24-5196

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WASHINGTON, DC

NICHOLAS SALFI — PETITIONER
(Your Name)

vs.

WARDEN, AMY ROBEY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE SIXTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NICHOLAS SALFI
(Your Name)

LUTHER LUCKETT CORR. COMPLEX P.O. BOX 6
(Address)

LAGRANGE, KENTUCKY 40031
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the duty of defense counsel to provide effective assistance during plea negotiations extends to delivering counteroffers to the prosecution.

2. Whether the rules created in *Lafler v. Cooper* concerning demonstration of prejudice apply to counteroffers during plea deal negotiations.

3. Whether the second and third prongs of the *Lafler* test place an undue burden on Petitioners to forecast the responses of prosecutors and judges to counteroffers.

4. Whether the Court of Appeals for the Sixth Circuit misapplied the *Lafler v. Cooper*/*Missouri v. Frye* standard to Petitioner when determining he failed to meet the *Martinez* v. *Ryan*, 566 U.S. 1 (2012) exception to procedural default.

5. Whether the Court of Appeals for the Sixth Circuit ruled prematurely and erroneously denied Petitioner's habeas corpus petition without reviewing the full record of timely filed pleadings.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. *Salfi v. Commonwealth*, No. 2011-SC-00562-MR, 2012 WL 4327660 (Ky. Sep. 20, 2012)

2. *Salfi v. Commonwealth*, No. 2016-CA-000292-MR, 2017 WL 652109 (Ky. App. Feb. 17, 2017)

3. *Salfi v. Jordan,* No. 3:17 CV-774-JHM-CHL, U.S. District Court for the Western District of Kentucky. Judgment entered May 24, 2023.

4. *Salfi v. Robey, No.* 23-5535, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Mar. 12, 2024.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at Case No. 23-5535; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at Civil Action No. 3:17-CV-774-RGJ-CHL; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[✓] reported at Salfi v. Commonwealth, 2017 Ky. App. Unpub.; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 12, 2024.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 18, 2024, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was February 17, 2017. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein which the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense (competent counsel).

Amend. XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law that will abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within jurisdiction the Equal Protection of the Law.

STATEMENT OF THE CASE

I. STATE PROCEEDINGS.

Petitioner's convictions arise from the Murder of his former girlfriend Kelly Doyle ("Doyle") and assault of Payton Thomas ("Thomas"), Doyle's male friend, on January 2, 2010.

On January 13, 2010, the Jefferson County Grand Jury charged Petitioner with murder, attempted murder, tampering with physical evidence, and assault in the first degree. *See Salfi v. Commonwealth,* No. 2011-SC-000562-MR, 2012 WL 4327660 (Ky. Sep. 20, 2012).

Prior to going to trial, Petitioner received a 40-year plea offer from the prosecution to plead guilty for murder and first-degree assault. Following consultations with his attorney about the terms of the offer and potential counteroffers to seek a more favorable plea deal, Petitioner rejected the initial offer. After his attorney lead him to believe the prosecution did not appear to be willing to negotiate further, Petitioner proceeded to trial. Petitioner was found guilty of murder and first-degree assault. *Id.* His sentence, 40 years for murder and 15 years for first-degree assault, were ordered to be served consecutively for a total of fifty-five years. *Id.* Petitioner appealed to the Kentucky Supreme Court, which rendered an unpublished opinion on September 20, 2012 affirming his conviction and sentence. *Id.*

On June 7, 2013, Petitioner alleged ineffective assistance of counsel and moved the trial court to vacate his conviction and sentence pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42. *Salfi v. Commonwealth,* No. 2016-CA-000292-MR, 2017 WL 652109 (Ky. App. Feb. 17, 2017) (KYCA Opinion, Appendix, R.E. 16-5, PageID.324-332.) In his motion to the trial court, Salfi specifically alleged that his trial counsel was ineffective for:

> 1) failing to conduct an adequate pre-trial investigation; 2) failing to prepare for trial; 3) failing to obtain an expert witness; 4) providing erroneous information as to the maximum penalty; and 5) cumulative error.

Appointed counsel supplemented Petitioner's pro se motion on November 7, 2014 and requested an evidentiary hearing. (*Id.*; Supplement to Motion to Vacate, Appendix, R.E. 16-2, PageID.250-258.) The

trial court denied Petitioner's motion without an evidentiary hearing and ruled that the record refuted his claims. (*Salfi*, 2017 WL 652109 at *1; KYCA Opinion Appendix, R.E. 16-5, PageID.324-332; Order Denying Motion to Vacate, Appendix, R.E. 16-4, PageID.276-280.)

Petitioner appealed this ruling to the Kentucky Court of Appeals. (*Salfi*, 2017 WL 652109 at *1-5; KYCA Opinion, Appendix, R.E. 16-5, PageID.324-332.) On February 17, 2017, the Kentucky Court of Appeals rendered an opinion affirming the trial court's denial of Petitioner's motion to vacate his sentence. (*Id.*) On June 8, 2017, the Kentucky Supreme Court denied discretionary review. (Order, Appendix, R.E. 16-6, PageID.361.)

II. FEDERAL HABEAS PROCEEDINGS.

On December 21, 2017, Petitioner filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging his convictions for murder and first-degree assault for which he received a total sentence of 55 years in prison. (Petition, R.E. 1.) The original petition set forth eight claims for habeas relief. (*Id.*) On April 25, 2018, the Warden filed his response and answer opposing the petition. (Response, R.E. 16, PageID.66-108.)

On July 23, 2018, Petitioner filed a motion for leave to amend his petition, and requested to present one new ground as his Claim 9:

> 1. That his trial counsel was ineffective for failing to present counteroffers to the prosecution during the plea-bargaining process. (Motion to Amend, R.E. 24, PageID.396-400.)

Petitioner discovered this failure only after reviewing the video trial records attached in the appendix to the Warden's original Answer. (*Id.*) Attached to his motion to amend the petition was an affidavit signed by post-conviction counsel. (Motion to Amend, Appendix, R.E. 24-1, Page.ID.401.) Post-conviction counsel stated that he believed Petitioner's newest claim was a valid post-conviction claim that post-conviction counsel failed to present during the IAC post-conviction process. (*Id.*)

The Warden objected to the proposed amendment because it was untimely, did not sufficiently relate back to the petition, and the claim was procedurally defaulted. (Response to Motion to Amend, R.E. 25, PageID.402-411.) On February 19, 2019, the Magistrate Judge issued a Report and Recommendation to deny the Motion to Amend. Petitioner filed his objection to the Report and Recommendation on March 7, 2019. On September 27, 2019, the District Court rejected the Report and Recommendation and granted Petitioner leave to amend his petition to add the new IAC claim. (Order, R.E. 31, PageID.442-448.)

On November 1, 2019, Petitioner filed his amended petition to the District Court. On December 11, 2019, the Warden filed an answer to Petitioner's amended petition, further arguing that it was untimely, procedurally barred, and that Petitioner's newest IAC claim lacked merit because it failed to demonstrate counsel was constitutionally deficient, and that there had been no showing of a reasonable probability of a different outcome. (Response and Answer, R.E. 33, PageID.456-469.) On December 27, 2019, Petitioner filed his reply to the Warden's response and answer. The Magistrate Judge issued a Report and Recommendation on May 24, 2022, denied all claims, and recommended a COA on only one claim – Claim 9, the newest plea-negotiation IAC claim. (Report and Recommendation, R.E. 44, PageID.527-533, 537.) Petitioner filed his objections to the Report and Recommendation on July 1, 2022. The Warden filed objections to the Report and Recommendation on June 6, 2022. (Objection, R.E. 45, PageID.539-548.) The District Court overruled the Objections and adopted the Report and Recommendation and entered an order and judgement denying the petition dismissing. (Order, R.E. 53, PageID.591; Judgment, R.E. 54, PageID.592.)

Petitioner filed a notice of appeal and filed an application for a COA on Claim 5 and Claim 6. (Order, Doc. 7-1 on appeal, p. 1-3.) The Court of Appeals for the Sixth Circuit denied a COA for those claims, docketed the appeal for Claim 9 from Petitioner's amended petition, and ordered a briefing schedule. (*Id.* at 2-8.) Petitioner's argument on appeal is that his trial counsel was ineffective "by failing to present counteroffers to the prosecution." (Appellant's Brief, Doc. 11 on appeal, p. 1.) Petitioner argued the District

Court erred in denying the IAC claim in his habeas petition and the court should have excused his procedural default. (Appellant's Brief, Doc. on appeal, 6-14; Doc. 11 on appeal, 1-12.)

Petitioner filed two briefs in his appeal. The first was on July 5, 2023 (mailed on June 22, 2023). (Doc. 4 on appeal, pgs. 6-14.) The second was filed on January 2, 2024 (mailed on December 28, 2023). (Brief, Doc. 11 on appeal, pgs. 1-12.) The Warden filed the appellee brief on February 8, 2024. (Appellee Brief, Doc. 12 on appeal.) On March 4, 2024, Petitioner timely mailed his reply brief in compliance of the briefing schedule provided by the Clerk's Office on December 27, 2023. On March 12, 2024, the Court of Appeals for the Sixth Circuit entered an order and judgment affirming the judgment of the District Court. On March 18, 2024, Petitioner's reply brief was received by the Court of Appeals for the Sixth Circuit and returned to sender.

On March 26, 2024, Petitioner timely mailed a Petition for Panel Rehearing. On April 3, 2024, the Court of Appeals for the Sixth Circuit issued a mandate affirming and ordering its judgment. Petitioner was alerted on April 8, 2024, his Petition for Panel Rehearing was not received by the Court of Appeals for the Sixth Circuit. On April 10, 2024, Petitioner filed a Motion to Recall the Court's Mandate, Motion for Extension of Time for Petition for Panel Rehearing, and a copy of the Petition for Panel Rehearing. On April 18, 2024, the Court of Appeals for the Sixth Circuit accepted Petitioner's Petition for Panel Rehearing, however, it ordered that the petition be denied as well as the motion to recall the mandate.

REASONS FOR GRANTING THE PETITION

QUESTION I: WHETHER THE DUTY OF DEFENSE COUNSEL TO PROVIDE EFFECTIVE ASSISTANCE DURING PLEA NEGOTIATIONS EXTENDS TO DELIVERING COUNTEROFFERS TO THE PROSECUTION.

The duty of counsel to communicate plea offers to defendants from prosecutors is well established. However, there has been no direction from the Supreme Court concerning the duty of defense counsel to relay counteroffers to the prosecution as part of the plea deal negotiation process. The District Court noted this when it adopted the Magistrate Judges Report and Recommendation, which stated "given the lack of caselaw on all fours with factual background of Salfi's claim" (R&R, PageID 537), and issued a COA on the question. The Warden agreed when it pointed to *Schnebelen v. Beaver*, No. 1:18-cv-00281-FDW, 2020 WL 2892219, *10 (W.D. N.C. June 2, 2020), "The Supreme Court has never held that counsel has a duty to communicate a defendant's formal plea counter offer to the prosecution." Petitioner urges this Court to extend defense counsel's duties during plea deal negotiations to include not only delivering offers from the prosecution, but also to deliver counteroffers to the prosecution to ensure fully negotiated non-prejudicial outcomes.

The Supreme Court has noted, "that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As such, failing to be present and active during plea negotiations is as if trial counsel failed to show up and present a defense. Furthermore, with ninety-four percent of state convictions resulting in guilty pleas, "prevailing professional norms" (*see Strickland v. Washington*, 466 U.S. at 688 (1984)) dictate it is unreasonable not to represent a client at such a critical stage in the trial process. The Supreme Court identified the critical importance of plea negotiations in *Missouri v. Frye*, 566 U.S. 134, 143 (2012) where it states, "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities that

must be met to render adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."

The Supreme Court further cites Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992), "To 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." *Id.* at 144. Horse trading and standard contract negotiations are not take-it-or-leave-it affairs. They necessarily require not only an offer, but also counteroffers and counter-counteroffers until all sides arrive at a mutually acceptable outcome. If trial counsel is only acting as a messenger to deliver offers <u>from</u> the prosecution, trial counsel is only doing half his job. For a negotiation to function properly, trial counsel has the duty to relate counteroffers to the prosecution to complete the negotiation circle.

During plea deal negotiations, where an initial plea offer has been rejected, when it can be shown that a defendant wishes to continue negotiations and present counteroffers and that the prosecutor is willing to entertain them, failure to deliver counteroffers to the prosecutor constitutes deficient performance sufficient to satisfy the deficiency prong of *Strickland v. Washington,* 466 U.S. 668 (1984). The prejudice prong can be shown from the lost opportunity of a lesser sentence than the one received from trial. The obvious caveat to this concept is that a defense counsel would have no duty to deliver frivolous directives.

In Petitioner's case, counsel failed to deliver any counteroffer to the prosecution or even inform the prosecution of a plea Petitioner would be willing to accept. This is relevant because the prosecutor displayed a willingness to continue negotiations and to entertain counteroffers after the rejection of the initial offer up to the bench conference on the day of trial (*see* VR file: Salfi, Nicholas (13) 6-06-11 vr#95b2, 11:47:06 – 11:48:17). Petitioner presented several plea scenarios to his defense counsel that would be acceptable, including a counteroffer matching the 40-year plea offer he received from the prosecution, only with better serve-out terms, showing they were not frivolous. Therefore, it is only the deficient performance of defense

counsel which led Petitioner to being sentenced to 55 years, rather than being able to plead to a lesser sentence of 40 years. This establishes both the deficiency and prejudice necessary to satisfy *Strickland.*

Question 2. WHETHER THE RULES CREATED IN *LAFLER V. COOPER* CONCERNING DEMONSTRATION OF PREJUDICE APPLY TO COUNTEROFFERS DURING PLEA DEAL NEGOTIATIONS.

To establish prejudice under the rules created in *Lafler v. Cooper*, "a petitioner must also show that he would have accepted the offer, the prosecution would not have rescinded the offer, and that the trial court would not have rejected the plea agreement." (citing *Lafler*, 566 U.S. at 168 and *Frye*, 556 U.S. at 148-49 (2012)). On its face, this rule would not seem to apply to a petitioner who is counteroffering during plea deal negotiations. Prong I of the *Lafler* test dictates that a petitioner must show that he would have accepted the offer. If a petitioner is counteroffering he is willing to accept a deal, just one on different terms than his initial offer. Because prong I does not apply to counteroffers, the rule itself is not appropriate to be used when evaluating prejudice based on the failure to communicate them. Therefore, the entire rule would seem irrelevant in evaluating prejudice.

Instead, the prejudice standard should be evaluated based on the lost opportunity the defendant has to better his outcome. In *Lafler*, this Court pointed out that, "prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012). This is not the only example of using lost opportunity as a standard to determine prejudice.

> "Likewise, we cited a decision from the Seventh Circuit that found prejudice because a defendant "could have tried to negotiate a different plea deal," notwithstanding the fact that the prosecutor in that case never offered a more favorable plea. *Debartolo v. United States*, 790 F. 3d 775, 779 (7th Cir. 2015) (emphasis supplied). In these cases, the court found that petitioner satisfied *Strickland* by establishing a reasonable probability that, absent counsel's errors, the defendant would have obtained a plea arrangement that was better than the trial outcome which proved prejudicial." *Byrd v. Skipper*, 940 F. 3d 248, 256 (6th Cir. 2019)

A plea negotiation is a multi-step process. The *Lafler* rule only applies to the first step, the initial offer. As stated, it applies to an acceptance or rejection to that initial offer, but it cannot function to evaluate a counteroffer. This is a scenario that was not anticipated when the rule was created, and needs its own rule.

Because the rule does not apply to Petitioner's claim, the case should be remanded to the Sixth Circuit for further consideration.

Question 3. WHETHER THE SECOND AND THIRD PRONGS OF THE *LAFLER* TEST PLACE AN UNDUE BURDEN ON PETITIONERS TO FORECAST THE RESPONSES OF PROSECUTORS AND JUDGES TO COUNTEROFFERS.

The second and third prongs of the *Lafler* test dictate that "the prosecution would not have rescinded the offer, and that the trial court would not have rejected the plea agreement." *Id.* (citing *Lafler*, 566 U.S. at 168 and *Frye*, 556 U.S. at 148-49 (2012)). Since establishing the rule, this Court has never outlined how a petitioner should be able to predict how prosecutor or trial judge will react to any proposals a petitioner should offer. This rule places an unfair burden on petitioners to, in effect, be fortune tellers or mind readers.

In regards to how to determine a trial judge's reactions, the Sixth Circuit addressed this concern in *Turner v. Tennessee*. The Sixth Circuit decided that "we think it unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances" and that "if the state wishes to suggest that the trial court would not have approved this plea arrangement, the State, and not Turner, bears the burden of persuasion." *Turner v. State of Tenn.* 858 F. 2d 1201, 1204 (6th Cir. 1988), judgment vacated on other grounds, 492, U.S. 902 (1989). The same logic would seem to apply when requiring a petitioner to intuit the thought processes of prosecutors.

Also, the second and third prongs would not seem to apply to the issue of relaying counteroffers in general. As in any contract negotiation, offers or counteroffers may be rejected by any party in the negotiations. However, the question about counsel's duty to relay counteroffers during plea deal negotiations

and the prejudice from not doing so does not turn on whether or not the counteroffer could be rejected, but whether it was issued at all. A non-tendered counteroffer has no opportunity to be accepted or rejected, so the *Lafler* rule could never be applied. The question and test should be whether or not counsel did his duty to negotiate, which includes issuing counteroffers, not on guessing the possible thought process of the negotiators.

Because the rule does not apply to Petitioner's claim, the case should be remanded to the Sixth Circuit for further consideration. Petitioner notes that the Sixth Circuit did not make a determination of the second and third *Lafler* prongs.

Question 4. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT MISAPPLIED THE *LAFLER V. COOPER/MISSOURI V. FRYE* STANDARD TO PETITIONER WHEN DETERMINING HE FAILED TO MEET THE *MARTINEZ V. RYAN*, 566 U.S. 1 (2012) EXCEPTION TO PROCEDURAL DEFAULT.

The Sixth Circuit ultimately determined that Petitioner's habeas petition failed to overcome procedural default because it was not substantial due to the *Lafler v. Cooper/ Missouri v. Frye* rule previously discussed. As Petitioner has pointed out, this rule, although it may be useful in determining prejudice in regards to a counsel's failure in plea negotiations in general, does not work when applied to specific duties during the negotiation process. Therefore, the Sixth Circuit should not have used it to determine prejudice received from a failure to present counteroffers.

Instead, the substantiality of Petitioner's claim rests on the issuance of the COA issued by the District Court which found the claim was both deserving of further proceedings and debatable among jurists of reason. This finding should also satisfy the *Martinez* exception to procedural default.

Assuming arguendo that the rule did apply to Petitioner, the Sixth Circuit erred in its application. In affirming the District Court's judgment that Petitioner's ineffective-assistance claim was not substantial

under *Martinez*, this Court overlooked and misapprehended several facts and did not consider the entire evidence in this case.

First, the Sixth Circuit draws on a state court decision from Petitioner's original RCr 11.42 stating that because Petitioner refused to accept his original plea deal (due to trial counsel's misadvice on his sentencing exposure), his claim that he was prejudiced because his trial counsel did not make a counteroffer is not substantial. This contention represents clear error because the current claim being presented is based on trial counsel's failure to communicate counteroffers and not on any failure to advise claim. Therefore, any argument concerning a failure to take the first offer is irrelevant to the issue at hand because it does not negate Petitioner's willingness to accept any properly negotiated plea deal.

Additionally, the Sixth Circuit states that the Kentucky Court of Appeals found that Petitioner was "unwilling to accept a 40-year sentence and wanted to "take his chances" at trial." This quote is a paraphrase of what the Kentucky Court of Appeals said and misapprehends their determination of facts. Specifically, the Kentucky Court of Appeals said, "Salfi attempts to convince this Court that because he thought seventy years was the worst he could do at trial, he decided to reject the plea offer and take his chances." *Salfi v. Commonwealth*, (Ky. Ct. App. 2017). This is a discussion of what Petitioner was arguing, not a determination of facts. Their actual determination was "assuming that counsel did not advise Salfi correctly, we do not believe a reasonable probability exists that Salfi would have accepted *the* plea offer had he been correctly advised." *Salfi v. Commonwealth*, (Ky. Ct. App. 2017) (Petitioner's emphasis on 'the'). Once again, this determination is based on a failure to advise claim, not a failure to negotiate. Further, the Kentucky Court of Appeals directly references 'the' rejected plea offer of 40 years, not 'a' 40-year sentence in general as presented by the Sixth Circuit.

Petitioner has distinguished 'the' 40-year plea deal he rejected due to its 34-year minimum serve-out potential from his proposed 40-year plea counteroffer with a 25 ½ year minimum serve-out potential. The 8 ½ year differential in serve-out potential forms the basis of his prejudice claim. Because the Sixth Circuit

partially based its decision on a misapprehension between 'the' 40-year plea offered rather than any 40-year sentence including his proposed counteroffer, it represents clear error.

Next, the Sixth Circuit states that Petitioner "does not argue that he instructed his attorney to convey a particular option to the prosecution as a counteroffer." As stated in his amended petition, "Based off of conversations with trial counsel, Petitioner believed counteroffers were rejected, not undelivered." (Amended Petition, p. 2). Through this, Petitioner meant he thought that trial counsel had delivered all discussed counteroffers which were all rejected. Because he thought all had been delivered, he has no reason to point to having to have given a specific command for a specific counteroffer.

Going further, as part of doing his duty during a critical stage of the trial process, a defense attorney does not require a specific command. The record indicates Petitioner's trial counsel told the trial judge he was addressing plea terms with his client before and after the rejection of the initial offer, demonstrating a willingness by Petitioner to plead out. Yet on the day of trial, the prosecutor noted an impasse occurred because Petitioner's trial counsel "Right. You never came back with me with a counter of what he would be willing to take." (VR file: Salfi, Nicholas (13) 6-06-11 vr#95b2, 11:47:06 – 11:48:17). Petitioner's trial counsel knew what he was willing to take and it is inexcusable not to have communicated this to the prosecution.

Another misapprehension of fact occurs when the Sixth Circuit states, "Nor does Salfi point to a plea option that he thinks that the prosecution and the trial court might have accepted." In Petitioner's Objections to Findings and Recommendation, Petitioner addressed this by pointing out "Petitioner's 'worst' offer contained a comparative total time as the prosecutor's sole offer, just with better serve-out terms for Petitioner. This should have been acceptable, or at least the basis for further negotiations. Being so close, it also should have been within the boundaries of acceptable pleas." (*see* Appendix H, Objections to Findings and Recommendations, p. 5). Petitioner also mentions, "the closeness of the counteroffer and the willingness

of the parties make it reasonably probable that a settlement would have occurred." (Reply to Respondent's Answer, p. 3)

Finally, the Sixth Circuit states that Petitioner fails to establish that both the prosecution and the trial court would have accepted a plea agreement because "all of Salfi's plea scenarios for a lesser sentence were premised on the prosecution agreeing that was affected by an extreme emotional disturbance when he killed Doyle and assaulted Thomas." This conclusion is in clear error because although some of the anticipated counteroffers did include terms that mentioned EED, those scenarios with EED were only specified in regards to the assault charge, not with the murder charge. Every plea was for murder, the main charge. Additionally, EED was not included as an element in 2 of his plea scenarios. In his Appellant's Brief, Petitioner states, "It's also noteworthy any plea would have still resulted in a murder conviction associated with significant time", indicating that although he had included EED in some of those pleas, he offered and expected a murder conviction, but one with a sentence having better terms than the original offer.

Taken together and when put in the proper context, it is easy to see that the Sixth Circuit's decision was based on misapprehensions of fact. Because the Sixth Circuit did not have the proper facts to consider when applying the *Lafler v. Cooper/Missouri v. Frye* standard it could not have arrived at a reasonable opinion.

Question 5 WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT RULED PREMATURELY AND ERRONEOUSLY DENIED PETITIONER'S HABEAS CORPUS PETITION WITHOUT REVIEWING THE FULL RECORD OF TIMELY FILED PLEADINGS.

It would seem from the timing of the Sixth Circuit's ruling that Petitioner's final filing, Appellant's Reply Brief, could not have been considered despite being timely mailed, March 4, 2024 (*see* Appendix F, legal mail deposit log and Request for Inspection of Records), but not received until March 18, 2024, some 6 days after the Court's ruling on March 12, 2024. That Appellant's Brief addressed the substantiality of his

claim to qualify under *Martinez*. By not being able to consider his final brief, the Court did not review the entire record and ruled prematurely.

The "prison mailbox rule" was established in *Houston v. Lack*, 487 U.S. 266 stating that court filings are deemed timely when delivered to prison authorities. Inmates must use the supplied legal mail rules and have the burden to supply proof they correctly used the system. To this end, Petitioner supplied a copy of the legal mail deposit log for his outgoing legal mail on March 26, 2024.

In support of the contention that his reply brief was timely filed Petitioner points to the briefing schedule filed from the Clerk's Office on December 27, 2023 (*see* Appendix G), that stated Appellant's Reply Brief (optional Brief) was to be mailed 24 days after the appellee's brief. Petitioner complied with this briefing schedule and his reply was timely mailed on March 4, 2024.[1]

In the federal habeas proceedings section of the Statement of the Case, Petitioner shows that the Sixth Circuit issued its final ruling on March 12, 2024, before Petitioner's reply brief was received. Petitioner's reply brief was timely mailed, being placed in Luther Luckett Correctional Complex's legal mail on March 4, 2024, but was returned and marked as received on March 18, 2024. This means the Sixth Circuit issued its ruling prematurely without the benefits of Petitioner's final argument, which covered many points that the Sixth Circuit misapprehended in its decision, as pointed out in Question 4.

Due to the delay of consecutive filings being received by the Sixth Circuit, Petitioner has been grievously harmed by the premature issuances of decisions without the consideration of those timely filed

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[1] FRAP 26 (a)(1)(A) for the Sixth Circuit states to, "exclude the day of the event that triggers the period"; and FRAP 26 (a)(2)(C) for the Sixth Circuit that states, "if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday."

The Appellee's brief was filed on February 8, 2024. Petitioner's time to file his brief started on February 9, 2024 and ran until March 3, 2024. However, since March 3, 2024 fell on a Sunday. Petitioner's time to file continued March 4, 2024.

and valid pleadings/motions. In Petitioner's Petition for Panel Rehearing, Petitioner addressed the first delay where he timely mailed his Appellant's Reply Brief on March 4, 2024 that was not received by the Clerk's Office until March 18, 2024, some 6 days after the Sixth Circuit filed its judgment on March 12, 2024. That response also fell within the prison mailbox rule and should have been considered before the Sixth Circuit's ruling as was addressed in his Petitioner for Panel Rehearing.

CONCLUSION

The Court of Appeals for the Sixth Circuit denied Petitioner's Habeas Corpus Petition as procedurally defaulted because it was not substantial based on failure to pass the test provided by *Lafler v. Cooper/Missouri v. Frye*. Petitioner respectfully requests this Court to reverse and remand the Sixth Circuit's ruling because the *Lafler* rule applies only to an initial offer during plea negotiations not counteroffers, places an undue burden on defendants to infer the reactions of prosecutors and judges, and was improperly applied to Petitioner's case due to a misapprehension of facts leading to an erroneous decision. Due to the critical nature of plea deal negotiations, it is vital for defense counsel's to be fully engaged in the process which means tending counteroffer's to the prosecutors as well as delivering initial offers. Additionally, this court should reverse and remand this decision due to the premature ruling of the Sixth Circuit.

Respectfully submitted on July 15, 2024,

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