No. 12-414

In the Supreme Court of the United States

SHERRY L. BURT, PETITIONER

v.

VONLEE TITLOW

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

Bill Schuette
Michigan Attorney General

B. Eric Restuccia
Deputy Solicitor General

John J. Bursch
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Aaron D. Lindstrom
Asst. Solicitor General

Raina Korbakis
Asst. Attorney General
Appellate Division

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Sixth Circuit failed to give appropriate AEDPA deference to a Michigan state court by holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.

2. Whether a convicted defendant's subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.

3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to "remedy" the violation of the defendant's constitutional right, or merely requires a re-offer of the plea.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the opinion. The Petitioner is Sherry Burt, Warden of a Michigan correctional facility. The Respondent is Vonlee Titlow, an inmate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, Pet. App. 1a–32a, is reported at 680 F.3d 577. The opinion of the district court, Pet. App. 34a–97a, is not reported but is available at 2010 WL 4115410. The opinion of the Michigan Court of Appeals, Pet. App. 98a–119a, is not reported but is available at 2003 WL 22928815.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on May 22, 2012. Pet. App. 33a. A petition for rehearing was denied on August 2, 2012. Pet. App. 121a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

A jury convicted Respondent Vonlee Titlow of second-degree murder.[1] Titlow now claims that his second attorney was ineffective for allowing Titlow to maintain his innocence and withdraw a manslaughter plea (negotiated by his first attorney), despite the fact that Titlow hired his second attorney to do exactly that. The Sixth Circuit held that the Michigan Court of Appeals unreasonably denied Titlow's ineffective-assistance claim, and it ordered the prosecutor to re-offer the plea and the state trial court to resentence Titlow. The Sixth Circuit erred in three fundamental ways.

First, the Sixth Circuit misapplied AEDPA deference to the state-court decision. Titlow has conceded the Michigan Court of Appeals' key factual finding: that his second attorney's advice was set in motion by Titlow's claim of innocence. And the Michigan Court of Appeals' legal conclusion was consistent with—not contrary to or a misapplication of—this Court's clearly established precedent that a defendant retains "the ultimate authority" whether to plead guilty. *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004). Because the Michigan Court of Appeals' decision did not represent an "extreme malfunction," *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) (citation omitted), AEDPA prohibited the Sixth Circuit from setting aside Titlow's valid, state-court murder conviction.

---

[1] Titlow is a transgender male who is housed in an all-male prison facility. The lower court opinions use a combination of male and female pronouns when referring to Titlow, but for consistency, this brief will use male pronouns only.

Second, the Sixth Circuit erred in concluding that Titlow would have preserved his plea deal but for ineffective assistance. There is no record evidence to that effect, only Titlow's self-serving, post-trial litigation assertions. Such assertions are insufficient to warrant setting aside a constitutionally fair trial, which is why the majority of circuits require objective evidence of a defendant's pre-trial intent to accept a plea deal. Titlow's credibility is also weakened by the fact that he has not even alleged that his plea withdrawal stemmed from a lack of pertinent information or his attorney's failure to advise. Nor could Titlow make those allegations, given that his first attorney had discussed all of the evidence and trial risks with Titlow less than one month earlier.

Third, the Sixth Circuit changed the applicable remedy this Court established in *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012). When a defendant claims that he rejected a plea offer based on counsel's bad advice and is then convicted of a more serious charge, his remedy is an order compelling the prosecutor to re-offer the plea. If the defendant accepts the offer, the state trial court has discretion to either vacate the post-trial sentence or simply leave it in place. *Id*. at 1389. But here, the Sixth Circuit believed that simply reinstating Titlow's current sentence could render the *Lafler* remedy illusory. So the court erroneously suggested that the state trial court "fashion" a new sentence using the plea-bargain sentence as a baseline. Pet. App. 24a–25a. Not so.

For all these reasons, the State of Michigan respectfully requests that this Court reverse the Sixth Circuit's grant of habeas relief to Titlow.

STATEMENT OF THE CASE

A. Death by "Burking"

Vonlee Titlow's murder conviction stems from his role in the death by "Burking" of his elderly, wealthy uncle, Donald Rogers.

The term Burking comes from a series of grisly killings by Messrs. Burke and Hare in 19th century Edinburgh. J.A. 230. Burke and Hare were grave snatchers; they would exhume the bodies of the recently buried and sell the cadavers to the anatomy department at the University of Edinburgh in Scotland. J.A. 230. Then Burke and Hare had an epiphany: rather than doing all that digging, it would be much easier to inebriate local drunkards to a state of unconsciousness and then cover the victim's nose and mouth, resulting in an essentially undetectable asphyxiation. J.A. 230–31. But Burke and Hare overplayed their hand; a surplus of cadavers resulted in a criminal investigation that consigned Burke and Hare to prison and placed their criminal innovation in the history books. J.A. 231.

Here, a jury convicted Titlow of second-degree murder for assisting his aunt, Billie Rogers, in killing his uncle, whose cause of death was "asphyxia by smothering" with "acute alcohol intoxication" as a contributing factor. J.A. 196. To understand Titlow's ineffective-assistance claim, the evidence of Titlow's role in Rogers' death must be considered at two discrete points in time: (1) the evidence available to Titlow's second attorney when he assisted Titlow in withdrawing his manslaughter plea, and (2) the evidence before the jury when it convicted Titlow.

B. Titlow accepts a plea offer.

In the early morning of August 12, 2000, police officers were dispatched to the Rogers' residence, where they found Don dead on the kitchen floor. J.A. 90–92. There was a plastic cup by his hand, an overturned chair by his head, and his legs were crossed. J.A. 93–98. Don's wife, Billie, told officers that Don was a chronic alcoholic and sometimes passed out, J.A. 100–01, and that she and Titlow discovered him on the floor after returning from the casino. J.A. 100.

Some of the first responders were suspicious; Don's body position—he was lying flat on his back with his legs crossed at the ankles, with "one arm up, one arm down"—was unusual. J.A. 121–22, 125–27. Still, the body exhibited no obvious signs of trauma, J.A. 129, and the coroner listed a heart attack on the death certificate as the cause of death. J.A. 184.

Eighteen days later, events took a dramatic turn. Danny Chahine, whom Titlow had been dating, appeared unexpectedly at the police station and gave a videotaped interview indicating his belief that Titlow and Billie had a role in Don's death. J.A. 3–17. Chahine had become suspicious because, a couple of days before Don died, Titlow told Chahine about Billie "jokingly" offering to pay Titlow $25,000 to get rid of Don. J.A. 4.

In the week following Don's death, Titlow and Chahine got together. Titlow was drinking heavily and was very upset. J.A. 8. Titlow told Chahine that when Titlow and Billie arrived home from the casino on August 12, Don was not yet dead. J.A. 8. Billie

and Titlow began pouring vodka in Don's mouth and nose and took turns putting their hands over Don's nose. J.A. 9–11. Whenever Don needed a breath, Titlow let go. J.A. 11. But then Billie took a pillow from the living room and put it over Don's head. J.A. 12. Although Titlow insisted that it was Billie who suffocated Don, J.A. 12–14, Titlow was full of remorse for having participated in the vodka pouring, lamenting that "they killed him." J.A. 15.

At the police department's request, Chahine wore a wire when he met Titlow for drinks two days later. J.A. 18–32. On the audiotape, Titlow reiterated that Billie, not he, had killed Don: "I know she got a pillow over his face. . . . She's the one that poured the Vodka in his mouth. She did most everything and she even told me, she said, 'I did all the work'. . . . 'Cause I [Titlow] couldn't do it. Just couldn't." J.A. 18–19. But Titlow continued to express regret: "I felt so bad about what happened . . . . I feel guilty for killing him. . . . I think [God] knows that what happened to me was that I was a victim." J.A. 23–24.

Based on these statements, Billie and Titlow were arrested and charged with murdering Don Rogers. Titlow cooperated by giving a statement to the police and taking a polygraph examination. In a statement, Titlow said that he and Billie, without a prior plan, poured vodka down Don's throat, and Billie then suffocated Don with a pillow. J.A. 38. Titlow "denied killing Donald Rogers personally" and denied "that he planned the death." J.A. 38. An examiner then administered the polygraph and determined Titlow was being truthful in answering the following questions:

Q1: Are you lying about what happened that night with Don?

A: No.

Q2: Did you plan with Billie to kill Don when he was drunk?

A: No.

Q3: Are you lying that Billie is the one that smothered him with that pillow?

A: No.

Q4: Did you personally smother Don with that pillow?

A: No.

Q5: Are you lying that you left when Billie smothered him?

A: No. [J.A. 39.]

On October 29, 2001, Titlow appeared in court with his first retained attorney, Richard Lustig, to accept a plea offer. In exchange for testifying at Billie's trial and pleading guilty to manslaughter, Titlow would receive an above-guidelines sentence of 7 to 15 years.[2] J.A. 42–43.

---

[2] Unlike the federal system, Michigan has an indeterminate sentencing scheme, so a criminal defendant is given a minimum sentence and a maximum sentence. *People* v. *Lowe*, 773 N.W.2d 1, 3–4 (Mich. 2009). An offender will serve at least his minimum sentence. Mich. Comp. Laws § 791.234(1).

The prosecutor expressly reserved the right to withdraw the offer if Titlow failed to testify. J.A. 43. And to establish the factual foundation for the plea, Titlow testified that he "did pour a shot of vodka in [Don']s mouth and I did accept money afterwards [from Billie] not to say anything about what had happened." J.A. 50.

Critically, Titlow testified that he and Lustig had "gone over all of the evidence together over a long period of time." J.A. 43. And Titlow understood fully that by pouring alcohol down Don's throat and then later accepting $100,000 from Billie to keep quiet, a jury could convict him of murder:

> MR. LUSTIG: And you and I discussed the fact that there are certain facts that could get you convicted of first degree murder. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> MR. LUSTIG: All right. They include two things. Number one, that you had a—you received $100,000.00 after the death of your uncle, correct?
>
> THE DEFENDANT: Correct.
>
> MR. LUSTIG: And also, that during the course of the so-called homicide, you did feed alcohol into his system . . . .
>
> THE DEFENDANT: Yes.

> MR. LUSTIG: Okay. Now, although you didn't participate in what appears to be a smothering, you understand a jury could find you guilty of first degree murder, second degree murder, manslaughter or nothing at all. You understand that?
>
> THE DEFENDANT: Yes. [J.A. 44.]

The trial court accepted Titlow's plea. J.A. 53.

C. Titlow maintains his innocence, hires new counsel, and withdraws his plea.

While waiting in jail to testify at Billie's trial, Titlow told a deputy that he did not commit the offense. Pet. App. 101a; Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice."). The deputy told Titlow that he should not plead guilty if he was not guilty, and the deputy recommended his own attorney. J.A. 298. That attorney ended up referring Titlow to another law firm, and attorney Fred Toca substituted for Lustig. J.A. 58–61, 300. Because Titlow had insufficient funds, Titlow agreed that Toca and the law firm could sell Titlow's "story" to help derive the $100,000 trial fee. J.A. 60. Contrary to Titlow's allegations below, the retainer agreement did *not* assign Toca or his law firm any rights to the story. J.A. 60.

Titlow and Toca executed the retainer agreement on November 26, 2001, J.A. 61, a mere three days before the November 29 trial where Titlow had agreed to testify against Billie. At that time, Toca knew (1) that Titlow was maintaining his innocence,

(2) Titlow had passed a polygraph examination, (3) the plea deal minimum sentence (7 years) was substantially above the guidelines minimum for a manslaughter conviction (approximately 2 to 5 years),[3] (4) the prosecutor had publicly stated that his office's analysis of the evidence revealed Titlow was only "guilty of manslaughter," and his office's theory "has always been Billie did the smothering,"[4] and (5) Titlow's previous retained attorney had gone over all the evidence and trial risks with Titlow less than one month earlier.

Given these circumstances and the press of time, Toca apparently did not pick up the file from Lustig but instead immediately re-initiated negotiations with the prosecutor, seeking a 3- to 15-year sentence. J.A. 301, 63–64. The prosecutor rejected that proposal. J.A. 64. Accordingly, Titlow withdrew his plea, testifying that he "fully" understood that the first-degree murder charge would be reinstated, and that the maximum penalty for a first-degree conviction was life in prison. J.A. 69–70.

If Toca had been given time to review Lustig's file, he would have seen the same record that Lustig had reviewed with Titlow less than one month earlier, before Titlow accepted the plea offer. And as even his co-defendant Billie's attorney acknowledged, that record was largely exculpatory:

---

[3] See Mich. Comp. Laws § 777.64 (multiple grids provide for a minimum-sentence range of 29 to 57 months).

[4] *Suspect pleads guilty to manslaughter*, DETROIT NEWS (Oct. 31, 2001), available at http://yhoo.it/114PzZb. Accord J.A. 66.

> [T]he statement[s] of Ms. Titlow are largely exculpatory and largely in fact wholly exculpatory with respect to her participation in the murder, wholly exculpatory with her participation in any suffocation, wholly exculpatory with respect to anything that was done . . . . Titlow basically admits to one thing . . . the fact that she poured some alcohol down his throat or held his nose at one point. And then she says, but I couldn't hold his mouth shut to keep him from breathing, I had to let him go. [J.A. 34–35.]

Ultimately, Titlow was unable to raise sufficient funds to pay Toca or his law firm, and Titlow's story did not sell. As a result, Toca withdrew, and the trial court appointed counsel. Attorney William Cataldo represented Titlow at trial.

D. The trial

The cumulative testimony at Titlow's trial was of an entirely different nature than that available to Toca at the time Titlow withdrew his plea.

The officers who arrived at the crime scene testified that Billie and Titlow's behavior was "out of place" and "at the extremes of a scale of normal people." J.A. 118, 103. In response to standard questions asking what happened, Titlow swore and then yelled at the officers. J.A. 101–104. Titlow did not want to provide a written statement and kept asking why it was necessary. J.A. 105. The officers testified that Titlow did *not* have glassy eyes, slurred speech, a stench of alcohol, or any coordination problems; there was no indication Titlow had been drinking at

all. J.A. 112–14, 115–17. This testimony contradicted Titlow's claim on the Chahine wiretap that Titlow was drunk the night of the murder. J.A. 21.

According to Chahine, Titlow's initial account was that he and Billie simply found Don dead in the kitchen. J.A. 137. But Titlow later changed his story, explaining to Chahine that Titlow and Billie found Don on the floor, drunk and passed out. J.A. 146. At that point, "Billie suggested that they *do what they planned on doing before*," i.e., "get rid of him [Don] now." J.A. 146 (emphasis added). And that's when Billie grabbed the vodka bottles. J.A. 146. This testimony contradicted Titlow's polygraph claim that there was no plan to kill Don. J.A. 38. Titlow and Billie then engaged in classic Burking—alternately pouring vodka down Don's throat and pinching his nose shut. J.A. 146–47.

Billie grew frustrated when Don did not die right away. J.A. 147. So Billie upped Titlow's compensation from the original $25,000 to $50,000 and retrieved a pillow from the living room. J.A. 147. Titlow did *not* tell Chahine that Titlow left the room, J.A. 149, as Titlow later tried to testify, J.A. 277. To the contrary, Chahine's questioning revealed that the increased compensation was in exchange for Titlow's help in holding Don down while Billie suffocated him:

> Q: You didn't hear a statement that she held him down so that the pillow could be placed over his head?
>
> A [by Chahine]: I did hear a statement like that.

Q: You did hear that statement?

A: Yes.

Q: What statement did you hear?

A: Billie asked her to help pin him down, so that she could put the pillow on his head.

* * *

A: . . . That was the answer for the 25 going up to 50, that she would have to do that.

Q: So Billie now is—you indicated now that [Titlow] told you that when Billie gets the pillow, that she tells [Titlow] I'll up from 25,000 to 50, but you're going to have to hold him down?

A: . . . She's saying—she said that Billie told her that she's going to up the money from 25,000 to 50,000 and she's going to help her. She's going to do something. So she asked her to pin him down so she could put the pillow—put the pillow on his face.

Q: So what you're saying is while Billie's got the pillow, she's negotiating with [Titlow]? If you want the money I'll make it higher and if you want the 50, you're going to have to do more?

A: Well, it's probably hard to believe, but they were negotiating while they were killing the man. [J.A. 177–78, 180]

Titlow's intimate participation explains why he was able to show Chahine exactly how Billie suffocated Don with the pillow. J.A. 166–67.[5]

The trial testimony continued to weaken Titlow's case from there. A medical expert testified that Don's body position suggested that the entire crime scene had been "staged," J.A. 194, presumably to avoid police detection. As a result, the death certificate was changed to reflect that the cause of death was "asphyxia by smothering." J.A. 196. Chahine testified that Titlow asked Chahine to lie and tell the police that he was with Titlow and Billie at the time of death. J.A. 161–62. Chahine also testified that Titlow had said, on "many occasions," that Billie wanted to "get rid of Don," J.A. 140, and Billie would pay Titlow $25,000 to do it, J.A. 139.

Titlow's testimony was a disaster for his defense. Contrary to the testimony and his own admissions of substantial involvement, Titlow maintained his complete lack of culpability, testifying that he "would never hurt anybody, ever." J.A. 257. Contrary to the officers' testimony about his sobriety, Titlow claimed to be "very drunk" and unaware of his surroundings.

---

[5] An obvious question is why Titlow would reveal all of this information to Chahine, whom Titlow had been dating and to whom Titlow had just disclosed he was transgender. J.A. 150. Indeed, Chahine asked that very question. J.A. 153. Titlow told him: "No one would believe you. You're a foreigner. There are two women, no records. [You] have [a] record" (for cocaine possession and making a false statement on a citizenship application). J.A. 154. Equally important, Titlow needed to get his feelings of guilt off his chest. J.A. 154. Titlow "said that [he] was doing [his] hair and [his nails] and [he] felt really, really bad spending Don's money." J.A. 154.

J.A. 258. Contrary to the testimony about Billie's frequent offers to pay Titlow to get rid of Don, Titlow insisted that he didn't think Billie was trying to kill Don, only to hurt him. J.A. 259. Contrary to the testimony about Titlow's active role in the murder, Titlow claimed that he told Billie to leave Don alone. J.A. 261. Contrary to the testimony that Titlow accepted Billie's money, he testified that he told Billie he didn't want her money. J.A. 268.

Titlow tried to convince the jury that he believed Billie was joking with the pillow. J.A. 270. And Titlow even denied receiving the $100,000, J.A. 271, though he admitted receiving $70,000 and a new car, J.A. 271–72. (Sometime after the murder, one of Billie's daughters called her. J.A. 156. The daughter knew what Billie and Titlow did, and she told Billie to give Titlow more money. J.A. 156. As a result, Titlow's compensation was ultimately upped from $50,000 to $100,000. J.A. 153, 156. Titlow told Chahine that he planned to use the money for a sex-change operation. J.A. 170–71. Financial professionals testified at trial to the series of transactions that resulted in Billie transferring the money to Titlow. J.A. 209–19, 220–23.)

The final straw came on Titlow's cross-examination. The prosecutor confronted Titlow with his testimony that he had left the room before Billie grabbed the pillow. J.A. 277. Titlow conceded that although this would have been "the perfect thing to tell the police" to explain his innocence, he never did so. J.A. 277. In fact, Titlow did not even mention that crucial "fact" when talking with Chahine during their wiretap conversation. J.A. 277.

In his closing argument, the prosecutor urged the jury to convict Titlow of first- or second-degree murder by repeatedly hammering Chahine's testimony that Titlow held Don down during the suffocation in exchange for more money. J.A. 281, 282, 283, 284, 285, 287, 288. Titlow's attorney tried repeatedly to cross-examine that crucial piece of Chahine's testimony, J.A. 177–80, but the damage had already been done. Based on the overwhelming evidence, the jury convicted Titlow of second-degree murder.

At sentencing, the prosecutor suggested that Titlow was a victim of some "bad advice," and that he was convicted by his own words. J.A. 291–92. Of course, Titlow's words on the wiretap recording were supplemented greatly by post-plea-withdrawal evidence and testimony as well as Titlow's own poor performance on the stand. Remember, the same prosecutor had characterized Titlow's initial admissions as evidence only of manslaughter, not murder. See *supra*, p. 11 & n.4. Titlow's trial attorney also thought it a "mistake" that Titlow withdrew the plea. J.A. 292. But the trial attorney continued to think—contrary to the testimony the jury believed—that Titlow "did nothing to participate whatsoever" in the suffocation. J.A. 292–93. The trial court's sentence was 20 to 40 years.

As for Billie, the State went to trial without Titlow's testimony in November 2002 and was unable to obtain a conviction. Billie died several months after her acquittal.

E. State court proceedings

Having lost his gamble to go to trial, Titlow accused Toca of being ineffective for allowing Titlow to withdraw the manslaughter plea. The Michigan Court of Appeals rejected Titlow's ineffective-assistance claim. It found that Toca's advice was "set in motion" by Titlow's assertions of innocence to Deputy Ott, and that "[w]hen a defendant proclaims his innocence, . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how 'good' the deal may appear." Pet. App. 101a–102a. "On the proofs and arguments offered by defendant, defendant has failed to demonstrate that his second attorney's advice to withdraw his plea fell below an objective standard of reasonableness." Pet. App. 102a. The Michigan Supreme Court denied leave to appeal unanimously. Pet. App. 120a.

F. Federal habeas corpus proceedings

The district court denied Titlow habeas relief, because Titlow could not satisfy AEDPA's exacting standard for setting aside a state-court conviction: Titlow "has not shown that the Michigan Court of Appeals's decision regarding this claim is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court or an unreasonable determination of the facts." Pet. App. 62a. Specifically, Titlow could not prevail on the deficient-performance component of his ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668 (1984). First, Titlow's "desire to withdraw her plea (which itself was motivated by a belief in innocence) pre-dated interim

counsel's involvement." Pet. App. 64a. Second, "how can a criminal defendant's counsel be ineffective for advising her to go to trial when she (the criminal defendant) claims to be innocent of the crime?" Pet. App. 64a–65a.

The Sixth Circuit reversed. The panel majority first held that the Michigan Court of Appeals had unreasonably determined the facts when it concluded that Toca's advice was based on Titlow's proclamations of innocence, because, at the plea-withdrawal hearing, Toca mentioned only the above-guidelines sentence. Pet. App. 18a–19a. Then, based on the fact that Toca relied on Titlow's protestations of innocence and did not pick up discovery materials from or discuss the case with Titlow's previous attorney until after Titlow's plea withdrawal, the majority *assumed* that Toca had not adequately advised Titlow on his sentencing exposure or the reasonableness of the plea offer. Pet. App. 19a–20a. The majority then held that Titlow established prejudice based on (1) the fact that Titlow accepted the plea before he withdrew it, (2) the sentencing disparity, and (3) Titlow's subjective testimony that he would not have withdrawn his plea but for counsel's ineffective advice. Pet. App. 22a.

The panel majority directed the State to reoffer Titlow the original plea agreement, Pet. App. 25a, even though the State had already lost the major benefit of the bargain: Titlow's testimony against Billie. The majority also ordered the Michigan trial court to fashion a sentence on remand that "remedied" the violation of Titlow's right to effective assistance. Pet. App. 25a.

Sixth Circuit Chief Judge Batchelder rejected each of these holdings. First, the panel majority failed to give appropriate AEDPA deference to the Michigan Court of Appeals' factual findings. The "record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw her plea." Pet. App. 26a (Batchelder, C.J., dissenting). Rather, the "record shows that Titlow wanted to withdraw her plea before she ever enlisted Toca as counsel." *Id*. "Titlow has not presented any evidence indicating that Toca advised her to withdraw her plea or that he was otherwise a decisive factor in her decision to go to trial. Instead, the record indicates that she had wanted to change her plea and enlisted Toca as new counsel to do just that." Pet. App. 27a. (Batchelder, C.J., dissenting).

Second, the Michigan Court of Appeals decision did not conflict with this Court's precedent. "It is undoubtedly reasonable for an attorney to recommend that his client reject a plea if the client maintains her innocence. . . ." Pet. App. 28a. (Batchelder, C.J., dissenting.) *Id*. Moreover, the "burden is on the defendant to present evidence establishing that counsel was ineffective, and the defendant's chance of success does not rest on the government's or counsel's ability to refute the claim of ineffective, as the majority suggests." Pet. App. 29a. (Batchelder, C.J., dissenting).

"Although Toca did not pick up the file before moving for the plea withdrawal, Titlow has not explained how the file would have undermined the reasonableness of the plea withdrawal and, therefore, has not overcome the strong presumption

of reasonableness" under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). *Ibid*. And the panel "majority cites *Lafler* v. *Cooper*, 132 S. Ct. 1376 2012), as a case involving a 'similar constitutional violation' without recognizing the crucial distinction between that case and this one—that the petitioner in *Lafler* presented actual evidence that he received deficient advice." Pet. App. 30a–31a (Batchelder, C.J., dissenting).

Finally, "*Lafler* . . . does not require the trial court to resentence Titlow." And "it is not the trial court's responsibility . . . to 'fashion a sentence for Titlow that . . . remedies the violation of her constitutional right,' as the remedy for the violation is the government's reoffering of the original plea agreement." Pet. App. 31a–32a (Batchelder, C.J., dissenting) (citing *Lafler*, 132 S. Ct. at 1389).

G. The re-offered plea

On remand, the prosecutor re-offered the manslaughter plea:

> Pursuant to the Sixth Circuit order, the People are reoffering the plea of reducing the charge of first degree premeditated murder to manslaughter with a sentence recommendation of seven to 15 years in exchange for the defendant's testimony at trial against her aunt and truthful testimony given at trial. [J.A. 319.]

But when it came time for Titlow to accept the plea, he resisted pleading guilty. He initially refused to admit the factual predicate; all he would admit

was that he "applied a shot of vodka down [Don's] mouth which ultimately led to my *aunt* taking his life." J.A. 320 (emphasis added). The prosecutor was not satisfied with this statement: "I don't think that that is an adequate basis [for the manslaughter plea] and I don't think that's what the facts are in this case. I don't think that's what the facts were at the trial which I proved beyond a reasonable doubt ten years ago." J.A. 320–21.

The trial judge asked Titlow to explain what happened the night of Don's murder. Titlow persisted with his discredited trial testimony: that he was drunk the night of the murder; that he took the bottle away from Billie and told her to stop; and that he left the room and returned to find Billie holding a pillow over Don's face. J.A. 321. And when the trial judge specifically asked Titlow if he assisted in killing Don, J.A. 321, Titlow maintained his innocence: "No and I passed a polygraph test to this." J.A. 322.

Befuddled by this turn of events, the prosecutor sought permission to *voir dire* Titlow. J.A. 322. And on cross exam, Titlow continued to maintain his innocence: he denied knowing that Billie was trying to kill Don; denied agreeing to help Billie in return for money and the car; and again brought up the polygraph. J.A. 322–23. The prosecutor threw up his hands. J.A. 323 ("Judge, I'm not going to argue with her. If she wants to plead let her plead guilty."). The trial judge then took a turn questioning Titlow, but with the same result. Titlow simply would not admit to the manslaughter factual predicate. J.A. 323–25.

The proceeding was halted so Titlow's lawyer could consult with him off the record. J.A. 325. When Titlow resumed his testimony, he finally admitted he knew it was a "possibility" that by pouring alcohol into Don's mouth, it could lead to Don's death. J.A. 325. The trial judge took the matter under advisement. J.A. 327.

SUMMARY OF ARGUMENT

In 1996, Congress enacted AEDPA, the Anti-terrorism and Effective Death Penalty Act. AEDPA "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was adjudicated on the merits in the State court proceedings." *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094 (2013) (internal quotations omitted). A state prisoner must establish that the state-court decision was either (1) contrary to or an unreasonable application of this Court's clearly established precedent, or (2) was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2). And with respect to facts, a state court's factual determination is "presumed to be correct," and it is the habeas petitioner's burden to rebut that presumption of correctness "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Given these thresholds, this Court has described the AEDPA standard as "difficult to meet": the state prisoner must show not just a mistake, but "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Metrish* v. *Lancaster*, 133 S. Ct. 1781, 1787 (2013) (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011)).

In granting Titlow habeas relief here, the Sixth Circuit erred thrice over.

First, the Sixth Circuit failed to give proper AEDPA deference to the Michigan Court of Appeals. To begin, the Sixth Circuit disregarded the Michigan Court of Appeals' factual finding that Titlow's plea withdrawal "was set in motion by [his] statement to a sheriff's deputy that he did not commit the offense." Pet. App. 101a. The Sixth Circuit held that this finding's "presumption of correctness" was rebutted by the plea-withdrawal transcript, in which Titlow's second retained attorney, Toca, mentioned the unusually high sentencing range and not Titlow's innocence. Pet. App. 18a–19a. But Toca's statements did not rebut the factual finding, which was based on an affidavit Titlow himself submitted to the Michigan Court of Appeals. J.A. 297–98. Indeed, in his district-court briefing in this very proceeding, Titlow conceded that it "is true that [his own] statement of innocence set in motion [Toca']s advice." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7. Yet on the basis of the Michigan Court of Appeals' purported factual error, the Sixth Circuit engaged in what amounted to *de novo* review of the Michigan Court of Appeals' legal conclusion, relying predominantly on its own case law rather than this Court's precedents. Pet. App. 19a–21a.

The Sixth Circuit also failed to apply the exacting AEDPA standard to the Michigan Court of Appeals' legal conclusion. The Michigan Court of Appeals held that it was not objectively unreasonable for an attorney to allow his client to maintain innocence. Pet. App. 102a. The Sixth Circuit did not

say this decision was "contrary to" or an "unreasonable application of" this Court's precedent. Instead, the Sixth Circuit said that Toca's failure to pick up Lustig's file before assisting Titlow to withdraw his plea was "totally inconsistent with a reasonable investigation" under *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). Pet. App. 20a (noting *Dickerson* v. *Bagley*, 453 F.3d 690, 696 (6th Cir. 2006)). And even that conclusion was wrong given the limited time (and the substantial information) Toca had before Titlow needed to withdraw his plea.

Second, the Sixth Circuit erred in concluding that Titlow would have accepted (i.e., not withdrawn) his manslaughter plea but for Toca's purported ineffective assistance. There is no record evidence of such intent, only Titlow's post-trial statements that he would have accepted the plea. Every state prisoner would make the same claim following a jury conviction imposing a higher sentence than a rejected plea offer, and Titlow's *post hoc* assertion of intent is belied by the fact that Titlow withdrew his plea understanding full well the evidence arrayed against him at that time, as well as the potential consequences of an adverse trial result. As five other circuits have held, a state prisoner asserting plea bargainer's remorse must support his would-have-taken-the-plea assertion with additional, objective record evidence. Titlow has failed to produce such evidence here, providing a second, independent ground for reversal.

Third, in imposing a remedy, the Sixth Circuit suggested that the state trial court's sentencing discretion was cabined by the initial plea agreement, and that merely reinstating Titlow's current sentence could render Titlow's *Lafler* remedy "illusory." Pet. App. 24a–25a; *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1384 (2012). But *Lafler* says no such thing. And the circumstances have changed: the State lost the benefit of the plea bargain—Titlow's testimony at Billie's trial—and the post-plea-withdrawal record looks significantly different than the record that existed when the prosecutor first extended a plea offer. In this situation, it would be entirely appropriate for the Michigan trial court to leave Titlow's conviction and sentence in place. The Sixth Circuit's contrary conclusion conflicts with *Lafler*.

ARGUMENT

I. The Sixth Circuit failed to give appropriate AEDPA deference to the Michigan Court of Appeals' decision.

Under AEDPA, federal habeas relief may not be granted unless a state-court merits decision "was contrary to, or involved an unreasonable application of" this Court's clearly established precedent, or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). This case involves the Michigan Court of Appeals' rejection of Titlow's ineffective-assistance claim.

The seminal case governing such claims, *Strickland* v. *Washington*, 466 U.S. 668 (1984), holds that a defendant must show both deficient performance by counsel and prejudice. *Id*. at 687. As to the first prong, judicial scrutiny of counsel's performance is "highly deferential" and "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 669. *Strickland*'s bar is "high," and surmounting it "is never an easy task." *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010). In a habeas case, "[e]stablishing that a state court's application of *Strickland* was unreasonable under 28 U.S.C. § 2254(d) is all the more difficult." *Richter*, 131 S. Ct. at 788 (internal quotations and citations omitted). Thus, where a state court applies *Strickland*, a federal habeas court's review of a state court's ineffective-assistance decision is "doubly deferential." *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011).

Rather than apply that double deference to the state-court ruling here, the Sixth Circuit essentially reviewed Toca's performance *de novo* after deciding that the Michigan Court of Appeals unreasonably determined the facts. But (1) Titlow failed to rebut the presumption of correctness applicable to the underlying facts, (2) the Michigan Court of Appeals' decision was not contrary to or an unreasonable application of this Court's precedent, (3) Titlow cannot show that he lacked any pertinent information when he withdrew his plea; and (4) Titlow cannot show that a more effective attorney would have made a whit of difference when Titlow decided to withdraw his plea.

A. The Michigan Court of Appeals did not unreasonably determine the facts.

In his state-court appeal, Titlow argued that Toca was ineffective for recommending that Titlow withdraw his manslaughter plea. The Court of Appeals rejected that claim because the plea withdrawal was not a Toca recommendation at all; the withdrawal "was set in motion by" Titlow's claims of innocence rather than Toca's advice. Pet. App. 101a. The Michigan Court of Appeals held that it is not objectively unreasonable to recommend that a client who proclaims innocence refrain from pleading guilty. Pet. App. 102a.

The Sixth Circuit began by attacking this factual finding. It concluded that the Michigan Court of Appeals "unreasonably determined the facts" under § 2254(d)(2) simply because Toca did not mention Titlow's innocence at the plea-withdrawal hearing; Toca only referenced the above-guidelines sentencing range. Pet. App. 18a–19a.

There are two fundamental problems with this analysis. First, Titlow has already conceded—in this very proceeding—that it "is true that a statement of innocence set in motion the second attorney's advice." Titlow's Reply to Answer to Pet. for Writ of Habeas Corpus 7. With respect to the Michigan Court of Appeals' factual determination that the "second attorney's advice was set in motion by defendant's statement to a sheriff's deputy that he did not commit the offense," Pet. App. 102a, Titlow says he "does not quibble with this finding." Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7.

Second, the Michigan Court of Appeals *also* found that Titlow withdrew his plea because the agreed upon sentence exceeded the sentencing guidelines range." Pet. App. 100a. So it is difficult to find any fault with the Michigan Court of Appeals opinion, much less that the Michigan Court of Appeals "unreasonably determined the facts" under § 2254(d)(2).

Chief Judge Batchelder's dissent is a paradigm of AEDPA fact deference. "Any advice that Titlow may have received from Toca was the result of Titlow wanting new counsel and no longer wanting to plead guilty." Pet. App. 28a (Batchelder, C.J., dissenting). Further, neither Toca's statements at the plea-withdrawal hearing, nor the fact that Toca asserted a separate reason for withdrawing the plea, contradicted or undermined the Michigan Court of Appeals' factual conclusion that Toca's advice stemmed from Titlow's assertion of innocence. *Ibid.* Critically, although Titlow bears the burden of proof under both *Strickland* and AEDPA, he "has not presented any evidence indicating that Toca advised [Titlow] to withdraw [his] plea or that [Toca] was otherwise a decisive factor in [Titlow's] decision to go to trial. Instead, the record indicates that [Titlow] had wanted to change [his] plea and enlisted Toca as new counsel to do just that." Pet. App. 27a. Titlow has conceded this fact for purposes of his habeas petition. Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice.").

As for the Sixth Circuit panel majority, it did not even apply the correct AEDPA test. The question is *not* whether the Michigan Court of Appeals' factual findings are "sufficiently rebut[ted]" by the plea-withdrawal-hearing transcript. Pet. App. 18a. AEDPA requires Titlow to rebut a "presumption of correctness" by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). But by changing the AEDPA fact-deference standard, the Sixth Circuit panel majority was able to characterize the Michigan Court of Appeals' factual findings as unreasonable, allowing the panel to then review the Michigan Court of Appeals' legal conclusion—that there was no ineffective assistance—*de novo* rather than deferentially. That approach was error.

B. The Michigan Court of Appeals' legal conclusion was not contrary to or an unreasonable application of this Court's clearly established precedent.

Once it is clear that AEDPA deference applies to the Michigan Court of Appeals' legal analysis, it is not possible to say that the Michigan Court of Appeals' decision was contrary to or an unreasonable application of this Court's clearly established law. Advising Titlow to withdraw his plea (or allowing him to do so) did not constitute deficient performance where Titlow was—as reflected in the pre-trial, trial, and post-trial record—maintaining his innocence.

The final decision to plead guilty is always the defendant's, not the attorney's. Michigan Rule of Professional Conduct 1.2(a) states that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with

respect to a plea to be entered . . . .” Accord, e.g., *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (defendant retains “the ultimate authority” to determine whether to plead guilty); ABA Model Rules of Prof’l Conduct R. 1.2(a). The Michigan Court of Appeals below expressly acknowledged this rule: “When a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty—no matter how ‘good’ the deal may be.” Pet. App. 102a.

Further, Michigan law does not allow a criminal defendant to maintain his innocence while simultaneously pleading guilty. While this Court has held that there is no constitutional violation where a criminal defendant maintains his innocence but nevertheless wishes to plead guilty, *North Carolina* v. *Alford*, 400 U.S. 25, 37–38 (1970) (a so-called “*Alford* plea”), this rule does not bind a state that elects to preclude a guilty plea by an accused who professes to be innocent. *Id*. at 38 n.11 (“the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence”).

Michigan has made that election.[6] See Mich. Comp. Laws Ann. § 768.35 (providing that the state trial court is duty bound to set aside a guilty plea

---

[6] Michigan is not alone in its approach. See Jenny Elayne Ronis *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1399 (Spring-Summer 2010) (“Courts that have completely rejected the *Alford* plea include Indiana, Michigan, and New Jersey, and federal courts strongly discourage the pursuit of an *Alford* plea by defendants.”) (footnotes omitted).

before sentencing if the trial judge had "reason to doubt the truth" of the plea); Mich. Ct. R. 6.302(D)(1) (directing the state trial court to question the defendant to establish that there is support for a finding of guilt). (Although the Michigan Supreme Court has indicated in *obiter dictum* that a criminal defendant may plead guilty even when he denies his guilt, those cases did not involve a criminal defendant who sought to both deny his guilt and accept a plea offer. E.g., *People* v. *Haack*, 240 N.W.2d 704, 709 (Mich. 1976); *In re Guilty Plea Cases*, 235 N.W. 132, 147 n.2 (Mich. 1975).)

The panel majority misunderstood Michigan law on this point. After failing to accord deference to the factual determination, the panel majority then alternatively insisted that even where the defendant maintains his innocence, the attorney must still provide him with the list of available of options. Pet. App. 19a ("even where counsel properly advises a client that she has the right to go to trial if she maintains her innocence, this advice must be cabined by a larger discussion [of the client's available options]"). But Michigan does not allow a defendant to maintain his innocence and still plead guilty, and the state courts are the final authority on state law. The unstated point is that the panel majority expected Toca to attempt to dissuade Titlow from maintaining his innocence. There is no such requirement in law in a state like Michigan that does not allow *Alford* pleas. Under the Michigan rule, it was not objectively unreasonable for Toca to advise or allow Titlow to withdraw his plea.

Of course, as Chief Judge Batchelder commented, the record does not establish that Toca's advice was the decisive factor in Titlow's decision to withdraw his plea anyway. The "record shows that Titlow wanted to withdraw [his] plea before [he] ever enlisted Toca as counsel." Pet. App. 26a. In other words, Titlow's dissatisfaction with his above-guidelines sentence and his proclamations of innocence preceded Toca's involvement, and these were the reason Titlow sought new counsel, as he himself has conceded in these proceedings. Titlow Reply to Answer to Pet. for Writ of Habeas Corpus 7 ("It is true that a statement of innocence set in motion the second attorney's advice.").

In the end, then, Titlow is unable to establish that Toca's performance was deficient even under a *de novo* standard. Pet. App. 28a–29a (Batchelder, C.J., dissenting). Based on the record before the Sixth Circuit, a fairminded jurist could have reasonably concluded that Titlow's ineffective-assistance of counsel claim had no merit. And that reality is further emphasized by the information Titlow and Toca had available to them at the time Titlow withdrew his plea.

C. Titlow has presented no evidence that he lacked any pertinent information when he withdrew his plea, or that Toca gave him deficient advice.

The Sixth Circuit was quick to assume that Titlow was not properly informed, stating that "[t]he record in this case contains no evidence" that Toca explained certain matters to Titlow and that "[w]e therefore conclude that Toca failed to fulfill" his

obligation to provide sufficient advice to Titlow during the plea-negotiation stage. Pet. App. 19a. That approach is backward. Under *Strickland*, there is "a strong presumption" that counsel's conduct fell within the wide range of reasonable professional assistance. 466 U.S. at 689. It was Titlow's burden to show that he did not receive sufficient information and advice, not the State's burden to *disprove* it.

The problem is that Titlow has no evidence, let alone clear and convincing evidence, as § 2254(e)(1) requires. At the time of his initial plea, Titlow and his first attorney, Lustig, had "gone over all of the evidence together over a long period of time." J.A. 43. Titlow also had the benefit of adverse witness testimony during a three-day preliminary exam. Titlow affirmed that he understood the risks of going to trial and the consequences of a guilty verdict. J.A. 43–45.

When Titlow withdrew his plea, he expressed his understanding that withdrawal meant reinstatement of murder charges and the possibility of a life sentence. J.A. 69–70. Titlow also acknowledged that he "fully underst[oo]d the consequences" of withdrawing his plea, and that he was doing so "freely and voluntarily." J.A. 70.

For his part, Titlow presented no evidence that Toca gave him deficient advice regarding the plea withdrawal. Titlow did not file an affidavit from Toca or of his own, nor did he move for an evidentiary hearing in the trial court, as Michigan law allows. See generally *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973) (a so-called "*Ginther* hearing" is an evidentiary hearing on a defendant's motion for new trial claiming ineffective assistance).

Instead, Titlow's claim—and the Sixth Circuit's ruling—is based on the fact that Toca did not pick up Lustig's file in the three-day window Toca had before Titlow was scheduled to testify at Billie's trial. As explained below, if time had allowed Toca to review Lustig's file, it would not have changed the result. But more important, the alleged misconduct does not rebut the *Strickland* presumption that Toca's advice to Titlow was "the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

In other words, given the three-day window to withdraw before Billie's trial began, it was not unreasonable for Toca to allow Titlow to withdraw his plea, particularly when Toca knew: (1) that Titlow was maintaining his innocence, (2) Titlow had passed a polygraph examination, (3) Titlow's minimum sentence under the plea deal (7 years) was substantially above the guidelines minimum sentence for a manslaughter charge (approximately 2 to 5 years), (4) the prosecutor had publicly stated that his office's analysis of the evidence revealed Titlow was only "guilty of manslaughter," and his office's theory "has always been Billie did the smothering," and (5) Titlow's previous attorney had gone over all of the evidence and trial risks with Titlow less than one month earlier.

The record also rebuts any claim that Toca guaranteed Titlow a particular result at trial. Titlow acknowledged that his plea withdrawal would result in a first-degree murder charge and a potential life sentence, and the retainer agreement plainly states

that "no promises or guarantees regarding the outcome" of the case had been made. J.A. 59.[7]

Significantly, the habeas petitioner in *Lafler* provided actual evidence that his counsel advised him to reject a plea based on wrong legal advice, and the state conceded counsel's deficient performance. Not so here. "Without evidence that Toca gave incorrect advice or evidence that he failed to give material advice, Titlow cannot establish that his performance was deficient." Pet. App. 31a (Batchelder, C.J., dissenting).

In other words, Titlow failed to surmount even *Strickland*'s "high bar." *Richter*, 131 S. Ct. at 788 (quoting *Padilla*, 130 S. Ct. at 1485), much less the double-deference standard that results from AEDPA's overlay on an ineffective-assistance claim.

---

[7] The only possible thing left is Titlow's contention that Toca's retainer agreement was unethical for taking a stake in the movie and book rights to Titlow's "story." But the agreement says only that Toca and his law firm would attempt to sell Titlow's story to help pay the estimated $100,000 in trial fees; it says nothing about a transfer of rights. J.A. 60; but see J.A. 312 (order revoking Toca's law license for other, unrelated reasons mentions in passing that Toca entered into a fee agreement "wherein he improperly acquired literary or media rights related to his client's criminal matter"). And the agreement's ethical propriety would be relevant only to a civil malpractice claim, not to the constitutional question whether Titlow had adequate information and advice before withdrawing his manslaughter plea.

D. Titlow has also not demonstrated that Toca's failure to review Lustig's file would have changed Titlow's decision to withdraw his plea.

As just noted, the Sixth Circuit reached its deficient-performance conclusion based on Toca's inability to pick up Lustig's file in the three-day window before Billie's trial began. Pet. App. 19a–21a. But Titlow has not explained how Toca's review of that file would have changed Titlow's mind about withdrawing his plea. *Strickland*, 466 U.S. at 694–95 (a defendant claiming ineffective assistance must show how, "but for counsel's unprofessional errors, the results of the proceeding would have been different"); *Brown* v. *Attorney Gen. of Cal.*, 292 F. App'x 674, 675 (9th Cir. Sept. 11, 2008) (rejecting a failure-to-investigate claim because the defendant "ha[d] not shown that further investigation . . . would have produced anything significant"); *Deiterman* v. *Kansas*, 291 F. App'x 153, 161 (10th Cir. Aug. 27, 2008) (rejecting a failure-to-investigate claim because the defendant "ha[]d failed to identify any evidence that his counsel would have discovered had he conducted further investigation that would have likely changed the outcome").

Here, the problem wasn't Toca's failure to review Lustig's file; Lustig had, less than one month before, gone over those exact same facts with Titlow at great length and advised Titlow about the potential consequences of going to trial versus accepting the plea offer. J.A. 43, 44. And when Titlow withdrew his plea, he acknowledged that he "fully" understood that murder charges would be reinstated. J.A. 69–70.

In other words, the problem was not Toca's conduct; it was the *post-plea-withdrawal* evidence amplifying Titlow's guilt. The most damaging trial testimony came when Danny Chahine unexpectedly said that Titlow told Chahine that Titlow pinned Don down during the smothering in exchange for more money. This testimony surprised Titlow's trial counsel, who attempted to impeach Chahine and call his testimony into question. J.A. 178–80.

But the damage was already done. The prosecutor in closing repeatedly referenced Chahine's testimony about Titlow holding Don down while Billie smothered him. J.A. 281, 282, 283, 284, 285, 287, 288. And this crucial evidence was not available to Toca between November 26 and 29, 2001.

Lustig's file also would not have revealed that Titlow would change his story at trial. For instance, at trial Titlow testified that he never made any statements about Billie seeking to have Don killed for $25,000, or about a hit man in Denver and that amount not being enough. 3/18/02 Trial Tr., pp. 91, 110. But Detective Zimmerman testified that Titlow had made such statements during a police interview, statements made with Lustig present but without a recording device because Titlow preferred it that way. *Id*. at 217, 223. Further, while Titlow at trial denied it, *id*. at 192–93, Detective Zimmerman also testified that Titlow told police that Billie, before pouring vodka into Don, asked Titlow to help her for $25,000, and that Titlow perceived this to mean help Billie kill Don in exchange for $25,000. *Id*. at 217–18. Zimmerman also rebutted Titlow's trial testimony in several other respects. *Id*. at 218–20.

Tellingly, before trial began, even the prosecutor considered Titlow guilty of manslaughter at most. J.A. 66. It was the trial itself that established Titlow's true culpability. Thus, "[a]lthough Toca did not pick up the file before moving for the plea withdrawal, Titlow has not explained how the file would have undermined the reasonableness of the plea withdrawal and, therefore, has not overcome the strong presumption of reasonableness." Pet. App. 30a (Batchelder, C.J., dissenting). The Sixth Circuit's heavy reliance on Lustig's case file misses the big-picture issues of why Titlow withdrew his plea, what Titlow knew when he withdrew his plea, and how little a *second* review of that file—less than one month after the first review—would have affected Titlow's plea calculus.

II. A state prisoner who seeks to reclaim a rejected plea must produce objective evidence that he would have accepted the plea but for ineffective assistance.

In the context of a rejected plea, *Strickland*'s prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In *Lafler*, this Court articulated a three-part test for this proof, with the first part divided into two additional sub-parts. A defendant must show "a reasonable probability

> [1] that the plea offer would have been presented to the court (i.e.,
>
> > [a] that the defendant would have accepted the plea and

> [b] the prosecution would not have withdrawn it in light of intervening circumstances),
>
> [2] that the court would have accepted its terms, and
>
> [3] that the conviction or sentence, or both, under the offer's terms would have been less severe" than the punishment ultimately faced. [132 S. Ct. at 1385.]

The question here is what proof satisfies sub-component [1][a], i.e., that Titlow would have accepted the plea.

The Sixth Circuit rested its analysis on Titlow's previous acceptance of the plea offer (before he withdrew it), the sentencing disparity, and his post-conviction statements (wrongly referred to by the panel majority as "testimony," Pet. App. 22a) that he would have not withdrawn but for Toca's ineffective assistance. Pet. App. 22a. Consider how each of these evidentiary pieces fit within the *Lafler* rubric.

The plea's initial presentation and trial-court acceptance satisfy parts (1)(b) and (2) of the *Lafler* test. The sentencing disparity satisfies part (3). But Titlow's acceptance of the first plea cannot be used to satisfy (1)(a), because Titlow withdrew the plea and maintained his innocence. Titlow cannot rely on the sentencing disparity to satisfy (1)(a), either. The third part of the *Lafler* test *always* requires a defendant to show a disparity, so sentencing disparity is a given.

That leaves only Titlow's self-serving, post-conviction, unsworn statements that he would have kept his plea deal absent ineffective assistance. And, in the Sixth Circuit, nothing more is required: "Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement." *Smith* v. *United States*, 348 F.3d 545, 551 (6th Cir. 2003) (quoting *Griffin* v. *United States*, 330 F.3d 733, 737 (6th Cir. 2003)); Pet. App. 22a (citing *Smith* as support for the panel's ability to consider Titlow's post-conviction statements "as evidence of Titlow's [pre-conviction] intent.").

But at least five other circuits disagree. The Seventh, Second, and Eleventh Circuits have all held, in published opinions, that a defendant's post-conviction statement that he would have accepted a plea offer is *not* sufficient to show *Strickland* prejudice, and that some objective evidence of the defendant's intent is required. *Paters* v. *United States*, 159 F.3d 1043, 1047 (7th Cir. 1998); *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991); *United States* v. *Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991). The Tenth and Eighth Circuits have done the same, albeit in unpublished decisions. *United States* v. *Morris*, 106 F. App'x 656, 2004 WL 1598792, at *2 (10th Cir. July 19, 2004); *Maldonato* v. *Archuleta*, 61 F. App'x 524, 2003 WL 361303, at *2 (10th Cir. Feb. 20, 2003); *Bachicha* v. *Shanks*, 66 F.3d 338, 1995 WL 539467, at *1 (10th Cir. Aug. 31, 1995); *Moses* v. *United States*, 175 F.3d 1025, 1999 WL 195675, at *1 (8th Cir. 1999).

These courts justifiably have been skeptical of a defendant's post-conviction statements about his willingness to accept a previously rejected plea; after a defendant has rolled the dice and lost at trial, he has every incentive to recapture the benefit of a rejected plea. Requiring *some* objective evidence of the defendant's intent, as at least five circuits do, makes sense.

While *Lafler* did not directly address this issue, that case involved substantial evidence supporting the defendant's intent to accept the plea, including testimony by counsel at an evidentiary hearing that the petitioner was open to pleading guilty, *Cooper* v. *Lafler*, 376 F. App'x 563, 572 (6th Cir. 2010), and pre-trial communication between the petitioner and the court in which the petitioner admitted guilt and expressed a willingness to accept the offer. *Lafler*, 132 S. Ct. at 1383. Titlow offers nothing similar in the way of objective evidence here, and the contrary evidence is overwhelming.

Titlow cannot dispute that he withdrew his initial plea despite having been thoroughly advised about the evidence arrayed against him and the potential risks of proceeding to trial. Titlow cannot dispute that it was his own statement of innocence that set in motion his second attorney's advice. Titlow cannot dispute that he continued to maintain his innocence at trial. Nor can he dispute that the prosecutor, the trial court, and even his own attorney

struggled to persuade Titlow to admit his guilt on remand from the Sixth Circuit.[8]

At a bare minimum, a state prisoner's statements about his intent to accept a plea must at least be credible. *Merzbacher* v. *Shearin*, 706 F.3d 356, 366–67 (4th Cir. 2013). Titlow's statement here is not credible. In finding prejudice, the Sixth Circuit said that Titlow's naked assertion was "bolstered" by the fact that he had actually accepted the plea once before. Pet. App. 22a. But with full knowledge of the evidence gathered against him and of the consequences of going to trial, Titlow changed his mind about the initial plea and withdrew it. So the plea withdrawal undercuts—rather than bolsters—Titlow's post-conviction assertion.

The record also rebuts Titlow's post-conviction statement that he would have kept his initial plea had he not been "persuaded" to withdraw it. J.A. 295. The record shows instead that Titlow regretted the above-guidelines minimum sentence that his plea

---

[8] Relying on its own precedent, the Sixth Circuit held that "declarations of innocence" were not clear evidence that a defendant would have rejected a plea offer with proper legal advice. Pet. App. 16a-17a. But such evidence is a strong indicator that a defendant would not have accepted a plea offer. *Merzbacher* v. *Shearin*, 706 F.3d 356, 366 (4th Cir. 2013) (state trial court's decision was not objectively unreasonable in determining that the defendant would not have accepted the plea where "he avidly and vociferously maintained his innocence throughout the proceedings.") And while this Court's precedent indicates that a defendant can enter a guilty plea while still maintaining his innocence, *Alford*, 400 U.S. at 33, that is very different from the situation here, where Titlow withdrew his plea in part because he was maintaining his innocence, and Michigan does not accept such pleas.

agreement called for, and that Titlow maintained his innocence. In fact, there is no record evidence that Toca even advised Titlow to withdraw the plea. And in the absence of such evidence, the courts must *presume* that Toca's conduct "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 669.

Further undermining Titlow's credibility that he would have accepted the manslaughter plea is the reality that Titlow continued to deny responsibility for Don's death to the bitter end. After the Sixth Circuit granted Titlow habeas relief, and before this Court granted certiorari, the State, complying with the Sixth Circuit's ruling, reoffered Titlow its pretrial plea to manslaughter on October 31, 2012.[9] The whole foundation of Titlow's habeas victory was that he would have accepted the prosecutor's plea offer if Titlow had only received accurate advice about the risks of going to trial. Yet when finally confronted with the re-offered plea, Titlow *still* resisted accepting the plea offer—even after those risks had been realized in his actual conviction—in an almost comical display of maintaining his innocence.

---

[9] Because the Sixth Circuit denied the State's request to stay the mandate and the mandate issued on August 10, 2012, the State had until November 8, 2012, to comply with the Sixth Circuit's order to reoffer Titlow the original plea agreement. The State re-offered its pretrial plea to Titlow on October 31, 2012, conditionally. On March 13, 2013, the Oakland County Circuit Court granted the State's motion to stay pending the outcome of the proceedings in this Court.

When the Michigan trial court first asked Titlow what made him guilty of manslaughter, Titlow said it was applying "a shot of vodka down – in his mouth which ultimately led to my *aunt* taking his life." J.A. 320 (emphasis added). When the court asked if he assisted in killing Don, Titlow replied "[n]o and I passed a polygraph test to this." J.A. 322. When the court repeatedly asked for a factual basis, Titlow again replied that he had "passed the polygraph test." J.A. 322. Titlow said he didn't even "assist in killing" Don. J.A. 323. "I did pour a shot of vodka down his mouth. That is it. That is all I did." J.A. 324. But, according to Titlow, he "had no idea [Billie] was going to be doing anything else" when the two of them poured vodka down Don's mouth. J.A. 324. These answers forced defense counsel to take a break to consult with Titlow off the record, J.A. 325, after which Titlow finally said that his actions placed Don in a position to die. J.A. 325.

In sum, the prosecutor, defense counsel, and the trial court itself had to undergo legal gymnastics to obtain Titlow's admission to the factual predicate for a manslaughter plea, as Michigan law requires. Titlow's continued assertions of innocence, and minimization of his responsibility, rebut his post-conviction statements that he wanted to keep his initial plea. *United States* v. *Stevens*, 149 F.3d 747, 748 (8th Cir. 1998) (defendant could not establish prejudice in light of his post-trial assertions of innocence). Because Titlow cannot credibly assert that he would have kept the manslaughter plea but for the ineffective assistance of his attorney Toca, he is barred from pursuing a *Lafler* remedy.

III. *Lafler* does not require a state trial court to resentence or otherwise "remedy" the purported constitutional violation.

A. The Sixth Circuit erroneously created an entirely new scheme for fashioning a *Lafler* remedy.

If a convicted defendant can establish true deficient performance and resulting prejudice (i.e., that the defendant would have accepted a plea but for the ineffective assistance), then the *Lafler* remedy depends on the injury. If "the sole advantage a defendant would have received under the plea is a lesser sentence," i.e., the charges that the defendant would have admitted to obtain the plea are the same as the charges that resulted in the trial conviction, then the trial court "may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Lafler*, 132 S. Ct. at 1389.

Alternatively, as was the case here, if "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial," "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* "Once this has occurred, the judge can then exercise discretion in deciding whether to [1] vacate the conviction from trial and accept the plea or [2] leave the conviction undisturbed." *Id.*

Lafler left "open to the trial court" how best to exercise its discretion, but the opinion did identify two considerations: the defendant's willingness to accept responsibility for his actions, and information discovered post plea. *Id*. at 1389, 1391. This Court made clear that it was the reoffering of the plea—not the trial court's exercise of its sentencing discretion—that constituted the "remedy." *Id*. at 1389 ("the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.").

Here, the Sixth Circuit created an entirely different scheme for fashioning a *Lafler* remedy. The Sixth Circuit indicated that the trial court should "exercise its discretion to *fashion a sentence*" for Titlow. Pet. App. 25a (emphasis added). But nothing in *Lafler* contemplates a re-fashioned sentence; to the contrary, as Chief Judge Batchelder noted in dissent, "*Lafler* . . . does not require the trial court to resentence Titlow [at all]. Instead, *Lafler* states that once the prosecution reoffers the plea proposal, 'the judge can exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." Pet. App. 31a (Batchelder, C.J., dissenting) (citing *Lafler*, 132 S. Ct. at 1389). *Lafler* merely restores a defendant's opportunity to accept a plea; it does not guarantee a different outcome.

The Sixth Circuit's mistake is not trivial, as it impinges on the state trial court's discretion to accept or reject the plea offer. See generally Mich. Ct. Rule 6.302(C)(3) ("If there is a plea agreement and its terms provide for the defendant's plea to be made

in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). But the panel majority says this discretion is now limited, and that endorsing the original sentence would cause the *Lafler* remedy to be "illusory." Pet. App. 24a–25a. *Lafler* has no such warning, nor does it suggest that further federal review looms due to any departure from the terms of the original plea offer.

The Sixth Circuit also erred by directing the state trial court to consult the initial plea agreement as a "baseline" in crafting a new sentence. *Lafler* does not impose that requirement either. Pet. App. 31a (Batchelder, C.J., dissenting) ("*Lafler* does not, as the majority states, *require* the trial court to consult the plea agreement."). By directing the state trial court to fashion a sentence with the lesser charge of manslaughter as its baseline, the Sixth Circuit improperly limited the trial court's discretion to simply leave the conviction undisturbed. And, as explained below, reinstating the post-trial conviction would be an entirely appropriate outcome here.

B. The trial could, in its discretion, leave undisturbed Titlow's trial conviction and sentence.

The plea in this case is radically different from those at issue in *Lafler* and *Missouri* v. *Frye*, 132 S. Ct. 1399 (2012), because the proposed plea bargain included Titlow's promise to testify against Billie at Billie's trial. J.A. 42. When Titlow chose to withdraw his plea on the day that Billie's trial began, the prosecution lost its key witness, and the jury acquitted Billie, who passed away a short time later.

As a result, it is no longer possible for Titlow to perform the testimonial obligation that was the indispensable predicate for his reduced sentence. Titlow's refusal to testify will forever deprive the State of the benefit of its bargain.

In addition, the trial court may consider the new, post-plea information about Titlow's crime. *Lafler*, 132 S. Ct. at 1391. Drawing all reasonable inferences in favor of the jury's conviction, the trial testimony revealed that (1) Titlow was sober, not drunk, on the night of the murder; (2) in his interaction with the officers on the scene, Titlow acted as though he had something to hide; (3) the crime scene itself was almost certainly "staged" to avoid police suspicion; (4) Titlow had planned with Billie to murder Don for some time; (5) Titlow did not leave the room while Billie smothered Don; (6) to the contrary, Titlow actively participated in holding Don down while he suffocated; (7) Titlow performed these acts in exchange for six-figure compensation; and (8) Titlow asked a third party to lie to establish an alibi. Had the prosecutor known *all* these facts earlier—particularly the fact that in exchange for the money Titlow held Don down while Billie smothered him—it is doubtful the prosecutor would have offered a mere manslaughter plea.

Finally, the trial court may take into account Titlow's unwillingness to accept responsibility for his actions. *Lafler*, 132 S. Ct. at 1389. Titlow not only refused to accept responsibility before, during, and after trial, he would not even accept responsibility after the Sixth Circuit remanded and ordered the prosecutor to reoffer the manslaughter plea that

Titlow supposedly desired. J.A. 319–25. In light of all these circumstances, it would be well within the trial court's discretion to simply reinstate Titlow's current sentence.

Justice Alito forecast this exact situation in his *Lafler* dissent. In Justice Alito's view, requiring the prosecution to renew an old plea offer "would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant's culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources." *Lafler*, 132 S. Ct. at 1398–99 (Alito, J., dissenting). One could add to those two circumstances a third—when an old plea offer is contingent on the defendant's testimony at another trial and the defendant fails to testify. Yet the Sixth Circuit panel majority ordered the State to reoffer the old plea despite the presence of all three harbingers of discretion abused.

Most concerning, the Sixth Circuit panel majority did not stop at ordering the old plea to be reoffered; the majority went further and essentially foreclosed the trial court from exercising the option of letting the original conviction and sentence stand: "We remain concerned that the remedy articulated in *Lafler* could become illusory if the state court chooses to merely reinstate Titlow's current sentence." Pet. App. 24a–25a.

Instead, the Sixth Circuit characterized the plea offer as a "baseline" for the trial court to "consult[ ]." Pet. App. 24a. And the Sixth Circuit concluded by suggesting that if the state court imposes a sentence

greater than that set forth in the plea, then a federal court would have an opportunity to consider whether the state court abused its discretion. Pet. App. 25a. Such a notion does not appear anywhere in *Lafler* or *Frye*, and the discussion in its entirety stands *Lafler* on its head.

Even more concerning, the Sixth Circuit's confusion about the *Lafler* remedy is not limited to this case. A short time after issuing the opinion here, the Sixth Circuit vacated a conviction in a federal prosecution; instructed the district court to allow the government 90 days to either re-offer the original plea agreement or release the defendant from custody; and ordered the district court *to impose the plea sentence* "to remedy the violation of Jones' right to the effective assistance of counsel." *Jones* v. *United States*, 2012 WL 5382950, at *3 (6th Cir. Nov. 5, 2012). In other words, the Sixth Circuit took away the trial court's discretion altogether.

In sum, it is necessary for this Court to reemphasize that (1) a state trial court's remand options are precisely those that *Lafler* describes; and (2) a state trial court does not abuse its discretion by allowing the original post-trial-conviction sentence to stand in appropriate circumstances.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

John J. Bursch
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Aaron D. Lindstrom
Assistant Solicitor General

Raina Korbakis
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: JUNE 2013