained in the statute. See *Miller v. Straub*, 299 F.3d 570, 580 (6th Cir. 2002) ("counsel must ensure that the client's decision is as informed as possible"); *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003) ("failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance.") Further, the trial court also failed to inform Mr. Trowbridge of the charges against him and the maximum and mandatory minimum sentences at the arraignment, as required under MCR 6.104(E)(1). *People v. Scott*, No. 303671, 2012 Mich. App. LEXIS 1929, at *4 (Ct. App. Oct. 9, 2012) (at the arraignment, the court must state the substance of the charge to the defendant prior to the entry of a plea.) The purpose of this requirement is to ensure that a defendant is able to make informed decisions throughout the plea negotiation process, and to be cognizant of exactly what he is risking if he chooses to proceed to trial.[2]

2. Mr. Trowbridge was prejudiced by his counsel's ineffective assistance.

Despite universal acceptance that Mr. Trowbridge's attorney was constitutionally ineffective, that deficiency must still be found to material and cause

[2] Even assuming that the district court informed Mr. Trowbridge of the charges and penalties at his district court arraignment, the penalties explained to him would also have been incorrect because the charging documents incorrectly stated the penalties as "life or any term of years." (R.10-15, Defendant-Appellant's Brief, PageID# 1420-25).

prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984. Here, the Circuit Court found no prejudice because in its view there was not a reasonable probability that Mr. Trowbridge would have accepted the July 30, 2010 plea offer, even if he had been correctly advised. "Given the evidence before the Michigan Court of Appeals, it is not objectively unreasonable for that court to conclude that Trowbridge would not have accepted a plea offer before trial even if knew he was facing a sentence of life without the possibility of parole." (Appendix, 8a-9a.)

When affirming the District Court, the Circuit Court relied on the testimony of Mr. Trowbridge's trial counsel, and counsel's advice to Mr. Trowbridge that he had a low chance of acquittal at trial, and that if convicted, he would face a lengthy sentence that would amount to life in prison, with a low chance of early parole. *Id* at 8a. Further, the Court found that Mr. Trowbridge would not have provided a factual basis for a guilty plea, because the only plea he attempted was a no contest plea, after which he took the stand in his defense at trial. *Id* at 9a.

A defendant is prejudiced by ineffective assistance of counsel when, but for the counsel's mistake, the outcome would have been significantly different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); see *United States v. Franklin*, 415 F.3d 537, 556 (6th Cir. 2005) (defendant must satisfy two-part Strickland test to prevail on habeas claim). The Sixth Amendment right to counsel extends to pretrial negotiations. *Missouri v. Frye*, 566 U.S. 134 (2012). Here, Mr. Trowbridge's counsel made a fundamental error and as a result provided Mr. Trowbridge with incorrect options: take a plea deal capped at 22 ½ years or go to trial and face more time but

not mandatory life. Mr. Trowbridge need not show that he would have chosen a different option had he been advised correctly, because, unaware of those options, no one knows what he would have done. He need only show that there was a reasonable probability that he would have chosen differently had he been provided with accurate options.

In *Lafler v. Cooper*, 566 U.S. 156, 164 (2012), the defendant rejected a plea offer upon inadequate advice from counsel, and was later convicted at trial. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). The defendant argued that his lawyer was constitutionally ineffective because he failed to counsel him on the possible plea offers before he decided to go to trial. (*Id*. at 161). When deciding whether the defendant had been prejudiced by his lawyer's bad advice, the Court considered whether: "there is a reasonable probability that (1) the defendant would have accepted the plea, (2) the prosecution would not have withdrawn it in light of intervening circumstances, (3) the court would have accepted its terms, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler* at 187; *see also, Lee v. United States*, 137 S. Ct. 1958, 1964 (2017) (a defendant has the right to the effective assistance of counsel during plea negotiations); *Jones v. United States*, 504 F. App'x 405, 407 (6th Cir. 2012) (defendant establishes prejudice under *Lafler* if the loss of the plea opportunity led to a trial resulting in a more serious sentence). Here, as in *Lafler*, Mr. Trowbridge has shown that his counsel's bad advice caused him prejudice, and the appellate court's finding was in violation of this Court's precedent.

a. Mr. Trowbridge would have accepted the plea had he been given proper advice.

The Circuit Court held that although Mr. Trowbridge's counsel's performance was deficient and satisfied the first prong of *Strickland*, the Michigan Court of Appeals correctly applied the *Strickland* test as Mr. Trowbridge had failed to show that there was a reasonable probability that he would have accepted the July 30, 2010 plea offer had he been properly advised of the mandatory life sentence. (Appendix, 9a.) The Circuit Court relied on Mr. Trowbridge's decision to choose one of the faulty options before him and proceed to jury trial. (Appendix, 7a-9a.)

The Circuit Court erred because had Mr. Trowbridge been provided with accurate options, there is a reasonable probability that someone in his position would have accepted a plea deal offered to him on July 30, 2010. Mr. Trowbridge's counsel correctly advised him as to the low chance of success at trial and the likely lengthy sentence if convicted; however, he did not rely on those factors when deciding whether to take his chances at trial. Mr. Trowbridge's counsel advised him that—win or lose at trial—he would always have the possibility of parole. No one advised him that if he lost at trial, he would absolutely die in prison. To the contrary, he was advised that he would have the possibility of parole sometime after a term of years in prison.

While Mr. Trowbridge need only show a reasonable probability that he would have taken the plea, the conciliatory testimony of Mr. Trowbridge's trial counsel establishes conclusively that he would have done so. Mr. Trowbridge's trial counsel testified at the evidentiary hearing that he believed Mr. Trowbridge would have

accepted the offer, had he been properly advised. (R.10-11, Evidentiary Hearing Tr., PageID# 1256.) Further, Mr. Trowbridge would have pleaded guilty to the August 9 offer, even though he was still unaware of the mandatory life sentence. (R.10-11, Evidentiary Hearing Tr., PageID# 1233-34); ("I [Mr. Trowbridge's trial counsel] was instructed by [Mr. Trowbridge] to put the plea on.") (R.10-11, Evidentiary Hearing Tr., PageID# 1259). Mr. Trowbridge's willingness to plead, made impossible only by the trial court's refusal to accept the plea, shows that he would have accepted a plea offer prior to the trial court's cutoff date if he had known about the mandatory life sentence.

b. The prosecutor would not have withdrawn the plea.

It is undisputed that the prosecutor would not have withdrawn the July 30 plea, had Mr. Trowbridge accepted it prior to the plea cutoff date. To the contrary, the prosecutor offered a plea on August 9, the first day of trial, and did not withdraw it. (R. 10-11, Evidentiary Hrg. Tr., PageID# 1259.) Mr. Trowbridge accepted that offer, and was prevented from pleading to the offer by the trial court judge. *Id.* at PageID# 1258.

c. The trial court would not have rejected a timely guilty plea.

At the evidentiary hearing, the trial court confirmed that it would have accepted a timely guilty plea, and did not accept Mr. Trowbridge's August 9 plea because it was past the cutoff date: "I don't even think [Mr. Trowbridge's trial counsel and the prosecutor] got the description of the plea agreement out, because I told them forget it. Not going to happen…you cannot run a docket with people pleading the day

of trial." (Evidentiary Hearing Tr., PageID# 1233-34). The trial court gave no indication that it would not have accepted a guilty plea prior to the cutoff date.

d. The sentence under the plea deal would have been significantly less severe than the one imposed.

The trial court sentenced Mr. Trowbridge to mandatory life, without parole on his conviction for first-degree criminal sexual conduct. The offer made on July 30th was to plead guilty to two counts of third-degree criminal sexual conduct as a habitual offender, which would have by agreement and statute carried a maximum sentence of 22 ½ years. MCL 750.520d(2); (Appendix, 42a; Plaintiff-Appellee's Brief on Defendant-Appellee's Motion to Remand, PageID#1440). Any term of prison is significantly less than the mandatory life sentence. The plea offered on August 9 of two counts of third-degree criminal sexual conduct without the habitual offender enhancement, which Mr. Trowbridge attempted to accept, carried a maximum of fifteen years. (R.10-11; Evidentiary Hearing Tr., PageID#1259).

Having satisfied the four-factor *Lafler* test and certified that he would have accepted the plea, if not for his trial counsel's deficient performance, Mr. Trowbridge suffered prejudice. See, e.g., *Jones v. United States*, 504 F. App'x 405, 407 (6th Cir. 2012) (defendant's counsel was ineffective under the first prong of *Strickland* because he advised defendant to withdraw his guilty pleas on remand, allowing the government to supersede the indictment, and defendant was prejudiced under the second prong because he received a lengthier sentence at trial than he would have received under the original plea agreement). To restore him to the position in which he would have been if he had received the proper assistance of counsel during plea

negotiations, Mr. Trowbridge should have the opportunity to accept the July 30, 2010 offer of two counts of third-degree criminal sexual conduct as a habitual offender, now that he is aware of and is serving the mandatory life sentence.

3. The appellate court erred in holding that the Michigan Court of Appeals denial of Mr. Trowbridge's ineffective assistance claim was not contrary to federal law or unreasonable.

For a federal court to grant habeas relief under AEDPA, Mr. Trowbridge must show that the Michigan Court of Appeals decision to reject his claim was contrary to federal law or was unreasonable. A state court decision is contrary to federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Davis v. Lafler*, 658 F.3d 525, 529 (6th Cir. 2011) (internal quotations and citations omitted). For a state court decision to be an unreasonable application of federal law, it must be "objectively unreasonable, not simply erroneous or incorrect." *Ferensic v. Birkett*, 501 F.3d 469, 472 (6th Cir. 2007) (internal quotations and citations omitted); *see also Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003) ("[i]n order for a federal court find a state court's application of [Supreme Court] precedent unreasonable, the state court's decision must have been more than incorrect or erroneous. The state court's application must have been objectively unreasonable.") (internal quotations and citations omitted).

Here, the Michigan Court of Appeals held that "we are not left with the definite and firm conviction that the trial court made a mistake when it concluded that

defendant had not established a reasonable probability that he would have accepted the prosecution's final pretrial plea offer with proper advice regarding the mandatory sentence he faced if convicted at trial." (Appendix, 45a.)

The Circuit Court held that the Michigan Court of Appeals denial was not unreasonable, based on the evidence presented, because it was not unreasonable for the court to find that "there was no reasonable probability that but for trial counsel's error, Trowbridge would have accepted the second plea offer." (Appendix, 7a.) To make that determination, the Court considered the disparity between the penalty Mr. Trowbridge was offered in a plea, and the penalty he actually faced, which the Court did not deem significant: "Trowbridge knew when he rejected the government's plea offer on July 30 that he was facing a sentence close to if not exceeding his natural life and that he was unlikely to be released early on parole." (Appendix, 8a.) A sentence "close to if not exceeding his natural life," however, is not synonymous with "mandatory life." If Mr. Trowbridge's attorney had told him that he "would face a lengthy sentence that could exceed his natural life" with the chance of parole, no matter how small the chance of parole was, he still would have been given ineffective counsel. The only correct advice was to advise Mr. Trowbridge that he faced "mandatory" life upon conviction at trial. There is a material difference. If his lawyer had told him he would die in prison – guaranteed – then he would have pled guilty with the hope that he might leave prison some day.

Further, the Circuit Court gave undue weight to Mr. Trowbridge's "assertions of innocence at trial and his failure to present his own testimony at the evidentiary

hearing," which "suggested an unwillingness to plead guilty before trial." (Appendix, 8a.) Every defendant enjoys a presumption of innocence, and Mr. Trowbridge's decision to exercise his right to trial does not mean he would not have pleaded guilty given proper advice. Mr. Trowbridge went to trial because he was told he did not have much to lose. According to his lawyer, he would be eligible for parole someday whether he was convicted by guilty plea or by jury. The Circuit Court cannot fault Mr. Trowbridge for believing he had little to lose when his lawyer told him so.

The Circuit Court also determined that Mr. Trowbridge's "consent to a no contest plea rather than a guilty plea could be viewed as evidence that Trowbridge would only have accepted a plea offer if he did not have to plead guilty, and that "the existence of some evidence in Trowbridge's favor does not mean that the Michigan Court of Appeals was objectively unreasonable to deny his ineffective assistance of counsel claim given the entirety of the record." *Id.* The Court's reasoning ignores that, without even knowing the sentence that awaited him, Mr. Trowbridge agreed to plead no contest on the day of trial, and was only prevented from doing so by the trial court. Had he known that he faced a mandatory life sentence, he would have pled guilty to avoid that fate. He could have made a factual basis then, just as he is willing to do it now. He will plead guilty, and would have pleaded guilty, if given the chance to do so.

No one in Mr. Trowbridge's position could have properly evaluated and considered the plea offers made before trial. No one in Mr. Trowbridge's position could have made a knowing and voluntary plea because any plea would have been

based on incorrect legal advice. Based upon the legal advice provided by his counsel, Mr. Trowbridge was aware that he would face a long prison sentence if he were convicted at trial, but reasonably believed that he would at least be eligible for parole. Had Mr. Trowbridge known that he would receive a life sentence without the possibility of parole if he were convicted at trial, he would have accepted the plea offer made on July 30, 2010, which would have carried a maximum sentence of 22 ½ years. The Michigan Court of Appeals decision to the contrary was objectively unreasonable, and the Circuit Court erred in finding otherwise.

4. Mr. Trowbridge should be given the opportunity to accept, and be resentenced under the July 30 plea offer.

Habeas relief for the ineffective assistance of counsel is "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 n.7 (6th Cir. 2006) (internal quotations and citations omitted); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.") (internal quotations and citations omitted). Further, "[t]he only way to effectively repair the constitutional deprivation [the petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred," and where "defendant receives a greater sentence than one contained in a plea offer that he would have accepted if not for the ineffective assistance of counsel, the properly tailored remedy is to give the defendant the opportunity to accept the offer." *Satterlee* at 370, n.7; see also *Turner v. Tennessee*, 858 F.2d 1201, 1208 (6th Cir. 1988) (petitioner must be

allowed to consider the offer with the effective assistance of counsel). Here, Mr. Trowbridge should be given the opportunity to accept the government's offer of July 30, 2010 with a sentencing cap of 22 ½ years.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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APPENDIX