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IN THE SUPREME COURT OF THE UNITED STATES

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SHERRY L. BURT, WARDEN, :

Petitioner : No. 12-414

v. :

VONLEE NICOLE TITLOW :

- - - - - x

Washington, D.C.

Tuesday, October 8, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

JOHN J. BURSCH, ESQ., Solicitor General, Lansing, Michigan; on behalf of Petitioner.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

VALERIE R. NEWMAN, ESQ., Assistant Defender, Detroit, Michigan; on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-414, Burt vs. Titlow.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

No court has ever held that AEDPA and Strickland can be satisfied by presumption based on a silent record. Yet that is precisely the approach the Sixth Circuit adopted in granting habeas relief here. The record doesn't say how attorney Toca investigated or what advice attorney Toca gave, but based on that record silence, the Sixth Circuit assumed Toca was ineffective. And under AEDPA and Strickland, the presumptions run the opposite way.

Now, if there's one thing that the Court takes away from the oral argument this morning, I hope that it's -- it's this: How upside down the Sixth Circuit's analysis is when it says on Page 19A of the petition appendix that Toca was deficient because the record contains no evidence that he advised Titlow about elements, evidence, or sentencing exposure. The correct

1 question is whether the record contains evidence that
2 Toca did not do those things. And that record silence
3 is dispositive in favor of the State on habeas review.

4 Now, if we could pull the curtain back and
5 see what really happened here, it may be the case that
6 Toca gave the proper advice, that he advised Titlow
7 about all the perils of going to trial, and that Titlow
8 continued to maintain her innocence.

9 Under Strickland, we're supposed to presume
10 that Toca did exactly that, especially when it's
11 Titlow's burden to satisfy the burden of proof, and she
12 failed to do that.

13 So I'd like to begin with our first issue,
14 which is AEDPA deference and the performance prong of
15 Strickland.

16 JUSTICE GINSBURG: May I just ask a question
17 about what you just said? The record does show that
18 Toca came into the case very late in the day, and he
19 asked to have a postponement because he said, I have to
20 get up to speed. I don't know anything about this case.

21 So Toca himself is saying, I'm not
22 acquainted with the case -- with the case.

23 MR. BURSCH: Well, I don't think he's --
24 he's saying that, Justice Ginsburg. He's saying I'm not
25 prepared for trial yet. But he says, I've got a lot of

1 materials here. He goes through a very sophisticated
2 sentencing analysis with the -- the sentencing court in
3 this plea withdrawal hearing.

4 If you understand Michigan sentencing, if
5 you've got a manslaughter charge, there's a grid. And
6 there's all kinds of different boxes that this could
7 have fit into, and he would have had to have analyzed
8 the evidence in order to determine that the two to five
9 range was appropriate for a manslaughter conviction, and
10 to be able to then negotiate with the prosecutor about
11 whether that was or was not appropriate.

12 And so we know that -- that Toca did a lot
13 of work.

14 JUSTICE ALITO: Was the sentence that was
15 ultimately imposed after the trial for the second-degree
16 murder conviction within the guidelines, within the
17 Michigan guidelines?

18 MR. BURSCH: Yes, it was.

19 JUSTICE ALITO: What -- do you know what
20 those guidelines were?

21 MR. BURSCH: I don't recall, but it's
22 something on the range of 15 to 20 years. And when
23 we're talking about guidelines, it's important for the
24 Court to understand the difference between what the
25 guidelines called for, for manslaughter and what was in

1 the plea agreement, because Michigan's got this
2 indeterminate sentencing system where you've got a range
3 for the lower end.

4 And so the plea deal was 7 to 15 years on
5 the lower end. And a manslaughter conviction -- that
6 is, if they had gone to trial and lost for manslaughter,
7 the lower end was 2 years to 5 years.

8 And so it was entirely reasonable, from an
9 objective perspective, for an attorney, looking at this
10 record at the time the plea was withdrawn, to say, yes,
11 if you want to maintain your innocence, the most likely
12 bad result at trial is most likely better than the plea
13 deal that you already have. Sure, there's a risk that
14 something worse could happen, but this Court has said in
15 Strickland and Lafler and other places that bad
16 predictions are not deficient performance.

17 And so really, when you get down to it, it's
18 really a problem with both the advice being reasonable,
19 but also the failure to carry the burden of proof. It's
20 just the case that Titlow has not come forward to
21 demonstrate, as he was required to do -- she was
22 required to do on the record what Titlow -- or what Toca
23 did to investigate and what advice Toca actually gave to
24 Titlow.

25 JUSTICE KENNEDY: When we're asking whether

1 the advice was reasonable, what force do we give to the
2 proposition that a well-counselled defendant was now
3 insisting that he wanted to change his plea? And there
4 was only three days. How do we factor that in? If --
5 if we look at the gist of what the counsel did --

6 MR. BURSCH: Right. I think that's an
7 important factor.

8 JUSTICE KENNEDY: -- it may lead us to one
9 answer. But if we know that a previously
10 well-counselled defendant had now changed his mind and
11 wanted to withdraw, how do we factor that in?

12 MR. BURSCH: I think that's a significant
13 factor because, as you point out, before the ink was
14 even dry on the plea agreement, Titlow was already in
15 prison saying, I'm innocent. Maybe I should be
16 withdrawing this plea, setting in motion a chain of
17 events that resulted in her firing the first attorney
18 and then hiring a second attorney.

19 And I don't think that the court of appeals,
20 the Michigan Court of Appeals, articulated any kind of
21 a -- a per se rule about that. You know, certainly we
22 all understand that the ethical obligation of the lawyer
23 is that if your client insists that they want to
24 maintain their innocence, you have to allow them to do
25 that.

1 But what the court of appeals did, at pages
2 100 to 101A of the petition appendix, it looked at that.
3 But it also looked at the other evidence. It looked at
4 the Strickland presumption that Toca did his job. And
5 then it says at the very conclusion of that sentence,
6 based on all the proofs and arguments presented, Titlow
7 failed to satisfy her burden. This instance is one part
8 of that.

9 JUSTICE ALITO: Could you explain the
10 procedural situation before the Michigan Court of
11 Appeals? There was a motion by the Respondent for a
12 remand to the trial court to create a record; is that --
13 that correct --

14 MR. BURSCH: That's correct.

15 JUSTICE ALITO: -- on the issue of
16 ineffective assistance of counsel?

17 And so the -- the question that the court of
18 appeals had to decide was whether the materials that
19 were submitted by the Respondent were sufficient to
20 justify the hearing.

21 MR. BURSCH: That's correct.

22 JUSTICE ALITO: And the court of appeals, I
23 gather, said they're not sufficient and cited, among
24 other things or principally, the fact that the
25 Respondent had claimed innocence, and that was the

1 reason for the change of attorney.

2 So the issue really wasn't -- that was
3 before them was really not entitlement to relief, but in
4 the course of deciding whether there should be a remand,
5 they necessarily got to the issue of whether there was
6 an entitlement to relief. Is that -- is that correct or
7 do I not understand?

8 MR. BURSCH: Just to be clear about Michigan
9 procedure, the defendant has an opportunity to a right
10 to ask for what's called a Ginther hearing in Michigan,
11 and that's an evidentiary hearing to develop a record
12 for an ineffective assistance claim.

13 Titlow did not ask for that hearing in the
14 trial court. She did ask for it in the Michigan Court
15 of Appeals. But under the Michigan court rules -- this
16 is 7.211(C)(1)(a)(2) -- she was required to make a
17 proffer to justify that hearing on this motion to
18 remand. And so the court of appeals, before it issued
19 its merits opinion, issues a one-sentence order that
20 says: The Motion to remand is denied because you have
21 not proffered enough evidence to demonstrate that a
22 hearing is warranted.

23 And that makes sense because the only
24 proffer was the polygraph, Lustig affidavit and the
25 Pierson affidavit. It would be entirely appropriate --

1 this often happens -- that Titlow herself would have
2 submitted an affidavit saying: This is what Titlow
3 knew -- I'm sorry: This is what Toca knew, this is what
4 Toca advised, and I relied on that. Or sometimes it's
5 even the case that the previous defense counsel is
6 willing to submit the affidavit that says: This is what
7 I knew, this is the advice that I gave.

8 None of that was there. And so that's why
9 you have this denial of the motion. So now in the
10 context of that record and, Justice Kennedy, the claim
11 of innocence and this whole thing being set in motion by
12 that claim of innocence, it was quite easy for the
13 Michigan Court of Appeals to say that, on the proofs
14 presented and in light of the Strickland presumption,
15 there was nothing objectively unreasonable about
16 allowing Titlow to recall her plea.

17 JUSTICE KAGAN: In just thinking about that
18 Michigan Court of Appeals decision, there is one sort of
19 troubling line in it to me. It says: "When a defendant
20 proclaims his innocence, it is not objectively
21 unreasonable to recommend that the defendant refrain
22 from pleading guilty no matter how good the deal may
23 appear." And one way to read this is it's a kind of
24 categorical rule which says that when the defendant says
25 he is innocent, basically your obligations to properly

1 advise him about a plea go away.

2 Now, I understand you not to read it that
3 way.

4 MR. BURSCH: Correct.

5 JUSTICE KAGAN: So could you tell me a
6 little bit about what you think of that question and why
7 you read the sentence the way you read the sentence?

8 MR. BURSCH: Yes. I think it would be very
9 difficult to defend the opinion if that was the only
10 sentence of analysis, because we do not agree that a
11 simple claim of innocence by your client relieves the
12 attorney of any responsibility to do anything. That's
13 not what happened here.

14 Four sentences before the sentence you just
15 read on Page 101A, the court of appeals talks about the
16 Strickland presumption that the attorney is doing his or
17 her job. Two sentences after that sentence you just
18 read on page 102A, the Michigan Court of Appeals
19 specifically says: "On the proofs and arguments offered
20 by defendant, there is no ineffective assistance here."
21 And so that was part of a larger discussion about
22 attorneys who do their job when their clients are
23 claiming innocence. And you have to put all that
24 together.

25 And I think it's significant also that the

1 Michigan Court of Appeals was giving Titlow the benefit
2 of the doubt here, because on Page 100A, just one page
3 earlier, it assumes Titlow's position, that is that Toca
4 actually gave the advice to withdraw the plea. We don't
5 even know that, because we don't have credible evidence
6 in this record.

7 We don't have an affidavit from Titlow. We
8 don't have an affidavit from Toca that indicates that
9 Toca ever gave that advice. Again, if you could draw
10 the curtain back, it may very well have been as we
11 assume under Strickland that he totally and completely
12 advised about all the risks of trial before the plea was
13 withdrawn.

14 JUSTICE BREYER: Can you clarify something
15 for me about habeas corpus law?

16 MR. BURSCH: Yes.

17 JUSTICE BREYER: I have to imagine facts, so
18 let's take it as a hypothetical. The U.S. -- the
19 district attorney says: This lawyer was adequate and
20 really two factors make that obvious. The first factor
21 is that the client said that she was innocent and,
22 taking that into account with the other things, that
23 could have justified adequately his withdrawal of the
24 plea and not convincing her not to.

25 Second, the sentence that the district

1 attorney wanted to give was more than a year greater
2 than the guidelines for manslaughter, and that could
3 have justified it.

4 Now, it writes -- the court then writes in
5 its opinion only the second reason and never mentions
6 the first. Now we go to habeas and the habeas court
7 thinks that second reason is pretty flimsy there. Gee,
8 she was exposing herself to murder, et cetera; it's
9 pretty flimsy. The first isn't so bad, but they didn't
10 rely on it. Okay.

11 So now what's the habeas court supposed to
12 do? Should the defendant have gone back to the State
13 court first? Is the habeas court supposed to have its
14 own independent hearing and make up its own mind? How
15 does this --

16 MR. BURSCH: That's a delightful question.

17 JUSTICE BREYER: I'm glad. I would love to
18 have an answer.

19 (Laughter.)

20 MR. BURSCH: And I want to start with a
21 record response to distinguish our case from your
22 hypothetical and then address the habeas question. Your
23 hypothetical assumed that the State court only mentioned
24 one of the two reasons, and here obviously the court of
25 appeals talked about innocence. We've discussed that at

1 length. But on page 100A of the opinion, the court of
2 appeals also notes that the defendant moved to withdraw
3 her plea because the agreed-upon sentence exceeded the
4 sentencing guidelines range. So they are both here.

5 But assuming your hypothetical that we only
6 had one and not two, the question is really easy under
7 2254, because so long as the decision was not a
8 misapplication of this Court's clearly established
9 precedent, there is no violation even if their reasoning
10 might not have been as strong as it could have been had
11 they mentioned the other reason.

12 So next habeas question: Does the defendant
13 get an opportunity to have a Federal habeas hearing to
14 further develop the record about what happened? And the
15 answer is no, because under 2254(e)(1) and (e)(2 there
16 is a presumption of correctness about everything that
17 was found in the State court system. And there is no
18 right to get a Federal evidentiary record if you have
19 not adequately pursued your ability to develop the
20 record in the State court.

21 And as Justice Alito has already pointed
22 out, it was Titlow's failure, not the State's failure,
23 to properly proffer evidence to get the Ginther hearing.

24 JUSTICE ALITO: What do you make of the fact
25 that -- what do you make of the fact that at the change

1 of plea hearing, the first attorney didn't mention the
2 claim of innocence, only mentioned the fact that the
3 sentence was above the guidelines?

4 MR. BURSCH: I don't think that's
5 significant because those two things are not mutually
6 exclusive. The defendant could believe in her heart of
7 hearts that she's innocent and at the same time the
8 attorney could acknowledge that there are facts in the
9 record already admitted that a reasonable jury could
10 conclude that you were guilty of manslaughter.

11 And so it would not be inconsistent for that
12 attorney to argue for a lower guidelines range in the
13 plea. And so there's really nothing inconsistent about
14 that. But of the important thing to understand here is
15 just the failure of the burden of proof. The Sixth
16 Circuit is upside-down when it reads into the record's
17 silence ineffective assistance.

18 JUSTICE GINSBURG: When you say the record
19 is silent, I am looking at the Joint Appendix, Page 295,
20 and this is Titlow's statement: "I would have
21 testified against my...had I not been persuaded to
22 withdraw my plea agreement, because an attorney promised
23 me he would represent me. He told me he could take my
24 case to trial and win."

25 So that sounds like she was persuaded by Mr.

1 Toca to go to trial because she could win. And he had
2 at that point not made any appraisal of the case.

3 MR. BURSCH: Well, first I have to disagree
4 with the premise of your question, Justice Ginsburg,
5 because there is no doubt that Toca made an appraisal.
6 He had -- you know, the quote from the plea withdrawal
7 hearing is "a lot of materials," and he made a very
8 sophisticated argument about what the guidelines range
9 should be and that range was lower than the plea
10 actually offered.

11 But what you need to understand about this
12 testimony from Titlow right here, this was a plea for
13 leniency at sentencing. This was not part of the
14 proffer to the Michigan Court of Appeals as part of the
15 motion for remand. What Titlow could have done was
16 submit her own affidavit or the affidavit from Toca
17 establishing whether this was actually true or not.

18 In addition, you've got to take the context
19 of this and juxtapose it against the other things that
20 Titlow was saying at this very same sentencing hearing.
21 And it's remarkable really that she says both of these
22 things. She says she feels sorry for her Aunt Billie
23 for being this manipulating and evil person and thanks
24 God that she did not do what Billie asked her to do.
25 And she says it was only because of her, Titlow, that

1 the truth came out. So somehow it's still a claim of
2 innocence, even after trial, even after there has been a
3 conviction.

4 If there are no further questions, I will
5 reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. O'Connell.

8 ORAL ARGUMENT OF ANN O'CONNELL,

9 FOR UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONER

11 MS. O'CONNELL: Mr. Chief Justice, and may
12 it please the Court:

13 There are two primary points that the United
14 States would like to make. First, when evaluating
15 Strickland prejudice in the context of a rejected plea
16 offer, the statement of a convicted defendant that she
17 would have accepted the plea absent sufficient advice
18 should be viewed with skepticism and to support a
19 finding of causation, the statement should be judged
20 based on all the objective circumstances.

21 Second, when a Federal habeas court finds a
22 Sixth Amendment violation in the rejected plea context,
23 it should not categorically require the government to
24 reoffer a rejected plea deal. That decision should be
25 left to the sentencing court, and requiring the

1 government to reoffer a rejected plea deal in a context
2 like this case where the plea agreement required the
3 defendant to do something other than plead guilty --
4 give testimony against her aunt -- it doesn't make
5 sense, and the government should not be required to make
6 the reoffer.

7 Every defendant who rejects a plea offer and
8 then is convicted after a trial will have an incentive
9 and will want to revert back to a plea deal that she
10 rejected beforehand. The statement of a convicted

11 defendant that she would not have withdrawn her plea --

12 JUSTICE SOTOMAYOR: Counsel, years ago, one
13 of my colleagues, not on this bench, but a different
14 one, said to me, you know, there's much to-do about
15 judges basing credibility on demeanor. And he said, no
16 one does that. What you base it on is the internal
17 consistency and logic of the testimony and how it's
18 corroborated by circumstances. And he said, otherwise,
19 you just rarely hear anybody say, story makes sense,
20 nothing -- story doesn't make sense, the story's not
21 corroborated, but the guy looks like he's telling the
22 truth.

23 I'm reading all the decisions that you cited
24 for me and not one, including in this circuit, relies
25 simply on that kind of statement. Every one of them is

1 based on comparing the testimony to other factors; to
2 logic, to evidence, to objectives. So I don't know what
3 rule it is, what objective evidence means. Do you mean
4 corroboration the way you need to prove a murder? Is
5 that what you want us to announce?

6 MS. O'CONNELL: I don't -- we're not asking
7 for any kind of a special rule that there has to be, you
8 know, a certain amount of corroborating evidence in
9 addition to the defendant's statement. I do think it is
10 just a general rule that you have to expand out to all
11 the objective circumstances to evaluate the credibility
12 of the defendant.

13 And what the Sixth Circuit says in this case
14 is, unlike some circuits, this court does not require
15 that a defendant must support his own assertion that he
16 would have accepted the offer with additional objective
17 evidence.

18 JUSTICE SOTOMAYOR: It said it, but it
19 didn't do it.

20 MS. O'CONNELL: Well, to the extent that the
21 court was saying that the defendant's statement should
22 be credited or not credited alone without necessarily
23 looking at everything, that's wrong. And to the extent
24 that it -- that it looked to other evidence in the
25 record and to corroborating circumstances, the ones that

1 it pointed to were too weak, and they were also very
2 selective.

3 The Court pointed to two things that the
4 court --

5 JUSTICE SOTOMAYOR: Well, counselor, that's
6 what juries do all the time, selectivity. That doesn't
7 move me. What I want to know is: Why do we announce a
8 rule that somehow suggests a limitation that can't
9 exist? Meaning what judges look to, to determine
10 credibility relies on factors that you can't sum up in
11 one word.

12 MS. O'CONNELL: All we're asking the Court
13 to announce or to clarify on this question is that the
14 subjective statement or the self-serving statement of
15 the defendant in these circumstances should be viewed
16 with skepticism, and that the Court should look --

17 JUSTICE SOTOMAYOR: Every court says that.

18 MS. O'CONNELL: Well, to the -- there could
19 be confusion on what the Sixth Circuit's rule is. I
20 mean, there is -- the Sixth Circuit believed that it was
21 announcing a rule or that it has a standard --

22 JUSTICE BREYER: Well, are there rules in
23 this area? I didn't think -- are there rules? I mean,
24 doesn't every judge, whenever that judge is deciding a
25 factual matter or the jury, take into account from every

1 witness, whether that witness is making a pretty
2 self-serving statement? I mean, that's a factor.

3 And I guess we could have some situations,
4 sometime, in some place, where a witness got on the
5 stand and said something that was totally in his favor,
6 but when you heard it, hmm, and you knew the case, hmm,
7 he's right. And then that could happen with this kind
8 of witness, too. It could happen. I'm not saying it
9 very often does, but it could.

10 So why should we have any special rule for
11 these witnesses and not for any other?

12 MS. O'CONNELL: We are not asking for any
13 kind of a special rule. We are just asking that -- that
14 the Court clarify if it addresses the second question,
15 that what the Sixth Circuit is saying, that you
16 essentially -- if you interpret it to mean that you
17 don't have to look out to all the -- the objective
18 circumstances to determine the credibility of the
19 defendant, that that's wrong.

20 CHIEF JUSTICE ROBERTS: Well, you need to
21 give us some examples of things that don't count. I
22 thought it was in your brief that you had said, look,
23 the fact that it turns out to have been a very bad deal,
24 you know, the bargain was one year, and the sentence
25 after guilty was 20 years, that, I take it, you say is

1 not a corroborating factor.

2 MS. O'CONNELL: Not in this case. The --
3 the disparity between the sentence that a person
4 receives after the plea deal and the sentence that they
5 received after a trial is going to be present in every
6 case.

7 CHIEF JUSTICE ROBERTS: Right.

8 MS. O'CONNELL: In fact, it has to be for
9 prejudice. That could be a corroborating circumstance
10 or something to support the defendant's statement in a
11 case where, like some of the court of appeals' opinions,
12 the defendant was misadvised on sentencing exposure.
13 The lawyer said, well, you should reject this plea deal
14 for 15 years because the maximum that you could get at
15 trial is 20 and so it's worth the risk.

16 But this defendant understood completely and
17 said multiple times on the record that she understood
18 that the -- the potential sentence for a murder
19 conviction was a life sentence and that that was back on
20 the table if she withdrew the plea offer.

21 JUSTICE ALITO: On the question of this --
22 of this sentence, what do you think were the range of
23 reasonable sentences that could have been imposed in
24 compliance with our recent decisions? You have -- you
25 have the sentence that was offered before the trial, but

1 that was predicated on, A, testimony, and B, not having
2 to go to trial. And then you have the sentence that was
3 imposed after the trial when there was no testimony and
4 there was a trial.

5 So what was the -- what do you think a trial
6 court could reasonably do in that situation, just split
7 the difference?

8 MS. O'CONNELL: Well, I think the trial
9 court has a lot of discretion under the Court's opinion,
10 but I think what -- what should have happened in this
11 circumstance is to go back to the sentencing court, not
12 require the government to reoffer this plea deal, which
13 just simply can't be -- can't be offered and accepted
14 anymore. In fact, in the record when you see it being
15 reoffered, they're saying we're offering manslaughter in
16 exchange for her testimony at a trial that already
17 happened. It doesn't make sense.

18 In this case, there -- there should be no
19 reoffer. We should go based on the conviction after
20 trial because of that, and perhaps there could be some
21 kind of a reduction of the sentence within the district
22 court's discretion to --

23 JUSTICE GINSBURG: Why -- why -- you made
24 the point that this plea bargain could not be carried
25 out once the number one condition, the prosecutor said,

1 you testify against your aunt and then we'll give you
2 this deal. Once the aunt is tried and she doesn't
3 testify, there's no -- there's no plea bargain.

4 So why isn't that enough to decide this
5 case? If you can't tell a prosecutor to renew a bargain
6 that can't be carried out, then it's become impossible.

7 MS. O'CONNELL: Well, I mean, we think
8 that's right. I don't know that it makes sense to say
9 that because there is no remedy, that the Court
10 shouldn't address the first or second questions. I
11 mean, maybe if the Court thinks that there's -- there's
12 definitely no remedy and that this 20- to 40-year
13 sentence should remain in place. But -- but, exactly,
14 we don't think that the -- that the government should be
15 required to reoffer the plea agreement in these
16 circumstances.

17 JUSTICE KAGAN: But we're in a position now,
18 aren't we, where the State court can do exactly that,
19 can say the circumstances have changed, and -- and so
20 leave everything undisturbed.

21 MS. O'CONNELL: Yes. The problem -- one of
22 the problems here is that the Sixth Circuit sort of took
23 as a given that in circumstances like this, that the --
24 the original plea offer has to be reoffered. And what
25 we think the court was saying in Lafler is that that's

1 one thing that's on the table. It's not necessarily
2 required in every case. There could be other creative
3 remedies. Like there could be a defendant who can no
4 longer -- who missed the opportunity to give the
5 testimony she was supposed to give, but perhaps she has
6 information on somebody else and so maybe we could do a
7 renegotiation of the plea.

8 The Sixth Circuit, we do not think, should
9 be just requiring after it finds a Sixth Amendment
10 violation that the government reoffer a plea agreement
11 in circumstances that are different from those in
12 Lafler.

13 JUSTICE SOTOMAYOR: But isn't that -- I
14 mean, the court didn't say that the court -- that the
15 court below -- the Sixth Circuit didn't say that the
16 court below had to accept the reoffered plea agreement.
17 It seemed inherent in Lafler and Frye that what the
18 court was saying is that the court below has to use its
19 judgment on whether offer -- accepting the plea is -- is
20 right or giving another remedy is right. All of these
21 arguments should be before that court, not before us, as
22 an absolute rule.

23 MS. O'CONNELL: That's right. And -- and we
24 simply think that the decision whether to require the
25 government to reoffer it in the first place should also

1 be something that's left up to the sentencing court.

2 JUSTICE SOTOMAYOR: So that's your only
3 point, which is that that should be an issue for the
4 court below.

5 MS. O'CONNELL: Yes. So this should all be
6 left to the discretion -- discretion of the sentencing
7 court to come up with an adequate remedy.

8 JUSTICE SOTOMAYOR: But some remedy has to
9 be offered --

10 MS. O'CONNELL: Well --

11 JUSTICE SOTOMAYOR: -- if there is a
12 violation.

13 MS. O'CONNELL: The -- the court's opinion
14 in Lafler, I think, leaves that question open. It says
15 that it could be the circumstances that the sentencing
16 judge determines that the most fair result is to leave
17 the conviction and the sentence in place, but the
18 sentencing court has that discretion. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Newman?

21 ORAL ARGUMENT OF VALERIE R. NEWMAN

22 ON BEHALF OF THE RESPONDENT

23 MS. NEWMAN: Mr. Chief Justice, and may it
24 please the Court:

25 There is no question that the Michigan Court

1 of Appeals erred and created an end-run around
2 Strickland in finding the professed -- that if a
3 defendant professes innocence, that there's no need to
4 look any further to say that defense counsel provided
5 effective assistance.

6 There is also --

7 JUSTICE SOTOMAYOR: I agree with you and so
8 does your adversary, but he says there is nothing in
9 this record to show what research was done or not done.
10 The fact that the prior counsel's record wasn't reviewed
11 doesn't say that he didn't talk to the prosecutor,
12 doesn't say that he didn't look into other record
13 evidence, any of the discovery that had been filed with
14 the court, or any of the other circumstances that could
15 have informed him adequately.

16 MS. NEWMAN: That is partially true, Justice
17 Sotomayor. The record does show that at every turn when
18 Mr. Toca stepped into the courtroom he asked for more
19 time and indicated he wasn't ready. The record does
20 show that, as soon as the plea was withdrawn, Mr. Toca
21 said: "I need more time. I'm not ready to go to trial.
22 And in all fairness, my -- my client deserves to have a
23 fair trial. I'm not ready."

24 He's not ready to go to trial. He doesn't
25 have a good handle on what the record is.

1 My brother counsel makes an argument that
2 Mr. Toca made a very sophisticated sentencing analysis
3 and therefore had a grasp of the record. I would
4 disagree with that interpretation of the record. Mr.
5 Toca came in and said that the guidelines were two to
6 five on the minimum sentence. The prosecutor said: "I
7 don't know what the guidelines are and I don't care."
8 There's -- we don't even know if his recitation of what
9 the guidelines range was, was accurate. So there is
10 nothing on this record to show that Mr. Toca even knew
11 anything about the --

12 JUSTICE SOTOMAYOR: Well, that's --

13 JUSTICE ALITO: Are you arguing that he --
14 he needed to be -- he needed to have enough material and
15 to have familiarized himself enough with everything
16 that's relevant to the case to be able to go to trial
17 before he could move to have the -- the previous plea
18 withdrawn?

19 MS. NEWMAN: No, my argument does not go
20 that far. What I'm arguing --

21 JUSTICE ALITO: All right. Well, then I
22 don't understand what the argument was.

23 MS. NEWMAN: The argument is that defense
24 counsel has a duty to investigate, that the defense
25 attorney has a duty to be able to inform the client of

1 the risks of either accepting a plea, withdrawing a
2 plea, whatever the case. In this case it's withdrawing
3 a plea that has already been accepted by the court.
4 This is a very significant step in this matter.

5 JUSTICE SCALIA: Well, that's true. But --
6 but you -- you have the duty, or -- or counsel for the
7 defendant has the duty to show that counsel did not do
8 that. It's -- it seems to me you are putting the burden
9 on the other side to -- to prove that the -- that
10 counsel knew all this. And that's not the way -- that's
11 not the way the game is played.

12 MS. NEWMAN: I agree with that,
13 Justice Scalia, and we are not putting the burden on the
14 other side. There is -- I will refer the Court to the
15 Pierson affidavit, which is in the Joint Appendix at
16 page 298. That affidavit, in particular, paragraphs 6,
17 7, and 8, indicates that in an arbitration hearing when
18 Ms. Titlow testified and Mr. Ott or deputy, Sheriff's
19 Deputy Ott testified -- in arbitration hearings,
20 witnesses are put under oath and the affidavit is a
21 sworn affidavit from an attorney. So it is a notarized
22 affidavit from -- about testimony that was taken under
23 oath, that indicates that Mr. Toca approached Ms. Titlow
24 while she was in jail, while she was represented by
25 counsel; that the approach was: "You should reject the

1 plea and not testify against your aunt." That's the
2 evidence that we have in the record, and that is not
3 just Ms. Titlow.

4 JUSTICE KENNEDY: But just -- just to be
5 clear, isn't that after Titlow had asked for an attorney
6 because Titlow had talked with the jailer, who
7 encouraged Titlow to plead innocent?

8 So -- so you have to include that preface to
9 this statement, or it's quite incomplete.

10 MS. NEWMAN: Justice Kennedy --

11 JUSTICE KENNEDY: Or correct me if that's
12 wrong.

13 MS. NEWMAN: I would say that's wrong, and
14 that's where the court of appeals is wrong again and why
15 the State court's findings are entitled to no deference,
16 because the state court took that affidavit from William
17 Pierson and turned the words on its head.

18 The affidavit does not state that Vonlee
19 Titlow approached the sheriff's deputy and asked for a
20 new attorney. The affidavit states that the sheriff's
21 deputy approached her. He told her she should consult
22 with his attorney because his attorney was really good
23 and his attorney would be able to help her.

24 And so it's the sheriff's deputy,
25 unequivocally from this affidavit, because it's the only

1 place that this evidence comes from, it's the sheriff's
2 deputy --

3 I'm sorry. Were you looking -- it's on page
4 298 of the Joint Appendix in William Pierson's
5 affidavit.

6 It's the sheriff's deputy that sets
7 everything in motion about innocence. And why does he
8 do that? Because he's in the courtroom when the plea is
9 entered. And what is part of the plea? Part of the
10 plea is that Vonlee Titlow passed a polygraph. Well, to
11 a layperson what does that mean? You pass a polygraph,
12 you are innocent, you didn't do the crime.

13 Well, in this case, that's not the situation
14 at all. The passing of the polygraph cemented her guilt
15 in participating in this crime. But what the -- what
16 she passed in the polygraph was that she was an aider
17 and abettor. So it was her aunt who took the pillow and
18 smothered her uncle, not Ms. Titlow. But she was
19 present. She participated. She accepted money after
20 the crime.

21 So everything that happened in the Michigan
22 Court of Appeals took the actual facts and turned them
23 on its head, which is why the factual findings are not
24 entitled to deference.

25 JUSTICE ALITO: Isn't it -- is it

1 unreasonable to read the Pierson affidavit -- and -- and
2 you submitted that; isn't that correct?

3 MS. NEWMAN: Correct.

4 JUSTICE ALITO: All right.

5 -- to read it to mean that there were
6 discussions between Deputy Ott and Titlow, and Titlow
7 said she wasn't guilty? Ott said, "Well, if you are not
8 guilty, you shouldn't plead guilty. I will refer you to
9 an attorney. If you want me to, I could ask somebody to
10 come and talk to me."

11 That seems to be a direct quote from -- from
12 Titlow. Isn't that -- so isn't it reasonable to read it
13 that way?

14 MS. NEWMAN: Justice Alito, that's one --
15 part of what you said I would agree with, that the -- it
16 does state in the affidavit, certainly, that he had an
17 attorney that was really good and could ask somebody to
18 come talk to me.

19 But the rest of the statements, I would
20 argue, are -- are inferences and not facts. And we have
21 facts in the affidavit.

22 JUSTICE BREYER: So the point is that there
23 has to be some evidence. You -- you are saying that the
24 court was wrong when they said your client said she
25 wasn't guilty.

1 Now, this affidavit doesn't show that. I
2 mean, paragraph 6 doesn't say who spoke first, but
3 common sense suggests that the deputy sheriff wouldn't
4 have made that statement unless she spoke first. I
5 mean, does he go around saying to everybody just
6 generally, oh, you know, if you are not guilty, you
7 shouldn't plead guilty" I mean, it says they had
8 discussions and during discussions he told her she
9 shouldn't plead guilty if she wasn't guilty.

10 MS. NEWMAN: It also -- it also says, with
11 all due respect, that --

12 JUSTICE BREYER: Where?

13 MS. NEWMAN: -- the deputy approached her.

14 JUSTICE BREYER: Where -- approached her --

15 MS. NEWMAN: Right.

16 JUSTICE BREYER: -- and discussions with
17 her. It doesn't say why he approached her. I mean, I
18 just don't think people normally do that, they go to
19 every person in jail and say: You know, if you are not
20 guilty, you shouldn't plead guilty. I mean, somebody
21 might, but something triggered that advice, and the
22 affidavit doesn't tell me what triggered that advice.
23 So I could infer that what triggered the advice was her
24 statement she was not guilty, or I could infer this is
25 an unusual situation where, for some reason unknown, he

1 brought it up. I don't know from reading paragraph 6.

2 MS. NEWMAN: And Justice Breyer --

3 JUSTICE BREYER: So whose burden is it?

4 MS. NEWMAN: Justice Breyer, I would argue
5 that it's -- it's an inference that doesn't matter.
6 It's an --

7 JUSTICE BREYER: Okay.

8 MS. NEWMAN: -- in this case.

9 JUSTICE BREYER: It doesn't matter. Why
10 doesn't it matter? Because if she went, he -- she said,
11 you know, I'm not really guilty, he said, well, you
12 shouldn't plead guilty, she said -- but I have a lawyer
13 that will get rid of your guilty plea. If it went
14 something like that, and then we assume the lawyer was
15 told about this -- it doesn't say, but that's a
16 reasonable assumption. And then the court opinion of
17 Michigan seems to make sense that that was a reason,
18 that was one of the reasons that made his conduct in --
19 in withdrawing the plea or, you know, not strongly
20 advising her against it. That was one reason why that
21 wasn't an inadequate assistance of counsel.

22 Now where have I made my mistake in this
23 chain?

24 MS. NEWMAN: Well, in paragraph 8 of William
25 Pierson's affidavit on page 298 it indicates that it was

1 Frederick Toca who encouraged her to reject a plea
2 agreement to testify against the aunt. So again we have
3 the attorney, who is not Ms. Titlow, who is saying: I
4 want to withdraw my plea. It's the attorney who is
5 saying to her and encouraging her to reject the plea.

6 JUSTICE SOTOMAYOR: Ms. Newman, you know,
7 I -- I'm -- this may be the first case that I have been
8 involved in as a judge -- and there might be others, but
9 myself personally -- where, in a situation like this,
10 the defendant has not put in an affidavit to explain
11 what happened.

12 There is some force to your adversary's
13 argument that there's a really sparse record here. And
14 AEDPA deference requires the burden on you. You can't
15 deny that. I guess -- I don't know if you were
16 responsible, but what other circumstances that would
17 occasion a defendant not saying, this is what I was
18 told?

19 MS. NEWMAN: I was not the attorney. I came
20 into the case at this level. So I did not do any of the
21 litigation below. However, there are -- there is record
22 evidence to support, not -- there is record evidence
23 that supports the claim and maybe was a strategic
24 decision by the attorney not to submit other affidavits
25 because the attorney was simply looking for a hearing to

1 expand the record. So we have --

2 JUSTICE SOTOMAYOR: But they didn't ask for
3 the hearing in the court below. They only asked for it
4 at the court of appeals.

5 MS. NEWMAN: They -- Michigan -- Michigan --
6 the way Michigan works is within 56 days of getting the
7 transcripts, you can file in the trial court. If you --
8 if you fail to make that 56-day deadline, then your
9 alternative is to go to the court of appeals and ask for
10 a remand.

11 So we don't know when the case got to the
12 attorney. So I don't think that there's any inference
13 that can be drawn from the fact that within that very
14 short time period, there was no motion filed in the
15 trial court.

16 JUSTICE ALITO: Who was the attorney at that
17 stage? I take it, it wasn't the trial attorney because
18 the -- a big part of the claim before the Michigan Court
19 of Appeals was that the trial attorney was also
20 ineffective.

21 MS. NEWMAN: Right. It was --

22 JUSTICE ALITO: Who was it?

23 MS. NEWMAN: It was an appellate attorney,
24 Liz Jacobs, was the attorney at that stage.

25 JUSTICE ALITO: And she's -- is she with

1 your office or she's --

2 MS. NEWMAN: She's not with my office, no.

3 JUSTICE ALITO: But she was appointed.

4 MS. NEWMAN: She was -- I don't know if she
5 was appointed or retained, but she's not with my office.

6 JUSTICE GINSBURG: May I ask you,
7 Ms. Newman, if you would agree that the Sixth Circuit
8 was wrong, at least to this extent: Is there -- what is
9 the argument for directing a prosecutor to make a plea
10 offer that was never previously made? The offer that
11 was made is impossible to carry out now. The offer was
12 conditioned on her testimony at her aunt's trial. That
13 didn't happen.

14 So there is no -- there is no plea bargain
15 offered. And yet, the court instructs a renewal,
16 instructs the prosecutor to renew an offer that doesn't
17 exist.

18 MS. NEWMAN: Well, Justice Ginsburg --
19 Ginsburg, as the Court decided last term in
20 *Lafler v. Cooper*, the point of the remedy is to put the
21 defendant as closely as possible back in the position he
22 or she would have been in but for the ineffective
23 assistance.

24 In *Lafler v. Cooper*, the Court recognized
25 that there's going to be situations where circumstances

1 have changed, and there's going to be circumstances
2 where that is not possible to -- to do that exactly.

3 In this case, of course, she cannot testify
4 against her aunt because her aunt was acquitted and is
5 deceased; however --

6 JUSTICE GINSBURG: Then how could -- how
7 could this Court order the prosecutor to renew an offer
8 that can't be made?

9 MS. NEWMAN: Well, it is an offer that can
10 be made if you remove the condition precedent. So the
11 offer -- the -- the premise of the offer is a charge
12 reduction. From first-degree --

13 JUSTICE GINSBURG: But the whole -- what
14 drove the prosecutor to make this bargain was he wanted
15 the testimony. So how -- how can that -- that's -- I've
16 never seen anything like this, where a court orders a
17 prosecutor to make a plea offer that was never made.

18 MS. NEWMAN: Well, again, referring to
19 *Lafler v. Cooper*, the remedy goes -- the Sixth Amendment
20 right attaches to the defendant, not to the prosecution.
21 So the goal here is to remedy, if the Court finds and
22 agrees that there's a Sixth Amendment violation, to
23 remedy that Sixth Amendment violation. If there is an
24 unequal burden to be borne by one -- one side or the
25 other, it has to be borne by the government.

1 And so therefore, the way to remedy the
2 Sixth Amendment violation, it was a charge reduction, is
3 to reoffer the manslaughter plea, which has already been
4 done in this case, by the way. My client has already
5 accepted that plea.

6 And then it's up to the trial court now
7 whether or not to accept the plea, reject the plea, or
8 do some sort of modification, which is exactly what the
9 Sixth Circuit ordered and is exactly what this Court
10 ordered in -- in *Lafler v. Cooper*, to allow the trial
11 court to have the discretion in fashioning a remedy that
12 both will take care of the Sixth Amendment violation and
13 can balance the concerns of the prosecution in what's
14 been lost in that process, but still be able to craft a
15 remedy.

16 JUSTICE SCALIA: I don't know that it's so
17 strange to make the prosecutor -- to make the
18 prosecution submit an offer that can no longer be
19 accepted. I mean, it doesn't seem to me any more
20 strange than to make the prosecution submit an offer
21 where the situation was at the beginning. You do this,
22 and I will -- you know, I will prosecute. The *quid pro*
23 *quo* was you avoid the possibility of conviction.

24 But here, she's already been convicted. She
25 had a trial, you know, by 12 fair, impartial jurors, and

1 she was guilty. That's -- that's what the jury found.
2 So it seems to me just as strange to make the
3 prosecution, now that we know she's guilty, submit --
4 submit that prior offer.

5 So, I mean, it seems to me quite weird, in
6 any event. So one -- one incremental weirdness is -- is
7 not so bad.

8 MS. NEWMAN: Justice Scalia, though, I think
9 you hit the point on the head. She -- she was always
10 guilty. And as my brother counsel stated, this case, in
11 some ways, is very, very similar to Cooper. You have
12 comments on the record by Frederick Toca that the
13 prosecution is -- has made comments and -- and they
14 reference this in the appendix, they reference a
15 newspaper article, the prosecutor talking about the fact
16 that this is nothing more than a manslaughter case.
17 This is -- we're charging first-degree murder, but
18 really, it's sort of a -- in sheep's clothing, it's
19 really just manslaughter.

20 And Frederick Toca is saying on the record,
21 this is just a manslaughter case. Why should my client
22 accept an above-guideline sentence of a seven-year
23 minimum and have to testify against a codefendant.
24 She's going to go to trial, and the prosecutor's already
25 admitted this is nothing more than a manslaughter case,

1 so she'll be convicted of manslaughter, and she's going
2 to be in a better position following trial and
3 conviction, just like in Cooper.

4 There was no question Mr. Cooper was going
5 to be convicted. There was no question at all. Defense
6 counsel gave the same advice. You can't be convicted of
7 the charged offense. You're going to be convicted of a
8 lesser sentence, and following that conviction, you will
9 be in a better position for sentencing than you will be
10 with this plea.

11 JUSTICE ALITO: If that's the case --

12 MS. NEWMAN: The facts are in all force.

13 JUSTICE ALITO: Your arguments seemed to
14 be -- have had a head-on collision. If this is nothing
15 but a manslaughter case, then why was -- what argument
16 do you have that Toca was ineffective in saying, let's
17 go to trial. So if you're convicted of manslaughter
18 without the plea, you'll get your guidelines sentence on
19 the manslaughter case?

20 MS. NEWMAN: Because it's for the same
21 reason in Cooper. He was absolutely wrong, and he was
22 not aware of the evidence that had been marshalled
23 against Ms. Titlow, including their own confessions.

24 JUSTICE ALITO: Well, that's not a
25 manslaughter case. I thought you were just saying it's

1 a manslaughter case.

2 MS. NEWMAN: I'm saying that his
3 representations on the record are similar to the
4 representations made by Mr. Cooper's attorney on the
5 record. That you would -- in response to Justice --

6 JUSTICE GINSBURG: But the charge was --
7 that she was convicted of second-degree murder, right?

8 MS. NEWMAN: She was convicted of
9 second-degree murder. And in this case -- in Cooper,
10 the defense attorney never filed a motion to quash. So
11 he never challenged the efficient -- the legal
12 sufficiency of the evidence.

13 In this case, attorney number one,
14 Mr. Lustig, did file a motion to quash. She tested the
15 sufficiency, the legal sufficiency of the prosecution's
16 case for first-degree murder.

17 JUSTICE ALITO: You have my head --

18 MS. NEWMAN: So there's no question --

19 JUSTICE ALITO: You have my head spinning.
20 I thought you were making the argument that there's
21 nothing unfair about requiring acceptance of -- about
22 the imposition of a manslaughter sentence because this
23 was a manslaughter case.

24 I thought you were making that argument.

25 MS. NEWMAN: I'm not making that --

1 JUSTICE ALITO: Did I misunderstand that?

2 MS. NEWMAN: I'm not making that argument.

3 JUSTICE BREYER: I thought you were -- there
4 is a reason that they spoke about, which was, well, she
5 said she was innocent. Now, as to that one, what they
6 wrote is the record discloses that the second attorney's
7 advice was set in motion by defendant's statement to the
8 sheriff's deputy that he did not commit the offense.

9 Now, you say that's just contrary to fact as
10 you point to the affidavit. And the affidavit I read, I
11 think it's a little -- rather ambiguous in that respect,
12 and I can overturn that or a Federal court can only if
13 this factual statement I just read you is clearly wrong,
14 clearly. So I have a tough time saying it's clearly.

15 And I know they overstated, because they
16 said automatically, in this case. Well, that may be an
17 overstatement. You have to read it in light of that
18 sentence.

19 But then you're making a second argument, I
20 take it, if this is right. Your second argument is,
21 anyway, he was incompetent for a completely different
22 reason. He didn't read the record. And if he'd read
23 it, he never would have made the statement that this is
24 just a manslaughter case. He would have seen that if
25 she withdrew her guilty plea she'd be tried for murder,

1 and then she'd get a really long sentence.

2 So that's an ineffective assistance of
3 counsel. Now, what does the Court in Michigan say about
4 that? Nothing. Nothing.

5 So now I wonder. Maybe nobody made that
6 argument to them. Or, maybe they made it and they
7 rejected it sub silentio. That's why I asked my first
8 question. Okay? So -- and you heard the response.
9 Even if they had heard that argument and they said
10 nothing about it, they don't have to -- they don't have
11 to mention every argument made. If they just deny, we
12 assume they deny it, and what we do is see whether they
13 were within their rights to deny it. That's how we are
14 supposed to look at it: Does it clearly violate Supreme
15 Court law to deny it?

16 And there is going to be a factual part of
17 that and a legal part. All right, how do we deal with
18 that?

19 MS. NEWMAN: Well, 2254 gives -- has
20 separate provisions for the legal aspect of that.

21 JUSTICE BREYER: First of all, did anybody
22 make the argument as clearly as you have made it? I saw
23 what it was, I think. So, that's -- did anybody make
24 that argument to the Michigan court?

25 MS. NEWMAN: Not that I'm aware of.

1 JUSTICE BREYER: No, okay. Well, that's the
2 end of that, isn't it? What you are coming for is you
3 have to proceed by asking for reopening in the Michigan
4 court and see if they say it's too late. And then, you
5 know, et cetera, they're all spelled out in this opinion
6 which I can't remember, Cullen or Pinholster or
7 something. And this isn't an argument for us now.

8 MS. NEWMAN: It's just a factual argument
9 trying to respond to the Court's questions about what
10 happened in this case and about what is contained in the
11 record and what Mr. Toca did say on the record.

12 CHIEF JUSTICE ROBERTS: If I could move
13 beyond the particular facts to some of the broader
14 points that the Solicitor General has raised. If you
15 don't have the requirement of at least some
16 corroboration, then all you have in every case is a
17 completely self-serving assertion: I wouldn't have pled
18 guilty, you know, if I had known this or I had known
19 that. And everybody will raise that argument.
20 Everybody raises ineffective assistance of counsel
21 anyway, and they will just add onto it this plea
22 assertion.

23 I mean, shouldn't it be -- the Sixth Circuit
24 really went out of its way saying there is no
25 requirement of corroboration at all.

1 MS. NEWMAN: Mr. Chief Justice, there is no
2 question the Sixth Circuit in dicta said that we don't
3 require it, but it exists in this case. And the reality
4 is, as we discussed in our brief, that every circuit
5 looks -- it's a Strickland analysis. Just like every
6 other Strickland analysis, the court looks at the entire
7 record and makes a determination based on the record.
8 And this Court has always eschewed hard, fast,
9 bright-line rules in terms of telling courts what has to
10 exist in order to make a specific finding.

11 CHIEF JUSTICE ROBERTS: So you think the
12 Sixth Circuit was wrong in what you are characterizing
13 as dicta? You think it was wrong to say that, and that
14 the other circuits which require something in addition,
15 that that's the rule that we should adopt?

16 MS. NEWMAN: I don't think -- No, I don't
17 think that any particular rule should be adopted. I
18 think the rules that exist under Strickland are fine for
19 the circuits. The rules have existed for decades and
20 the circuits have no trouble figuring out when the
21 threshold is met and when it's not.

22 CHIEF JUSTICE ROBERTS: Well, I thought --
23 maybe I'm misremembering, but the Sixth Circuit
24 distanced it itself from the other circuits, didn't it?

25 MS. NEWMAN: Yes, it did distance itself by

1 stating --

2 CHIEF JUSTICE ROBERTS: Now, you are telling
3 me that all the circuits have always done this. So the
4 Sixth Circuit at least thinks it's doing something
5 different?

6 MS. NEWMAN: It may think it is doing
7 something different, but in this particular case there
8 was objective evidence that they pointed to and, as the
9 Solicitor General mentioned, there's always going to be
10 sentencing disparity because you're going to have to
11 have a sentencing disparity in order to show prejudice.
12 So in effect there will always be objective evidence
13 that will support any subjective statement of a criminal
14 defendant or you're never going to see a --

15 CHIEF JUSTICE ROBERTS: Well, if there is
16 always going to be objective evidence, that's like
17 saying you don't have to have corroboration.

18 MS. NEWMAN: Well, for this Court -- my
19 point is obviously the Court can -- can set forth a
20 rule, but in doing so I think we are going to run into
21 what Justice Sotomayor said earlier in terms of judges
22 do this all the time, they -- they figure out who's
23 credible. I mean, it's never just like here's these
24 things, but this guy's credible so I'm going to believe
25 him. It's the totality of the circumstances, and it's

1 always going to have to be a totality of the
2 circumstances. So to say, here's the line, there has to
3 be objective evidence, then what is the objective
4 evidence? How are you going to define objective
5 evidence?

6 CHIEF JUSTICE ROBERTS: So the Sixth Circuit
7 was wrong when it said, we are doing something different
8 than the other circuits?

9 MS. NEWMAN: They certainly did not do
10 anything different in this case. In the other cases
11 that I have reviewed from the Sixth Circuit, I have not
12 seen a case that relied only on subjective testimony.
13 So I can't point to a case where the Sixth Circuit is
14 doing something different than any other case, and I
15 don't believe anyone else has pointed to a particular
16 case. So they might think they are doing something
17 different, but in reality they are doing the same thing
18 as everybody else.

19 JUSTICE ALITO: Can I ask you about Mr. --
20 Mr. Toca's ethical lapses? Are they -- do they have a
21 legal significance in this case?

22 MS. NEWMAN: They certainly speak to his
23 credibility. United States v. Soto-Lopez, is a very
24 similar case out of the Ninth Circuit, where the Court
25 did rely on the fact that the attorney had significant

1 problems, ethical problems. And in this case Mr. Toca's
2 actions and his ethical problems go hand in hand. I
3 mean, he approached a represented defendant who was in
4 jail and encouraged her to reject a plea. He did this
5 on a very short timeline, admitting that -- well, not
6 admitting, but we know from prior counsel that he had
7 not even picked up the phone to speak with prior
8 counsel, who had spent almost a year litigating this
9 case. He had not retrieved prior counsel's file. It
10 appears from the record -- those are facts.

11 In terms of inferences, it appears from the
12 record that he got his information from the media. This
13 was a highly, highly publicized case. He signed a
14 retainer agreement with a client who had no money, who
15 gave him some jewelry and the right to promote her
16 story.

17 So he had every -- he violated multiple
18 ethical rules, and those violations lead to the
19 conclusion, a reasonable conclusion that the reason for
20 withdrawing the plea was to make the deal more
21 lucrative. It is not lucrative if she pleads. She had
22 already pled, so she had already entered a plea and all
23 that was left was sentencing. That's not a very
24 exciting story if your entire retainer agreement relies
25 on the fact that you have the media rights to sell this

1 story.

2 So yes, I would argue that the ethical
3 lapses are very significant in this case and lend
4 credibility to --

5 JUSTICE ALITO: In what sense is his
6 credibility -- did his credibility figure in the
7 decision of the Michigan Court of Appeals?

8 MS. NEWMAN: Well, it didn't. There were
9 separate issues raised on ethical violations, and they
10 were denied by the Michigan Court of Appeals and they
11 were denied by the Federal court.

12 JUSTICE KAGAN: Do you know if the Michigan
13 Court of Appeals was ever presented with this argument
14 that, in fact, he gave the advice that he did because of
15 the peculiar fee arrangement that he had?

16 MS. NEWMAN: They were specifically
17 presented with the conflict argument and off the top of
18 my head, I apologize, I don't recall if that is
19 specifically contained in there, but I think it was. I
20 mean, it was definitely briefed and argued, the ethical
21 violations.

22 JUSTICE KAGAN: And Mr. Toca is now, remind
23 me, disbarred for?

24 MS. NEWMAN: Disbarred.

25 JUSTICE KAGAN: Forever?

1 MS. NEWMAN: Yes. He committed multiple
2 misdemeanors and a felony and in part was disbarred
3 based on this conduct in this case. So he is no longer
4 practicing law. Last I checked, he is no longer
5 practicing law anywhere in the United States.

6 JUSTICE ALITO: What was submitted to the
7 Michigan Court of Appeals? Not the -- I am not talking
8 about the exhibits that were attached, but there was a
9 motion, a brief? What was it?

10 MS. NEWMAN: Yes, in Michigan it's called a
11 motion to remand. You are required under the court
12 rules to submit a brief in support of that motion to
13 remand and you are required to submit a proffer. So the
14 proffer --

15 JUSTICE ALITO: It's not in the habeas
16 record, it's not in the record of the Federal Court.
17 And we've been unable to get it from the State court,
18 but it does exist?

19 MS. NEWMAN: Yes.

20 JUSTICE ALITO: This motion?

21 MS. NEWMAN: Absolutely, yes. You have to
22 file a motion to remand and the court of appeals
23 specifically references that motion to remand and the
24 proffer by the affidavit in stating that normally they
25 wouldn't consider those, that proffer as substantive of

1 evidence, but in this case inexplicably, they did, which
2 leads to another reason why the Michigan Court of
3 Appeals decision is unreasonable. Because the Michigan
4 Court of Appeals failed to engage in further fact
5 finding.

6 So we take the record as we get it from them
7 and under Williams and other decisions, if the Court is
8 the one responsible for an inadequate record, and we
9 would have what we have, and I would argue to this Court
10 that the record that we had supports that the Michigan
11 Court of Appeals erred both legally and factually in its
12 findings and therefore neither are entitled to any
13 deference. And the Sixth Circuit habeas should be
14 affirmed in this matter.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Bursch, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF JOHN J. BURSCH

19 ON BEHALF OF THE PETITIONER

20 MR. BURSCH: Thank you, Mr. Chief Justice.

21 A few clean-up points. Starting with this
22 idea that the actual predicate was wrong. As we
23 explained in our briefing in the habeas pleadings in
24 this very case, Titlow already conceded that the factual
25 predicate was correct. And Justice Breyer, you asked

1 about the quantum of proof necessary to overcome that
2 assumption that the Court of Appeals made based on the
3 record before it and actually, the legal standard under
4 AEDPA is not clearly wrong. Under 2254(e)(1), which is
5 reprinted in our blue brief, it is presumed correct and
6 that presumption could only be overcome by clear and
7 convincing evidence, and we don't have that here.

8 Second, with respect to the advice, my
9 friend on the other side points to Paragraph 8 of the
10 Pierson affidavit. And it's a little ironic that they
11 put all their eggs in that basket now because in their
12 briefing they disclaim it as triple hearsay and say this
13 Court should not rely on it and she said some things
14 characterizing that paragraph that aren't in there.
15 There is nothing in paragraph 8 or the rest of the
16 affidavit that says Toca approached Titlow. I don't
17 think where that comes from.

18 But assume that everything that she says is
19 correct and that Toca did give the advice to withdraw
20 the plea, that still doesn't mean that it's bad advice
21 when you apply the AEDPA and Strickland rubrics because,
22 as Justice Alito pointed out, the differentiation in the
23 manslaughter guidelines and what was actually in the
24 plea actually makes this objectively reasonable advice.

25 And, in fact, it's more than that, because

1 at the time the plea was withdrawn, consider all the
2 facts that were known from talking to the prosecutor,
3 looking in the police file and everything else that --
4 that Toca presumably did. At that time, no one knew
5 about this critical Chahine testimony, which only came
6 out at trial, that it was actually Titlow who held Uncle
7 Don down while he was being smothered. I mean, that
8 completely changes the complexion of this case.

9 And so to say that Titlow was always guilty
10 when all of her testimony up to the point of the plea
11 withdrawal had been, I told my Aunt Billie to stop and
12 then I left the scene, that's just not credible.

13 Point on the second issue, the prejudice
14 prong. Chief Justice Roberts and Justice Sotomayor, you
15 note that the other circuits all look at objective
16 evidence and we think that's the right way to approach
17 this. And you're exactly right, Chief Justice, that the
18 Sixth Circuit takes a different approach. The Sixth
19 Circuit says, although some circuits have held that a
20 defendant must support his own assertion that he would
21 have accepted the offer with additional objective
22 evidence, we, in this circuit, have declined to adopt
23 such a requirement.

24 And you can see how that difference played
25 out in this very case, because the Sixth Circuit didn't

1 look at all the other evidence that was in the record
2 that was contrary to this self-serving statement that
3 Titlow made; that Titlow had the plea in hand, and
4 before the ink was even dry, was already professing
5 innocence and talking to other lawyers; that she fired
6 Lustig and there was no reason to do that unless she
7 wanted to -- to withdraw the plea; that she did not have
8 a propensity for truthfulness.

9 At trial, she lied about the fact that she
10 was drunk when she was not the night of the murder. The
11 evidence came out that she asked Chahine to lie about
12 the alibi, and she hid the murder weapon.

13 And then you've got all these statements at
14 the sentencing hearing and post remand where she's
15 continually asserting her innocence. It's happening all
16 the time.

17 When you consider all that objectively,
18 under the other circuit standards, clearly, that would
19 not be sufficient to establish prejudice here.

20 JUSTICE SOTOMAYOR: I -- I --

21 MR. BURSCH: That's the objective evidence.

22 JUSTICE SOTOMAYOR: I -- I don't understand
23 what you're saying. The other side says, and I think
24 it's the standard, that you look at the totality of the
25 circumstances.

1 MR. BURSCH: Correct.

2 JUSTICE SOTOMAYOR: And what you're saying
3 is they didn't do that here. It's not that -- they use
4 some objective evidence, you're saying they didn't use
5 other objective evidence. I am --

6 MR. BURSCH: Here's -- yeah. Here's the
7 connection, Justice Sotomayor. The reason they didn't
8 look at the other evidence is because they have a
9 different rule. They don't think they have to look at
10 it. They did look at things like sentencing
11 disparities. As the Solicitor General's office
12 explained, that shouldn't come into play here because
13 that was a well-known disparity; it wasn't something
14 that was hidden by client's ineffective assistance. And
15 they -- the Sixth Circuit talks about the fact that she
16 accepted the plea once and then withdrew it. Obviously,
17 that cuts both ways.

18 So all you are left with is the subjective
19 testimony. And when you look at all the other objective
20 evidence, the evidence that other circuits would look
21 at, there's really only one possible outcome here.

22 So in sum, Your Honors -- oh, I guess I do
23 want to mention one other quick point since my light
24 hasn't gone yet. The book deal. There was no book
25 deal. Look at page Joint Appendix 60, and I've seen

1 copyright assignments. That wasn't the case here. They
2 were trying to raise money for the trial.

3 And -- and this case had nothing to do with
4 the reason why Toca was disbarred. That's at Joint
5 Appendix 302 to 317. It was because he falsely put
6 someone else's license tabs on his license plate and
7 that was a misdemeanor and then he lied about it.

8 In sum, record silence under AEDPA and
9 Strickland means the State wins, not the convicted
10 murderer.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 12:04 p.m., the case in the
15 above-entitled matter was submitted.)

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