No. 12-414

IN THE
Supreme Court of the United States

SHERRY L. BURT, WARDEN,
Petitioner,

v.

VONLEE NICOLE TITLOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT VONLEE NICOLE TITLOW

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit gave appropriate deference to the Michigan Court of Appeals under AEDPA in holding that defense counsel was constitutionally ineffective.

2. Whether a convicted defendant's subjective testimony that she 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* v. *Cooper* always requires a state trial court to resentence a defendant who shows a reasonable probability that she 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.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

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

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

The Michigan Court of Appeals concluded that Respondent Vonlee Nicole Titlow[1] had no redress for her attorney's outrageous and uninformed advice to withdraw a favorable plea—which the trial court had already accepted—because of a nonexistent claim of innocence. Rather than analyzing Ms. Titlow's now-disbarred attorney's failure to conduct any investigation or evaluating that attorney's disastrous advice to withdraw the plea under *Strickland*'s case-by-case inquiry, the state court latched onto the nonexistent innocence claim and held that whenever "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. 102a. If *Missouri* v. *Frye* and *Lafler* v. *Cooper* are to mean anything at all, the Sixth Circuit's decision conditionally granting Ms. Titlow's petition for habeas corpus must be affirmed.

The two other questions raised by the State are not properly presented in this case. First, the Sixth Cir-

[1] Respondent Vonlee Nicole Titlow is a transgender woman who has lived as female since childhood. Throughout her trial and appeal, she has consistently referred to herself with feminine pronouns. Out of respect for her identity and consistent with the opinions of the federal courts in this case, Respondent Titlow will be referenced by feminine pronouns throughout this brief. *See* Pet. App. 34a ("This opinion will refer to Petitioner as a female"); Pet. App. 2a ("Vonlee Nicole Titlow, a transgender prisoner . . . appeals from the district court's denial of *her* petition for a writ of habeas corpus following *her* conviction . . .") (emphasis added); *see also Murray* v. *U.S. Bureau of Prisons*, No. 95-5204, 1997 WL 34677, at *1 n.1 (6th Cir. Jan 28, 1997) ("Murray uses the feminine pronoun to refer to herself. Although the government in its brief used the masculine pronoun, for purposes of this opinion we will follow Murray's usage.").

cuit did not rely exclusively on Ms. Titlow's subjective testimony in finding that she had demonstrated a reasonable probability that but for counsel's advice, she would not have withdrawn her plea. Rather, the Sixth Circuit relied on the complete trial record, which demonstrates objective corroborating evidence that Ms. Titlow in fact accepted the plea agreement, the trial court approved it, and the constitutionally deficient advice offered by her attorney caused the plea withdrawal. Furthermore, no record evidence suggests that Ms. Titlow sought new counsel for the purpose of maintaining her innocence after entering a plea.

Second, the issue of the appropriate remedy in this case is premature. The state court has not yet fashioned any remedy for the violations of Ms. Titlow's Sixth Amendment rights, and the Sixth Circuit did not dictate how the state court may exercise its discretion in doing so. Moreover, even if the question was properly before the Court, the Sixth Circuit correctly applied *Cooper*[2] when it ordered the state to reoffer the plea agreement to Ms. Titlow, while recognizing that the state court could use its discretion

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[2] This brief uses *Cooper* as the short-form citation to *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012). Though Anthony Cooper was the respondent in that case, Blaine Lafler, the petitioner and warden of a Michigan correctional facility, is a frequent litigant. *See The Bluebook: A Uniform System of Citation* B4.2, at 13 (Colum. L. Rev. Ass'n et al. eds., 19th ed. 2010) ("When using only one party name in a short form citation, use the name of the first party, unless that party is a geographical or *governmental or other common litigant*.") (emphasis added). Mr. Lafler has been a party to more than fifty petitions for certiorari before this Court and to many habeas actions filed in the Eastern District of Michigan. Using Mr. Lafler's name would only create needless confusion. *See, e.g.,* S.G. Br. at 20 n.6 (confusing the identities of Mr. Lafler and Mr. Cooper by referring to Mr. Lafler as the criminal defendant).

"to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." Pet. App. 24a.

STATEMENT OF THE CASE

When the police arrived at the home of Donald and Billie Rogers in the early morning hours of August 12, 2000, they found Donald Rogers, Ms. Titlow's wealthy uncle, lying dead on the kitchen floor. J.A. 127. Hours earlier, the chronic alcoholic had passed out and fallen from his chair. J.A. 20. The authorities initially concluded that Mr. Rogers's death resulted from a combination of natural causes and acute alcohol intoxication, but his death certificate was later amended to indicate that he died from asphyxia by smothering. J.A. 184-86.

In the days that followed, Ms. Titlow revealed the truth about her uncle's death to her boyfriend, Danny Chahine. Ms. Titlow told Mr. Chahine that she and Ms. Rogers had poured vodka down Mr. Rogers's throat after he had passed out and held their hands over Mr. Rogers's mouth and nose, and that Ms. Rogers had smothered Mr. Rogers with a pillow. J.A. 321-22. Mr. Chahine approached the police, and at the police's request, wore a recording device on a subsequent date with Ms. Titlow. J.A. 18-32. During the date, Ms. Titlow repeated similar details about her role in Mr. Rogers's death, and asked Mr. Chahine to serve as an alibi. JA. 278. The recording captured Ms. Titlow saying that she felt "guilty for killing [Mr. Rogers]." J.A. 23.

Ms. Rogers was the sole beneficiary of Mr. Rogers's large estate. Soon after Mr. Rogers's death, Ms. Rogers gave Ms. Titlow approximately $100,000 in the form of a new car and a check so that Ms. Titlow would keep quiet about the incident. J.A. 270-71.

In January 2001, Ms. Rogers and Ms. Titlow were arrested and charged with first-degree premeditated murder, which in Michigan carries a mandatory life sentence without the possibility of parole.

Plea Proceedings

Richard Lustig, Ms. Titlow's first attorney, filed numerous pre-trial motions and succeeded in having Ms. Titlow's trial severed from Ms. Rogers's. Mr. Lustig also negotiated a plea bargain. As a condition precedent to the plea, a polygraph examination was administered to Ms. Titlow on October 25, 2001, and confirmed that she aided and abetted Ms. Rogers in Mr. Rogers's death. During the polygraph interview, Ms. Titlow admitted to helping pour vodka down Mr. Rogers's throat and stated that Ms. Rogers had subsequently smothered Mr. Rogers with a pillow. J.A. 38. The polygraph examiner concluded that Ms. Titlow was being truthful. J.A. 39.

Ms. Titlow agreed to a conditional plea, which reduced the charge from first-degree premeditated murder to manslaughter.[3] On October 29, 2001, Ms. Titlow entered a plea of guilty pursuant to the plea agreement. The additional conditions of the plea were that she accept a sentence of seven to fifteen years imprisonment, testify against her aunt at trial in accordance with the polygraph examination, and waive her right to appeal the plea or sentence. J.A. 42-43.

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[3] The Michigan Sentencing Guidelines provide a range in which a judge can set a presumptively appropriate minimum sentence. State law determines the maximum allowable sentence. For manslaughter, the maximum is fifteen years. The sentence for first-degree murder is life in prison without the possibility of parole. The maximum sentence for second-degree murder is life with the possibility of parole.

Ms. Titlow stated that she had reviewed the evidence against her, understood that the evidence supported a first-degree murder conviction, and was aware that the agreed minimum sentence of seven years exceeded her minimum sentence range derived from the applicable statutory guidelines for manslaughter. J.A. 43-53. She admitted that "in pouring the alcohol down Mr. Rogers['s] throat, [she had been] aiding Billie Rogers," J.A. 51; that in doing so she acted "in a reckless and dangerous manner which put the victim in a position of great bodily harm and/or death," J.A. 50; and that she accepted $100,000 in exchange for not talking about what had happened. J.A. 44, 50. The trial court accepted the plea and scheduled a sentencing hearing for December 19, 2001. J.A. 53.

During Ms. Titlow's confinement and prior to the scheduled sentencing hearing, Sheriff's Deputy Eric Ott initiated discussions with Ms. Titlow and advised her not to plead guilty if she was not guilty. Deputy Ott urged Ms. Titlow to retain his own attorney, Saunders Dorsey,[4] who passed the referral to Attorney Frederick Toca. Deputy Ott lost his job for interfering with Ms. Titlow's case, but was reinstated and punished by a suspension of sixty days without pay after an arbitration hearing.[5]

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[4] In October 2002, Saunders Dorsey pleaded guilty to criminal contempt charges for aiding and abetting a former client's purchase of real estate with proceeds from the client's drug trafficking and had his license to practice law revoked. Michigan Attorney Discipline Board, *Grievance Administrator* v. *Dorsey*, Nos. 02-118-AI, 02-121-JC (July 1, 2005), *available at* http://www.adbmich.org/coveo/opinions/2005-07-01-02o-118.pdf.

[5] The information regarding Deputy Ott's interaction with Ms. Titlow and his subsequent disciplinary proceedings is contained in an affidavit from Attorney William Pierson, who represented Oakland County in the Ott arbitration hearing. The arbitrator

Exactly one month after her initial plea hearing, and on the day Ms. Rogers's trial was scheduled to begin, Ms. Titlow—now represented by Mr. Toca—moved to withdraw her plea. Mr. Toca had agreed to represent Ms. Titlow only one week before the hearing and had arranged to be compensated in the form of jewelry and the right "to sell [Ms. Titlow's] story and/or do any and all interviews, publicity, etc, related to this matter in order to help derive $100,000.00 (*80,0000*) [sic] which would serve as trial fee." J.A. 60.[6] Under the structure of the fee arrangement, Mr. Toca would only receive the full fee if Ms. Titlow went to trial.

At the motion hearing, Mr. Toca stated that the basis for withdrawing Ms. Titlow's plea was that "the offer was out of line, that seven years is outside Ms. Von Lee [sic] Titlow's guidelines." J.A. 64. Mr. Toca indicated on the record that Ms. Titlow would not testify against Ms. Rogers unless the minimum sentence was changed to three years, which was within her presumed minimum sentence guidelines range of two to five years. J.A. 64. At no point during the hearing did Mr. Toca or Ms. Titlow indicate that Ms. Titlow was withdrawing her plea because she thought she was innocent. The court granted the motion to withdraw the plea and scheduled Ms. Titlow's trial for

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ultimately found "that the testimony of [Ms.] Titlow was more credible than that of Deputy Ott, that key components of Deputy Ott's testimony w[ere] rendered suspect or proven to be inconsistent, and that Deputy Ott [had] breached departmental rules and regulations." J.A. 298. Ms. Titlow submitted Mr. Pierson's affidavit to the Michigan Court of Appeals as an attachment to her motion to remand.

[6] When Mr. Toca was later *disbarred*, the Michigan Attorney Discipline Board cited as an aggravating factor that, in connection with this case, he "improperly acquired literary or media rights related to his client's criminal matter." J.A. 312.

January 14, 2002. J.A. 70. Mr. Toca requested more time to prepare for trial, asserting that he needed more time to get "up to speed" because he had been "retained last week." J.A. 72. The court denied Mr. Toca's request.

In the days between agreeing to represent Ms. Titlow and returning to court for the critical hearing, Mr. Toca never looked at his new client's file, spoke to her previous attorney, or undertook any other meaningful investigation into the evidence supporting the prosecution's case.[7] Had Mr. Toca simply taken the time to obtain Ms. Titlow's file prior to moving to withdraw her plea on November 29, 2001, he immediately would have seen ample evidence of her culpability and understood why she herself admitted to "aid[ing] and abet[ting]" in Mr. Rogers's death. J.A. 56. Mr. Toca would have seen a transcript of the recorded conversation in which Ms. Titlow said that she "fe[lt] guilty for killing him," J.A. 23, and that Ms. Rogers offered Ms. Titlow hush money that she accepted. J.A. 24. Mr. Toca would have seen that Mr. Chahine told the police that Ms. Rogers had previously joked about murdering her husband, J.A. 5, and that Ms. Rogers and Ms. Titlow took turns putting their hands over Mr. Rogers's face. J.A. 10-11. All of this evidence and more was detailed in an extensive preliminary examination. Finally, Mr. Toca would have seen that Ms. Titlow admitted—on the record—that the evidence against her was sufficient for a jury to find her guilty of first-degree murder. J.A. 44. In-

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[7] In a sworn affidavit, Ms. Titlow's first attorney, Richard Lustig, stated that "Mr. Toca did not pick up the discovery materials from my office, nor discuss the facts of the case with me until January 10, 2002." J.A. 301. This affidavit was also attached to Ms. Titlow's motion to remand in the Michigan Court of Appeals.

stead, Mr. Toca neglected to obtain any of this evidence and recklessly advised Ms. Titlow to withdraw a favorable plea and proceed to trial where she faced the possibility of life without parole.

The trial of Ms. Rogers went forward. Ms. Titlow did not testify against her aunt, and the jury acquitted Ms. Rogers on December 12, 2001. Ms. Rogers died a few months later.

On December 19, 2001, Mr. Toca again requested that the court delay Ms. Titlow's trial. He stated, "I think the Court realizes that I was kind of brought into this thing at the last minute." Mot. Tr. 5, Dec. 19, 2001. At the hearing, Ms. Titlow's trial was rescheduled to begin on March 4, 2002. *Id.* at 8-9.

On February 6, 2002, less than one month before the trial was set to start, Mr. Toca moved to withdraw as counsel, citing a breakdown in communication as well as "some other issues." J.A. 80. The court chided Mr. Toca for failing to obtain transcripts from Ms. Rogers's trial and questioned the financial arrangements between him and Ms. Titlow. J.A. 82-83. Ms. Titlow stated that she had given Mr. Toca "some jewelry" and retained his services through "an agreement on a supposed[ ] . . . book deal," which had since fallen through. J.A. 84. The court allowed Mr. Toca to withdraw as counsel, and appointed Attorney William Cataldo to represent Ms. Titlow.

Trial and Sentence

Ms. Titlow's trial began on March 11, 2002. At the heart of the prosecution's case were the recorded statements of Ms. Titlow that implicated her in Mr. Rogers's murder and Mr. Chahine's testimony regarding her statements. Ms. Titlow also testified in her own defense and admitted, as she had before, that she poured vodka into the victim's mouth, held her

hand over his nose and mouth, and accepted $100,000 in hush money, J.A. 256-59, 271, but denied any role in the actual smothering. J.A. 277. None of this evidence was new or different from what was already in Mr. Lustig's case file. The jury convicted Ms. Titlow of the lesser-included offense of second-degree murder.

At Ms. Titlow's sentencing hearing on April 17, 2002, the prosecutor described Ms. Titlow as "a victim of some bad advice," and noted that he "tried to give her some good advice and her original attorney did too." J.A. 291. The prosecutor went on to say, "Mr. Cataldo did a very good job at the trial with what he had to work with." *Id.* Mr. Cataldo added, "Mr. Lustig, a very fine lawyer, was able to work the Prosecutor, renegotiate down to seven years, 7 to 15. Then Ms. Titlow received some advice and made a decision that was different." J.A. 292. Ms. Titlow stated that she:

> would have testified against Billie during her trial, *had I not been persuaded to withdraw my plea agreement* and the chance to testify, because an attorney promised me he would represent me. Even had me sign a book agreement for payment to take my case. He told me he could take my case to trial and win. . . . He told me my previous attorney was not doing enough for me. I don't know a lot about the law, . . . So I trusted what he was saying. Also, *this firm came to me. I did not go to them*. After receiving some expensive jewelry and realizing they were not going to be able to get any money out of me, they walked out on me.

J.A. 295 (emphasis added). The trial court imposed a sentence of twenty to forty years.

Michigan State Appellate Court Rulings

Ms. Titlow appealed by right. She argued, among other things, that Mr. Toca provided ineffective assistance of counsel by advising her to withdraw her plea. The Michigan Court of Appeals rejected Ms. Titlow's ineffective assistance claim, stating that Mr. Toca advised Ms. Titlow to withdraw her plea because of an alleged claim of innocence. Pet. App. 101a-102a. The state court acknowledged that the additional materials submitted on appeal, including an affidavit of William Pierson from Deputy Ott's arbitration hearing, (hereinafter "Pierson Affidavit"), should be considered "for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim." Pet. App. 102a. But the state court relied exclusively on the Pierson Affidavit to conclude that "[w]hen a defendant proclaims his innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty." *Id.*[8]

The Michigan Supreme Court denied leave to appeal. Pet. App. 120a. Ms. Titlow subsequently filed a motion for relief from judgment, which the state trial court denied. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *People* v. *Titlow*, No. 273274 (Mich. Ct. App. Apr. 27, 2007); *People* v. *Titlow*, 738 N.W.2d 715 (Mich. 2007).

Federal Habeas Proceedings

Ms. Titlow timely filed a petition for a writ of habeas corpus in the United States District Court for the

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[8] The state court also denied Ms. Titlow's motion to remand for an evidentiary hearing on her ineffective assistance of counsel claim.

Eastern District of Michigan.[9] Ms. Titlow argued that the Michigan Court of Appeals erred in concluding that she was not denied her right to effective assistance of counsel at the time of her plea withdrawal and unreasonably applied *Strickland*. Pet. for Writ of Habeas Corpus 24. The district court denied relief but granted a certificate of appealability on all of her claims. Pet. App. 96a.

The Sixth Circuit reversed. Pet. App. 1a. It observed that the reason Mr. Toca offered for the plea withdrawal on the record "explicitly conflicts with the rationale on which the Michigan Court of Appeals relied," i.e., "that the plea withdrawal was based on Titlow's assertion of innocence." Pet. App. 18a-19a. On the record, Mr. Toca relied exclusively on the fact that the minimum sentence in the plea agreement exceeded the minimum sentence range under the applicable statutory sentencing guidelines. The Sixth Circuit found that the evidence from the plea withdrawal hearing rebutted the Michigan Court of Appeals' findings by clear and convincing evidence. *Id.* Turning to the *Strickland* analysis, the Sixth Circuit next found that Mr. Toca's performance during the plea-bargaining stage was deficient because he failed to examine Ms. Titlow's case file or conduct sufficient investigation before advising Ms. Titlow to withdraw her plea. Pet. App. 19a-21a. Without the discovery material, the court noted, Mr. Toca could not effectively advise Ms. Titlow about the risks involved in

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[9] Ms. Titlow presented multiple issues in her petition, including: ineffective assistance claims with respect to her trial counsel's failure to impeach Mr. Chahine and appellate counsel's failure to raise meritorious issues on direct appeal; denial of due process arising from prosecutorial misconduct, the inadequacy of the jury instructions, and the insufficiency of the evidence presented at trial; and the constitutionality of her sentence.

withdrawing her plea. Finally, the Sixth Circuit found that Mr. Toca's deficient performance prejudiced Ms. Titlow because there was a reasonable probability that she would not have withdrawn her plea but for Mr. Toca's intervening advice. Pet. App. 22a. In support of this finding, the Sixth Circuit pointed to: the fact that the plea offer was presented to and accepted by the state trial court in October 2001; the minimum sentence Ms. Titlow received after trial—which was nearly three times longer than the minimum sentence she was offered under the plea agreement; and Ms. Titlow's testimony during the initial plea hearing *and* sentencing hearing that she would not have withdrawn the plea but for Mr. Toca's advice. Pet. App. 22a-23a. Based on those showings, Ms. Titlow satisfied the prejudice standard articulated in *Cooper*, 132 S. Ct. at 1385.

Accordingly, the Sixth Circuit held that Ms. Titlow's Sixth Amendment rights "were violated when Mr. Toca provided ineffective assistance of counsel at the plea-bargaining stage" and that "[t]he Michigan Court of Appeals' decision to the contrary unreasonably determined the facts in light of the evidence presented." Pet. App. 23a. The Sixth Circuit reversed the district court's judgment and conditionally granted the writ, requiring the State to reoffer the original plea agreement to Ms. Titlow within 90 days. The Sixth Circuit continued: "If the State in fact reoffers the plea agreement and Titlow accepts, the state court may then exercise its discretion to fashion a sentence for Titlow that both remedies the violation of her constitutional right to the effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a.

2012 Plea Hearing

On October 31, 2012, the parties returned to the state trial court pursuant to the Sixth Circuit's order. The prosecutor reoffered the plea agreement to Ms. Titlow. J.A. 319. Ms. Titlow accepted the plea and provided a factual basis. During voir dire, Ms. Titlow admitted that she poured alcohol into Mr. Rogers's mouth, which put him in risk of great bodily harm and contributed to his death, J.A. 322, 324, and that she accepted money from her aunt to not say anything about the crime. J.A. 323. Ms. Titlow provided the same factual basis at the October 2012 plea hearing as she did during her original plea hearing eleven years earlier. At the State's request, the trial court took the plea under advisement and stayed its proceedings pending the ruling of this Court.

SUMMARY OF ARGUMENT

In advising clients during the plea bargaining process, attorneys have critical "responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). Here, without reviewing the significant evidence against his client, Attorney Frederick Toca advised his client to withdraw a plea—which would have spared her murder conviction—and to proceed to trial. Such outrageous conduct falls far short of what the Sixth Amendment requires.

The Michigan Court of Appeals unreasonably determined that Ms. Titlow's Sixth Amendment rights were not violated by Mr. Toca's conduct. First, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) only protects those decisions that are not contrary to or an unreasonable application of

clearly established law or are not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2). The Michigan Court of Appeals unreasonably determined that Ms. Titlow asserted her innocence based on an affidavit from an unrelated proceeding that does not contain an assertion of innocence. Rather, all of the evidence in the record indicates that Mr. Toca blindly advised Ms. Titlow to withdraw her plea and proceed to trial. Put simply, there is no evidence to support the conclusion that Ms. Titlow retained Mr. Toca to withdraw her plea and assert her innocence—a fact that is underscored by Mr. Toca's attempt to seek a lower minimum sentence.

Additionally, the Michigan Court of Appeals' failure to inquire beyond the nonexistent claim of innocence or to analyze the substance and reasonableness of Mr. Toca's advice constitutes an unreasonable application of *Strickland*. The record demonstrates that Mr. Toca failed to conduct any investigation before advising Ms. Titlow to withdraw a highly favorable plea and to proceed to trial on first-degree murder. Mr. Toca advised Ms. Titlow without reviewing the compelling evidence of culpability contained in her case file and detailed in the course of an extensive preliminary examination: a recorded conversation in which she admitted her participation in the murder, testimony from her boyfriend regarding these confessions, and the polygraph report containing further admissions. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, 466 U.S. 668, 690-91 (1984). No reasonable professional judgment would support the complete absence of any investigation in this case or Mr.

Toca's advice to withdraw the plea and proceed to an unwinnable trial.

Second, the question of whether a defendant's subjective testimony standing alone is enough to demonstrate a reasonable probability that she would have accepted a plea offer is not presented by this case. In addition to considering Ms. Titlow's own statements, the Sixth Circuit—consistent with the approach taken by every other circuit—considered ample objective evidence of Ms. Titlow's intent to plead guilty, including: (1) Ms. Titlow's actions in accepting the original plea, including admission on the record of her role in the crime; (2) the strength of the prosecution's evidence against her; and (3) the disparity between the sentence offered in the plea and the sentence she received after being convicted of a more serious crime. Taken together, the evidence weighed by the Sixth Circuit satisfies the *Cooper* prejudice test. The State's insistence that all of this evidence is irrelevant can only be read as an invitation to improperly heighten the *Strickland* and *Cooper* prejudice analysis.

Third, review of the remedy offered by the Sixth Circuit is premature because the state trial court has not yet acted on the reinstated plea offer. The Sixth Circuit, fully consistent with *Cooper*, explicitly left to the state court the discretion "'to vacate the conviction from trial and accept the plea *or leave the conviction undisturbed*.'" Pet. App. 25a (emphasis added). There is no reasonable reading of the Sixth Circuit's opinion that requires resentencing in all such cases or, for that matter, even requires the state court to resentence in this case. The Sixth Circuit did nothing more than quote *Cooper* itself and apply this Court's directive.

ARGUMENT

I. AEDPA DEFERENCE CANNOT PROTECT THE MICHIGAN COURT OF APPEALS' DECISION IN THIS CASE

The Sixth Circuit fully complied with the statutory commands of AEDPA when it issued the writ of habeas corpus. The decision of the Michigan Court of Appeals rested on both an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and "an unreasonable application of . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1)-(2). In light of these factual and legal errors, the Michigan Court of Appeals' decision received all the deference that is due under AEDPA.

A. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Determination Of The Facts

The decision of the Michigan Court of Appeals turned entirely on the erroneous factual finding that Ms. Titlow withdrew her plea because she claimed her innocence. The state court found that Mr. Toca's advice to withdraw the plea "was set in motion by defendant's statement to a sheriff's deputy that [she] did not commit the offense." Pet. App. 101a. This is a grave misstatement of fact, and has plagued these proceedings ever since. In turn, this erroneous factual finding was the basis for the state court's holding that whenever "a defendant proclaims [her] innocence . . . it is not objectively unreasonable to recommend that the defendant refrain from pleading guilty." Pet. App. 102a.

Ms. Titlow never made any such claim of innocence. As evidence for its finding, the state court could only point to an affidavit that says nothing about Ms. Titlow claiming innocence and is wholly contradicted

by other evidence in the record. It was unreasonable for the state court to draw such a conclusion, based solely on speculation about an affidavit that was submitted only as an offer of proof in support of a remand for an evidentiary hearing[10] and contains quadruple hearsay.

According to the Michigan Court of Appeals, and the State in its opening brief, Ms. Titlow withdrew from a favorable plea deal on the eve of Ms. Rogers's trial because Ms. Titlow had become convinced of her own innocence. Pet. App. 101a; Pet. Br. 10. Simply

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[10] While the State is correct that Ms. Titlow did not move in the trial court for an evidentiary hearing on her ineffective assistance claim, pursuant to *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973), Pet. Br. 34, Ms. Titlow did file a timely motion to remand for a *Ginther* hearing in the Michigan Court of Appeals, which is allowable under Michigan law. *See* Mich. Ct. R. 7.211(C)(1). The affidavits Ms. Titlow submitted to the Michigan Court of Appeals were not part of the trial record, but were merely an offer of proof "for the limited purpose of determining whether they disclose factual support for defendant's ineffective assistance of counsel claim, such that remand for a *Ginther* hearing would be appropriate." Pet. App. 102a. Because the appellate court's "review of . . . ineffective assistance of counsel is limited to the facts contained in the record," *People* v. *Marji*, 447 N.W.2d 835, 839 (Mich. Ct. App. 1989), the Michigan Court of Appeals had no business reaching outside the record to decide the substance of Ms. Titlow's claim based solely on the Pierson Affidavit. A state court's misapprehension of the boundaries of the record on review "fatally undermine[s] the fact-finding process, rendering the resulting factual finding unreasonable." *Taylor* v. *Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). At the very least, the inadequacy of the state court's fact finding process in this case should weigh strongly against giving deference to that finding. *See Teti* v. *Bender*, 507 F.3d 50, 59 (1st Cir. 2007) (quoting *Lambert* v. *Blackwell*, 387 F.3d 210, 239 (3d Cir. 2004)) (agreeing that "the extent to which a state court provides a 'full and fair hearing' . . . might be a consideration while applying deference under § 2254(d)(2)").

put, there is no evidence in the record that Ms. Titlow proclaimed her innocence, and any contrary reading of the record is unreasonable. Accordingly, the Sixth Circuit correctly concluded that the state court findings had been "rebutted by clear and convincing evidence." Pet. App. 19a.[11]

The Michigan Court of Appeals relied upon just a single piece of evidence for its finding: the Pierson Affidavit. But the Pierson Affidavit did not suggest a claim of innocence. In the Affidavit, Mr. Pierson, an attorney for Oakland County, Michigan, summarized testimony from an arbitration hearing involving Deputy Ott's violation of departmental rules when he approached Ms. Titlow and spoke with her in jail after she pleaded guilty. J.A. 298. Mr. Pierson referenced testimony taken at the arbitration hearing about Deputy Ott telling Ms. Titlow "that she should not plead guilty if she was not guilty." *Id.*

Even a cursory examination of the Pierson Affidavit reveals that these are not the words of Ms. Titlow. Further, the Affidavit does not say, or even imply, that Ms. Titlow was claiming her innocence. First, the Pierson Affidavit by its own terms only purports to recite the claims involved in the arbitration hearing and not the truth of the matter regarding the conversation between Ms. Titlow and Deputy Ott. Second, the Affidavit is a remarkable piece of quadruple hearsay in that: (1) it is an affidavit; (2) of Mr.

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[11] Although there is disagreement among the circuits as to the relationship between sections 2254(d)(2) and 2254(e)(1), the Sixth Circuit reads the "clear and convincing" standard of (e)(1) as controlling the (d)(2) inquiry. *Benge* v. *Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). *But see Taylor*, 366 F.3d at 999-1001. *Cf. Wood* v. *Allen*, 558 U.S. 290, 301-02 (2010) (declining to resolve how the provisions fit together). Regardless, the Michigan Court of Appeals' decision fails either standard.

Pierson's recollection of; (3) someone's[12] testimony about; (4) Deputy Ott's earlier statements to Ms. Titlow. Each successive layer of hearsay only adds to the unreliability of the Affidavit. See, e.g., *Boren* v. *Sable*, 887 F.2d 1032, 1036-37 (10th Cir. 1989) (noting the compounding unreliability of multiple levels of hearsay). The Pierson Affidavit offers no context for this underlying interaction between Deputy Ott and Ms. Titlow, other than the fact that *he made a statement to her* about innocence. See J.A. 298. In short, nothing in the Affidavit indicates that Ms. Titlow herself sought to affirmatively maintain her innocence. An inference that Deputy Ott must have been responding to a claim of innocence by Ms. Titlow is unsound. We do not know what transpired between Ms. Titlow and Deputy Ott.

Despite all of this, the Court of Appeals still concluded that the Pierson Affidavit was sufficient evidence—in fact, the only evidence—that Ms. Titlow "told a sheriff's deputy at the jail that [she] planned to plead guilty despite [her] protestations of innocence"—even as the court acknowledged that the record was "not fully developed on this point." Pet. App. 100a.

When a state court plainly misreads the record, its decision "reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wiggins* v. *Smith*, 539 U.S. 510, 528 (2003) (quoting 28 U.S.C. § 2254(d)(2)); see also *Taylor*, 366 F.3d at 1001 ("[When] the state courts plainly misapprehend or misstate the record in

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[12] It is not even clear who testified to the conversation between Deputy Ott and Ms. Titlow at the arbitration hearing.

making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.").

Even if, arguendo, the Pierson Affidavit could somehow be read as a statement of innocence by Ms. Titlow, the Michigan Court of Appeals' finding was plainly contradicted by other evidence in the record. Accordingly, the decision of the state court was unreasonable because that court "had before it, and apparently ignored," evidence that was central to Ms. Titlow's claim and contradicted the court's theory of Ms. Titlow's case. *Miller-El* v. *Cockrell*, 537 U.S. 322, 346 (2003); see also *Miller-El* v. *Dretke*, 545 U.S. 231, 246-47 (2005) (finding clear and convincing evidence to rebut state court findings where the state court "made no mention" of evidence showing that the prosecutors' strikes were racially determined).

First, as the Sixth Circuit observed, at the hearing to withdraw Ms. Titlow's plea, Mr. Toca "did not refer to [Ms.] Titlow's claims of innocence at any point." Pet. App. 18a. Instead, the only reason that Mr. Toca offered to the trial court for withdrawing Ms. Titlow's plea was the disparity in the minimum sentence under the plea agreement (seven years) and her minimum sentence range under her statutory sentencing guidelines (two to five years). *Id.*; J.A. 63-69; J.A. at 64 ("[W]e felt that the offer was out of line, that seven years is outside of Ms. Von Lee [sic] Titlow's guidelines"). Neither Mr. Toca nor Ms. Titlow made any statement to the trial court that the basis for the plea withdrawal was a desire to proceed to trial because Ms. Titlow was innocent. The Michigan Court of Appeals mentioned these statements from the plea withdrawal in passing, Pet. App. 100a, but over-

looked how this evidence contradicts the finding that the withdrawal was based on Ms. Titlow's assertion of innocence. If Mr. Toca truly was only there to withdraw the plea for a client who insisted on her innocence, and a trial to prove it, then he had no reason to state otherwise.

Second, Ms. Titlow's statements at her sentencing were equally inconsistent with an innocence claim. Ms. Titlow stated that she was "persuaded" by Mr. Toca to withdraw her plea agreement and go to trial. J.A. 295. There is no evidence in the record suggesting otherwise.

The State attempts to supplement its weak theory that Ms. Titlow continued to assert innocence by characterizing her trial as a parade of unforeseen revelations. Pet. Br. 12. But the trial revealed no important facts that had not already been disclosed to the prosecution at the time of the original plea agreement. The core of the evidence at trial was, as expected, the details contained in the recorded conversation and Mr. Chahine's testimony. Just as in her polygraph interview and at her initial hearing entering the plea, Ms. Titlow testified that she and Ms. Rogers found Mr. Rogers on the floor and poured vodka into his mouth and nose, taking turns covering his face. Ms. Titlow also admitted to accepting money from Ms. Rogers to remain silent. Trial Tr. 127, 144, Mar. 18, 2002.

Moreover, if the prosecution believed that the trial evidence made Ms. Titlow more culpable, as the State now contends, Pet. Br. 38, it is not apparent in the prosecution's closing argument, which begins with a lengthy discussion of accomplice liability—the prosecution's theory from the very beginning. Trial Tr. 6-9, Mar. 19, 2002; *id.* at 6 ("Billie Rogers is the one that actually did the smothering."). The State also

offers no argument for why any of the trial evidence it cites is relevant to the *Strickland* inquiry. This is not an instance in which "important new information about a defendant's culpability [came about] after the offer is rejected . . . ." *Cooper*, 132 S. Ct. 1376 at 1399 (Alito, J., dissenting). Indeed, the State only cites one contested statement from Mr. Chahine, offered for the first time at trial, that Ms. Titlow allegedly may have held the victim down while Ms. Rogers smothered him.[13] Pet. Br. 38. Aside from the question of whether Mr. Chahine's statement is credible in light of other evidence, it is abundantly clear from the trial record that Ms. Titlow's culpability was established largely by facts that she repeatedly admitted were true.

Finally, it is not true that Ms. Titlow "conceded" the State's innocence argument for the purposes of these proceedings, as the State repeatedly attempts to establish with a single, out-of-context sentence from a reply brief. Pet. Br. 28. First, the only "admission"

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[13] Contrary to the State's claim that substantial new evidence was revealed during the trial, the evidence presented at trial was entirely consistent with what Mr. Lustig, Mr. Toca, and the prosecution would have known before trial. Mr. Chahine had already told police about Ms. Rogers's earlier proposals to kill her husband, J.A. 4-5, and the recorded conversation is consistent with Ms. Titlow's affirmation that there was no prior plan to kill Mr. Rogers on the evening in question. J.A. 24-25 ("I honestly to God just thought it was a big old joke at first."). In the recorded conversation, Ms. Titlow also discusses Ms. Rogers's monetary offer during the incident. *Id.* The remaining piece of "new" evidence—Mr. Chahine's testimony that Ms. Titlow had held Mr. Rogers down—is contradicted by other evidence, and, as the State has acknowledged, Mr. Chahine further testified that he did not actually know when Ms. Titlow held Mr. Rogers down—it could have been before or during the smothering. Answer in Opp'n Pet. Habeas Corpus 12 n.2, June 3, 2008, ECF No. 11.

made in this pleading was that at some point there was a statement of innocence. But based on the Pierson Affidavit, which is the only evidence of the conversation, that statement actually came from Deputy Ott, not Ms. Titlow. Indeed, the very next paragraph of the reply brief describes how it was Deputy Ott who insisted that Ms. Titlow speak with another attorney who Deputy Ott knew to be "really good." Reply Answer in Opp'n Pet. Habeas Corpus 7, July 17, 2008, ECF No. 14. Second, whatever the substance of the conversation between these two non-lawyers was, it is irrelevant to Mr. Toca's duty to conduct a reasonable investigation before advising Ms. Titlow in connection with her plea.

B. The Michigan Court Of Appeals' Decision Was Based On An Unreasonable Application Of *Strickland*

The Michigan Court of Appeals assumed that Ms. Titlow had effective assistance of counsel without a proper assessment of the reasonableness of counsel's actions. If the state court had conducted the necessary analysis under *Strickland*, it would have found sufficient evidence that Ms. Titlow's Sixth Amendment rights were violated: (1) by Mr. Toca's disastrous advice that Ms. Titlow withdraw her favorable manslaughter plea and go to trial for first-degree murder in the face of the State's strong case; and (2) by Mr. Toca's failure to make any investigation into Ms. Titlow's case before making that recommendation. In place of an assessment of the case-specific competence of Mr. Toca's investigation and advice, the state court articulated a limit on counsel's duties in representing clients who claim innocence during plea negotiations that has no basis in this Court's precedents or any cogent view of professional responsibility. All of these errors demonstrate an unrea-

sonable application of *Strickland*, and its progeny, to the facts of Ms. Titlow's claim. See *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000).

1. The State Court's Assumption That Counsel's Advice To Withdraw The Plea Was Appropriate Because Ms. Titlow Supposedly Claimed Her Innocence Was An Unreasonable Application of *Strickland*

The Michigan Court of Appeals failed to adequately consider whether Mr. Toca's advice to withdraw Ms. Titlow's plea reflected even minimally competent professional judgment. Instead, the state court latched onto the purported innocence claim and held that whenever "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. 102a. But in *Strickland*, this Court was clear about the necessary inquiry under the first prong of the test for ineffective assistance: "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690; see also, e.g., *Roe* v. *Flores-Ortega*, 528 U.S. 470, 478 (2000) (describing the "circumstance-specific reasonableness inquiry required by *Strickland*"). And the analysis is the same when a defendant is denied effective assistance during the plea-bargaining process. *Cooper*, 132 S. Ct. at 1384; *Hill* v. *Lockhart*, 474 U.S. 52 (1985).

The extent of the state court's *Strickland* analysis was to say that Mr. Toca acted as effective counsel *no matter what advice* he gave Ms. Titlow. Pet. App. 102a. This depth of inquiry cannot be squared with *Strickland*. The state court did not consider what ad-

vice Mr. Toca gave or the reasonableness of his recommendation to withdraw the plea on the eve of a co-conspirator's trial, in the face of a near-irrefutable case carrying a top charge of first-degree murder. Therefore, the "facts of the particular case" support a credible ineffective assistance claim. *Strickland*, 466 U.S. at 690. Relying on innocence as a short-cut around *Strickland* was an unreasonable application of that decision. In *Wiggins* v. *Smith*, this Court rejected a similar attempt by a state court to "automatically justif[y]" counsel's actions without considering the reasonableness of a tactical decision. 539 U.S. at 527-28 (finding a state court decision an unreasonable application of *Strickland* where the court "merely assumed" that counsel's investigation was adequate without assessing whether the decision to cease all investigation "actually demonstrated reasonable professional judgment").[14]

2. Counsel Failed To Make Any Investigation Into Ms. Titlow's Case Before Recommending The Withdrawal Of The Guilty Plea

Had the Michigan Court of Appeals assessed Mr. Toca's conduct at the time it occurred, it would have found strong evidence that Mr. Toca's representation of Ms. Titlow fell below an objective standard of reasonableness. Mr. Toca advised Ms. Titlow to withdraw her plea, while claiming that he could take Ms. Titlow's case to trial and win. J.A. 295. But before making this sales pitch and withdrawing Ms. Titlow's

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[14] As the Michigan Court of Appeals improperly concluded that Mr. Toca did not perform deficiently in advising Ms. Titlow to withdraw her plea, it did not reach the issue of prejudice. As explained in Part II, *infra*, Ms. Titlow has satisfied *Strickland*'s prejudice prong.

plea, Mr. Toca had a duty to pick up Ms. Titlow's file, speak to Mr. Lustig, or otherwise make a reasonable investigation of the law and facts relevant to the case. *Strickland*, 466 U.S. at 690; see also *United States* v. *Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012) (holding that counsel's uninformed advice to forego a favorable plea offer based on the illusory promise of a better offer constituted ineffective assistance); *Beckham* v. *Wainwright*, 639 F.2d 262 (5th Cir. 1981) (attorney failed to advise defendant of consequences of a jury trial after he withdrew his plea). Ms. Titlow was scheduled to testify against Billie Rogers one week after Mr. Toca was retained. J.A. 53, 71. This gave Mr. Toca one week to investigate the case and make a sufficiently informed recommendation about the plea deal.

During this week, Mr. Toca neither spoke with nor picked up the case file from Ms. Titlow's original counsel, Mr. Lustig. J.A. 301; Pet. App. 20a. In fact, Mr. Toca did not obtain the case file or speak to Mr. Lustig until six weeks after the plea withdrawal. *Id.* At the plea withdrawal hearing, Mr. Toca confessed to this lack of preparedness, telling the trial court, "in all fairness, I was retained last week. There's a lot of material here." J.A. 71. Moments later, Mr. Toca asked the trial court for more time to prepare for trial in order to get "up to speed" on Ms. Titlow's case. J.A. 72.

Mr. Toca's failure to investigate Ms. Titlow's case before withdrawing her plea cannot be recast as a strategic choice of reasonable counsel. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. But no reasonable professional judgment could support Mr.

Toca's performance in this case. Ms. Titlow's plea deal depended on her testimony at Ms. Rogers's trial. Once Ms. Rogers's trial began, Ms. Titlow's chances of obtaining *any* plea deal fell to zero. Professional standards confirm that defense counsel must be aware of what benefits their client can provide the government in striking a deal. See Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Defense Representation*, Guideline 6.2: The Contents of the Negotiations (2011), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo (detailing how counsel should prepare a negotiation plan). If anything, the high stakes and compressed timeframe for making a recommendation called for more—not less—investigation of Ms. Titlow's case and her potential bargaining leverage or defenses. Moreover, "the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Mr. Toca knew that Ms. Titlow had reduced her sentencing exposure from a potential life-without-parole sentence for first-degree murder to a sentence of seven to fifteen years. Before undoing such a favorable plea deal at a point in the proceedings where a similar deal would be unobtainable, a reasonable attorney would conduct an extensive investigation, or at least *some* investigation.

There is no evidence in the record that Mr. Toca had any informed reasons for recommending such a reckless gamble. Yet there is ample evidence in the record to show that Ms. Titlow had no reasonable hope for a full acquittal. As the Sixth Circuit correctly held, the investigation before withdrawing the plea was deficient. Pet. App. 21a. There can be no "reasonable argument that counsel satisfied *Strickland*'s deferential standard" in this instance. *Harrington* v.

Richter, 131 S. Ct. 770, 788 (2011). In the end, Mr. Toca's representation of Ms. Titlow sealed her fate. Mr. Toca denied his client "'effective representation by counsel at the only stage when legal aid and advice would help [her].'" *Missouri*, 132 S. Ct. at 1408 (*citing Massiah* v. *United States*, 377 U.S. 201 (1964)).

Had Mr. Toca conducted the investigation that the Sixth Amendment demands and reviewed Ms. Titlow's file or talked to her previous attorney, he would have found ample evidence of her culpability. Before the motion to withdraw the plea, the State had at its disposal for trial: (1) the recorded conversation with Ms. Titlow and Mr. Chahine in which Ms. Titlow admitted her role in Mr. Rogers's murder, see Pet. App. 23a ("[H]er recorded conversation with her paramour Chahine was highly incriminating."); (2) Mr. Chahine's testimony and the State's other evidence, which was detailed over the course of an extensive, multi-day preliminary examination; (3) the polygraph examination administered by the police that established Ms. Titlow was an aider and abettor in the homicide; and (4) Ms. Titlow's representations at the plea hearing, where she admitted to pouring the vodka down Mr. Rogers's throat and accepting a significant amount of hush money. J.A. 43-44, 50. In the face of this evidence, the State's assertion that "[i]t was the trial itself that established Titlow's true culpability," Pet. Br. 39, is wholly unfounded. All of the prosecution's evidence was available for Mr. Toca to review if he had obtained Ms. Titlow's file or spoken to Mr. Lustig. J.A. 301. Furthermore this Court has established that *Strickland* analysis will depend solely "on the facts of the particular case, viewed *as of the time of counsel's conduct*." 466 U.S. at 690 (emphasis added). "[E]very effort [must] be made to

eliminate the distorting effects of hindsight." *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689).

The State's reasons for sanctioning Mr. Toca's conduct fail. Pet. Br. 35. First, as discussed *supra*, the State's assertion that Ms. Titlow maintained her innocence is baseless. Second, the State argues that Ms. Titlow "passed a polygraph." *Id.* But the polygraph, which was a precondition for the State accepting Ms. Titlow's plea in the first place, was expressly designed to—and in fact did—cement the evidence of Ms. Titlow's role in the homicide. J.A. 37-40. Third, the State argues that Ms. Titlow's bargained-for minimum sentence of seven years under the plea was "substantially above" the guidelines minimum. Pet. Br. 35. This is untrue: there was a two-to-four-year disparity between the minimums. This argument also ignores the significant difference between the plea offer of manslaughter and the State's threatened charge of first-degree murder, which bears a life-without-parole sentence. Fourth, the State contends that the prosecutor said publicly that Ms. Titlow was only guilty of manslaughter. *Id.* Yet, the only support for this contention submitted by the State is a newspaper article; on the record, the prosecutor told the court that if the plea fell apart, the prosecution would proceed to trial on a first-degree murder charge, as it did. J.A. 43. Fifth, the State argues that Mr. Lustig went over all the evidence and trial risks a month prior to the plea withdrawal. Pet. Br. 35. But the State cannot rely on the efforts of previous counsel to relieve Mr. Toca of his duty to advise his client. See *Smith* v. *United States*, 348 F.3d 545, 553 (6th Cir. 2003) (although the first attorney had negotiated the plea and conveyed its terms to the defendant, "the nature and quality of the advice [the

defendant received from the second attorney] before he made his final decision" to reject the plea offer was constitutionally inadequate); *Boria* v. *Keane*, 99 F.3d 492, 497-98 (2d Cir. 1996) (reviewing only the second attorney's performance, and finding it constitutionally ineffective, where defendant was represented by one attorney during arraignment and subsequent counsel during plea bargaining). Competent counsel is necessary for any defendant to determine what the client might be guilty of, as well as what the prosecutor may be able to prove. Such assessments are at the core of the plea bargaining process. See *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011). No amount of diligence on Mr. Lustig's part could render Mr. Toca's uninformed advice sound under the Sixth Amendment or cure the prejudice caused by that reckless advice.

3. The State Court Created An Unprecedented And Ill-Advised Categorical Limit On Counsel's Duties To A Client Who Claims Innocence During Plea Bargaining

According to the Michigan Court of Appeals, Mr. Toca's advice to withdraw the plea was objectively reasonable, no matter how ill-informed or incorrect, because Ms. Titlow claimed her innocence. Pet. App. 102a. Even assuming that the record supported an inference that Ms. Titlow had claimed innocence, the state court's analysis—which, in effect, creates an "innocence exception" to the guarantee of effective assistance of counsel—has no basis in *Strickland* or the realities of professional responsibility.

This Court has never categorically limited the duties of counsel when a defendant says he is innocent. On the contrary, counsel's "overarching duty to advocate the defendant's cause" stays the same. *Strick-*

land, 466 U.S. at 688; see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."). Prevailing professional standards, which are "guides to determining what is reasonable," *Strickland*, 466 U.S. at 688, explicitly reject the state court's two-tiered system of counsel's duties. See, e.g., Am. Bar Ass'n, *ABA Standards For Criminal Justice: Prosecution and Defense Function*, Standard 4-4.1: Duty to Investigate (3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#4.1 ("The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

The Michigan Court of Appeals' analysis is equally contradicted by the reality that criminal defendants who claim innocence during plea bargaining are in the same need of advice as those who admit guilt. There are many reasons someone may choose to maintain his innocence during plea negotiations, but eventually plead guilty. A defendant might assert his innocence mistakenly because he does not understand the elements of the crime or what the prosecution must prove to make its case. See *Cooper*, 132 S. Ct. at 1383 (noting that the defendant went to trial thinking that he could not be found guilty because his counsel wrongly told him that shooting someone below the waist could not evince intent to murder). Or a defendant may assert his innocence without understanding his options in negotiating a plea or the various risks of going to trial. Cf. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that counsel "must inform her client [of] whether his plea carries a risk of deportation.").

In all of these cases, defendants need competent advice from counsel that is informed by, among other things, a reasonable investigation into the facts of the case. "Plea bargains are the result of complex negotiations suffused with uncertainty," and thus the competent advice of counsel "in balancing opportunities and risks" is necessary to protect a defendant's right to make an informed choice about whether to plead guilty. *Premo*, 131 S. Ct. at 741. The State's invocation of the defendant's "ultimate authority" to plead guilty only underscores this need. Pet. Br. 31 (citing *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004)). "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . [T]he high stakes . . . require the utmost solicitude." *Nixon*, 543 U.S. at 187 (internal citations omitted). Moreover, the fact that the ultimate authority over the disposition of a criminal case belongs to the defendant has never meant that the accused ought not to have the effective assistance of counsel in exercising that authority. See *Cooper*, 132 S. Ct. at 1388. Finally, the availability of a plea under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), is wholly irrelevant to a *Strickland* analysis of Mr. Toca's performance.[15] Whatever procedures govern

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[15] Contrary to the State's assertions, Pet. Br. 31, it is not even clear that *Alford* pleas are unavailable under Michigan law. While Michigan requires a factual basis for the guilty plea, *see* Mich. Ct. R. 6.302(D)(1), this does not mean that a defendant cannot maintain his innocence. The "'factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury on the facts admitted by the defendant *even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference*.'" *People* v. *Haack*, 240 N.W.2d 704, 709 (Mich. 1976) (emphasis added) (quoting *In re Guilty Plea Cases*, 235 N.W.2d 132, 145 (Mich. 1975)). While the State claims that the cases express nothing more than *obiter dictum*, Pet. Br. 32, this rule was essential to the holding in

the plea bargaining process under Michigan law, Mr. Toca had a solemn duty to conduct a reasonable investigation so that he could provide reasonable advice. Contrary to the State's assertions, the Sixth Circuit did not expect Mr. Toca to "dissuade [Ms. Titlow] from maintaining [her] innocence." Pet. Br. 32. The Sixth Circuit's expectations for Mr. Toca were those demanded by the Sixth Amendment and articulated by this Court in *Strickland* and *Cooper*. And they were expectations that were not met in this case.

II. THE SIXTH CIRCUIT'S OPINION AS TO THE REQUIRED CORROBORATION FOR MS. TITLOW'S CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDINGS IN *COOPER* AND *STRICKLAND*

A. The Court Should Not Reach This Issue Because This Case Does Not Raise The Question Presented

1. The Sixth Circuit Considered Objective Evidence That Ms. Titlow Would Have Pleaded Guilty

Certiorari was granted to consider whether a habeas petitioner's statements, *standing alone*, can provide sufficient evidence to satisfy the *Strickland* prejudice standard. The facts of this case do not align with the question presented, however, because numerous pieces of objective evidence in the record bolster Ms. Titlow's statements that she would have pleaded guilty but for Mr. Toca's interference. Be-

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each case and has been applied in later cases. *See, e.g.*, *People* v. *Frazier*, 300 N.W.2d 408, 409-10 (Mich. Ct. App. 1980). The State cannot explain why a defendant who pleads guilty pursuant to a plea agreement would be subject to a different rule. Pet. Br. 32.

cause a question presented may be dismissed as improvidently granted when the case "did not turn on the issue on the basis of which certiorari was granted," the Court should not decide this question. *Smith* v. *Butler*, 366 U.S. 161, 161 (1961).[16]

Contrary to the State's and the Solicitor General's representations, the Sixth Circuit considered additional facts beyond Ms. Titlow's subjective testimony and found several pieces of objective information that together established a "reasonable probability," *Cooper*, 123 S. Ct. at 1385, that she would have accepted the plea if not for Mr. Toca's intervening advice.

First, the Sixth Circuit considered Ms. Titlow's actions as support for her words. It considered the fact that the plea offer was presented by the prosecutor, accepted by Ms. Titlow, and approved by the state trial court at her initial plea hearing in October 2001. Pet. App. 22a. It concluded that "Titlow's position that would she have accepted [sic] the plea offer but for [Mr.] Toca's intervening advice is bolstered by the fact that she had actually accepted the plea on the record at the October 2001 hearing." *Id*.

Second, the court weighed the strength of the State's evidence against Ms. Titlow. In particular, it noted the "highly incriminating" recorded conversation between Ms. Titlow and Mr. Chahine and observed that Ms. Titlow's own version of the facts dur-

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[16] Ms. Titlow submitted her Brief in Opposition *pro se*. Accordingly, the Court did not have the benefit of a complete opposition which would have, for example, addressed "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court" and "any objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2.

ing her in-court statements "was not inconsistent with a second-degree murder conviction." Pet. App. 23a. Given the strength of the State's case, the Sixth Circuit concluded that it was likely that if Mr. Toca had considered the evidence, he would not have advised Ms. Titlow to withdraw the plea. Pet. App. 23a (citing *Hill*, 474 U.S. at 59 for the proposition that that "the prejudice inquiry under the second prong of *Strickland* depends 'on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea'").

Finally, the Sixth Circuit considered the disparity in sentencing between the plea offer and the sentence Ms. Titlow ultimately received as evidence of prejudice. "[T]he sentence Titlow ultimately received (20-to-40 years' imprisonment) was nearly three times the punishment that she was offered under the plea agreement (7-to-15 years' imprisonment)." Pet. App. 22a.

As the Sixth Circuit explicitly cited several independent and objective facts, it is far from the case that it relied on Ms. Titlow's statements "standing alone" in concluding that there was "a reasonable probability [Ms. Titlow] would have accepted the plea." Pet. App. 16a.

2. This Case Presents No Genuine Conflict Among The Circuits

The Sixth Circuit is entirely consistent with all the other circuits in its application of the standard announced in *Cooper*. Like each of the other Courts of Appeals,[17] the Sixth Circuit weighs all the evidence

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[17] While courts may differ in how they describe their applications of the *Strickland* and *Cooper* standards, "the minor differences in the lower courts' precise formulations of the . . . stand-

before it and assesses whether the defendant's statements provide credible evidence of his intent to accept a plea. Because there is no genuine conflict among the circuits on this issue, the Court should dismiss this question as improvidently granted. See *Bunting* v. *Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J., joined by Ginsburg and Breyer, JJ., respecting denial of certiorari).

While it is true that the Sixth Circuit asserted in its opinion that "unlike some circuits, this court does not require that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence," Pet. App. 17a (internal quotation marks omitted), that dicta is inconsistent with the court's own opinions in other matters and, as noted above, inconsistent with the rule applied here. Like all other circuits, when presented with a defendant's subjective statement that he would have taken a plea, the Sixth Circuit evaluates the credibil-

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ard are insignificant: the different formulations are mere variations on the overarching . . . standard." *Strickland*, 466 U.S. at 696-97. All courts assess whether a defendant's post-conviction assertions are credible in light of available evidence, with only minor variations in how they conduct such an assessment. *See, e.g.*, *Moreno-Espada* v. *United States*, 666 F.3d 60, 66-67 (1st Cir. 2012); *Raysor* v. *United States*, 647 F.3d 491, 495-96 (2d Cir. 2011); *United States* v. *Day*, 969 F.2d 39, 45-46 (3d Cir. 1992); *Merzbacher* v. *Shearin*, 706 F.3d 356, 366-67 (4th Cir. 2013), *petition for cert. filed* (U.S. Apr. 25, 2013) (No. 12-9952); *Jimenez* v. *Thaler*, No. 3:11-CV-0697-B, 2011 U.S. Dist. LEXIS 150896, at *17 (N.D. Tex. Dec. 5, 2011), *adopted by Jiminez* v. *Thaler*, No. 3:11-CV-0697, 2012 U.S. Dist. LEXIS 2177 (N.D. Tex. Jan. 9, 2012); *Julian* v. *Bartley*, 495 F.3d 487, 499 (7th Cir. 2007); *Wanatee* v. *Ault,* 259 F.3d 700, 702 (8th Cir. 2001); *Nunes* v. *Mueller,* 350 F.3d 1045, 1053 (9th Cir. 2003); *Maldonado* v. *Archuleta*, 61 F. App'x 524, 527 (10th Cir. 2003); *Diaz* v. *United States*, 930 F.2d 832, 835 (11th Cir. 1991); *United States* v. *Anderson*, 705 F. Supp. 2d 1, 11 (D.D.C. 2010).

ity of that statement in order to determine whether it constitutes adequate proof to satisfy the *Cooper* standard. See *Merzbacher,* 706 F.3d at 366 (describing Sixth Circuit as adopting view that "a petitioner's own *credible* testimony that he would have accepted a plea offer combined with a disparity between the sentence offered and the sentence actually received establishes a reasonable probability that the petitioner would have accepted the plea.") (emphasis added).

The Sixth Circuit has evaluated evidence such as a defendant's unawareness that co-defendants would testify against him, as well as ignorance of the large disparity between a potential and offered sentence, as supporting the credibility of a defendant's statements. See *Griffin* v. *United States,* 330 F.3d 733, 739 (6th Cir. 2003). And in circumstances where the credibility of defendants' statements could not be determined based on record evidence, the Court has remanded such cases for evidentiary hearings. See, e.g., *Smith,* 348 F.3d at 553; *Griffin,* 330 F.3d at 739. If, as the State claims, the Sixth Circuit deemed a self-serving statement alone sufficient to provide evidence of intent, remand in such cases would be entirely unnecessary.

B. Ms. Titlow Has Amply Demonstrated A Reasonable Probability That She Would Have Accepted The Plea

Under the standard applied by any circuit, Ms. Titlow has satisfied each element of *Cooper*'s prejudice test. *Cooper* requires that a defendant demonstrate that "but for the ineffective advice of counsel there is a reasonable probability [1] that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and 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 under the judgment and sentence that in fact were imposed." 132 S. Ct. at 1385. The State concedes that Ms. Titlow satisfies *Cooper*'s second and third requirements. Pet. Br. 40. The State also concedes that Ms. Titlow has satisfied the second part of the first requirement, that the prosecutor would not have withdrawn the plea offer. *Id.*

Ms. Titlow also satisfied the remaining *Cooper* requirement, as she has shown a reasonable probability that but for Mr. Toca's grossly deficient performance, she would have accepted the plea. As noted above, the State is flatly incorrect in asserting that the Sixth Circuit relied only on Ms. Titlow's statements in concluding that she demonstrated a reasonable probability that she would have accepted the plea. See also S.G. Br. at 22 ("[T]he court of appeals erred in concluding that the statement *by itself* was sufficient to establish prejudice.") (emphasis added). Instead, the Court of Appeals explicitly looked to Ms. Titlow's actions in originally accepting the plea; the strength of the prosecution's case against her; and the conviction on a greater charge and higher sentence that she received after trial. Pet. App. 22a-23a.

The State attempts to minimize the record evidence regarding Ms. Titlow's willingness to accept a plea by claiming in conclusory fashion that "Titlow's acceptance of the first plea cannot be used to satisfy [the first *Cooper* prong] because Titlow withdrew the plea and maintained [her] innocence." Pet. Br. 40. The State's claim begs the question entirely by assuming incorrectly both that Ms. Titlow claimed innocence and that this was the reason she withdrew. A plea withdrawal standing alone does not vitiate the probative value of the course of the preceding plea

negotiations. Courts routinely consider the course of plea negotiations as evidence in determining whether a defendant would have taken a plea. See, e.g., *Julian*, 495 F.3d at 499 (citing that defendant "altered course at the last minute just after receiving . . . erroneous information"). Surely the culmination of those negotiations—acceptance of the plea agreement at an on-the-record hearing—should be considered by the court. The State's argument that Ms. Titlow's initial acceptance and subsequent withdrawal of the plea agreement "undercut[]" rather than support her assertion that she would have accepted the plea is backwards. Pet. Br. 43. Indeed, that the defendant proved her willingness to plead guilty by accepting a plea, and finalizing it during an on-the-record hearing, provides strong evidence of her intent to plead guilty at the time and in the absence of Mr. Toca's flawed advice.

Ms. Titlow's post-trial statements are particularly probative of her intent to plead guilty because they were first made on the record at a sentencing hearing prior to any habeas proceeding. This testimony was further supported by statements made at the same hearing by both her trial counsel and the prosecutor confirming that Ms. Titlow "[was] a victim of some bad advice" from Mr. Toca. J.A. 291-92.

Ms. Titlow's statements that she would not have withdrawn the plea but for Mr. Toca's unreasonable advice are also corroborated by the prosecution's strong evidence for its murder case, see pp. 9-10, 23-25, *supra,* and the disparity between the sentence she was offered under the plea agreement (seven to fifteen years) and the potential sentence she faced if she proceeded to trial and was convicted of first-degree murder (life without parole) or second-degree murder

(up to life imprisonment).[18] The fact that Ms. Titlow faced a near certainty of spending decades in prison if she proceeded to trial lends credence to her statements that she would not have withdrawn her plea if not convinced to do so by Mr. Toca.

Further, Ms. Titlow repeatedly and consistently stated on the record that she engaged in behavior that led to the victim's death, including at the recent plea hearing on remand from the Sixth Circuit. Contrary to the State's account of events, it was the prosecutor, not Ms. Titlow, who entered the plea hearing with the intent that the agreement not be finalized—to the surprise of Ms. Titlow and her counsel. Plea Hr'g Tr. 3-7, Oct. 31, 2012. The prosecutor began his presentation to the court by encouraging the judge *not* to accept the agreement, and instead to take it under advisement. While Ms. Titlow took issue with some of the facts the prosecutor sought to elicit from her, at no point did she insist that she was innocent of the crime. Indeed, contrary to the State's claims, she admitted to "pour[ing] . . . vodka in [Mr. Rogers's] mouth . . . [which] led to his death," J.A. 324, and "receiv[ing] money not to say anything" about the killing. J.A. 322.

In sum, Ms. Titlow has provided "credible evidence that she would have accepted a guilty plea if properly advised." See S.G. Br. 16. Ms. Titlow did in fact plead guilty when "properly advised" by her original counsel, Mr. Lustig. The State's version of the facts is belied by the fact that this original plea hearing occurred four days *after* Ms. Titlow "passed" the poly-

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[18] For the reasons explained in Part II.C, *infra*, the State's and Solicitor General's arguments that this evidence cannot serve to corroborate Ms. Titlow's statements are unavailing.

graph examination[19]—the event that, according to the State, convinced her of her innocence. It was not until after Mr. Toca advised her to withdraw the plea—without conducting any investigation into Ms. Titlow's case and pursuant to a fee arrangement that included a perverse financial incentive to take the case to trial—that Ms. Titlow later withdrew from the plea agreement. Ms. Titlow has more than demonstrated a "reasonable probability" that she would have maintained her guilty plea if not for Mr. Toca's intervening advice to withdraw.

C. The State Improperly Urges This Court To Revisit Its Decision In *Cooper* By Requiring A More Stringent Standard For Evaluating Prejudice Claims

As explained above, there is no daylight between the standard this Court set out in *Cooper*, the Sixth Circuit's application of that standard to the facts of this case, and the method employed by federal courts in every Circuit. But the State's agenda in presenting this irrelevant issue is larger: it asks the Court to revisit its recent decision in *Cooper* and to articulate a new, stricter standard for determining whether a habeas petitioner has satisfied the *Strickland* prejudice prong in the context of a foregone plea offer. The Court should reject the State's entreaty to reconsider the prejudice standard it established in *Strickland* and recently reaffirmed in *Cooper*.

In determining whether there is a reasonable probability that the outcome would have been different, "a court hearing an ineffectiveness claim must consider

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[19] The polygraph examiner concluded that Ms. Titlow was being truthful when she admitted to aiding and abetting Ms. Rogers in Mr. Rogers's death but denied being the principal actor. J.A. 38-39.

the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695 (emphasis added). The State asks this Court to adopt a radically new standard that would require habeas petitioners to present separate pieces of evidence that are independently sufficient to satisfy each element of the *Cooper* standard. Pet. Br. 40. The State's proposal is inconsistent with the standard set out in *Strickland*, and should be rejected.

The State pursues a rule against subjective statements in an attempt to replace the *Strickland* and *Cooper* totality standard with a more stringent one that discredits habeas petitioners' statements altogether. The State asks this Court, as it did unsuccessfully before the Sixth Circuit in *Cooper*, to impose just such a *per se* rule. Pet. Br. 42; see *Cooper* v. *Lafler*, 376 F. App'x 563, 571 (6th Cir. 2010), *vacated and remanded by Cooper,* 132 S. Ct. at 1384 (2012).

The State offers no justification to deny a reviewing court the ability to weigh all the evidence before it to determine whether a habeas petitioner's assertions are credible. A habeas petitioner's subjective statement often provides a key component of the evidentiary package that courts consider in determining whether he has demonstrated by a reasonable probability that he would have accepted a plea offer. In fact, in some cases, courts have rejected a habeas petitioner's claim of prejudice because he *failed* to provide a statement attesting that he would have accepted a plea, underscoring the evidentiary value of such statements. See, e.g., *Toro* v. *Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (rejecting petitioner's claim because he never averred that he would have taken the plea: "The memorandum merely states: '[Toro] would have to have been insane not to accept the plea agreement for the minimum sentence.'"); *Di-*

az, 930 F.2d at 835 (reasoning that defendant needed to do more than "argue[ ] only that he would have received a lesser sentence had he accepted the plea agreement.").

The State attempts to needlessly complicate an otherwise straightforward practice of determining credibility. For example, the State suggests that because the final element of the *Cooper* test "*always* requires a defendant to show a disparity,[20] . . . sentencing disparity is a given" and cannot be used as additional objective evidence to support the credibility of subjective testimony. Pet. Br. 40; see also S.G. Br. 23 (suggesting that sentencing disparities can only be considered when the counsel's advice is regarding the potential sentences). The State's and the Solicitor General's arguments miss the point. The *degree* of the sentencing disparity between the plea offer and the potential sentence the defendant faces if he were to be convicted following trial serves as a valuable piece of evidence in the court's credibility analysis, because the greater this disparity, the more likely it is that the defendant would have accepted the plea. See *Raysor*, 647 F.3d at 495-96; *Smith*, 348 F.3d at 552; *United States* v. *Gordon*, 156 F.3d 376, 380-381 (2d Cir. 1998) (per curiam); *Day*, 969 F.2d 39. Like all evidence in the record, the reviewing court may take the degree of sentencing disparity into account when determining the credibility of the defendant's testimony. The State's attempt to draw inflexible rules into *Cooper*'s standard is completely inconsistent with *Strickland*. See *Strickland*, 466 U.S. at 696 ("Most

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[20] This statement itself is inaccurate, as *Cooper* describes this element as a reasonable probability "that the *conviction or* sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 132 S. Ct. at 1385 (emphasis added).

important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."). A *per se* rule preventing a reviewing court from weighing a habeas petitioner's statements about his intentions would impair the court's ability to make credibility determinations based on the totality of the evidence before it, as the *Strickland* standard requires.

III. THE SIXTH CIRCUIT'S REMEDY FAITHFULLY APPLIED *COOPER*

A. Review Of This Question Is Premature

Whether *Cooper* always requires resentencing is neither presented nor ripe for decision in this case. The Sixth Circuit did not require the state trial court to resentence Ms. Titlow. The court gave the State ninety days to reoffer the original plea agreement to Ms. Titlow or release her from custody; the State elected to reoffer the agreement, and Ms. Titlow accepted it on October 31, 2012. J.A. 319. Yet, because the Michigan trial court stayed its proceedings pending the decision of this Court, at this stage it is impossible to know whether the trial court will ever resentence Ms. Titlow or what the remedy may be. The Michigan court has not yet accepted the plea and remains free to reject it under the express terms of the Sixth Circuit's order. Nothing in the Sixth Circuit's order limits the state court's discretion beyond the procedures already outlined in *Cooper*.

As the Sixth Circuit described, "[i]f the state in fact reoffers the plea agreement and Titlow accepts, the state court *may then* exercise its discretion to fashion a sentence for Titlow." Pet. App. 25a (emphasis added). The state court's discretion includes the ability "'to vacate the conviction from trial and accept the

plea *or leave the conviction undisturbed*.'" Pet. App. 24a (emphasis added). The Sixth Circuit thus made explicit the possibility that the sentencing court might not change Ms. Titlow's sentence at all. This comports both with Michigan state rules and this Court's holding in *Cooper*. See *Cooper*, 132 S. Ct. at 1391; Mich. Ct. R. 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 (a) reject the agreement; or (b) accept the agreement . . . ."). Even the State acknowledges that the Sixth Circuit's ruling keeps intact the Michigan trial court's discretion to "leave undisturbed Titlow's trial conviction and sentence." Pet. Br. 48.

The answer to the State's third question presented, therefore, is "no"—*Cooper* does not, by its own terms, require resentencing, nor did the Sixth Circuit require resentencing here. The controversy that the State's brief contemplates, namely that "the Sixth Circuit erroneously created an entirely new scheme for fashioning a *Lafler* remedy," simply is not present. Pet. Br. 46. Neither does the State offer any other basis for its bizarre reading of the Sixth Circuit's order. This question could be ripe *only if* the state court were to accept Ms. Titlow's plea (which has not yet occurred), and *only if* the state court were to do so based on an understanding that it had no other choice under the Sixth Circuit's order or under *Cooper*. In fact, however, neither of those vital "ifs" have come to pass. As was the case in *California* v. *Rooney*, "[t]here are two too many 'ifs' in that proposition to make . . . review appropriate at this stage," 483 U.S. 307, 312–13 (1987), and the Court should therefore dismiss certiorari as to this question as im-

providently granted. See *Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring in result) (the Court "ought not to decide the question if it has not been cleanly presented."); see also, e.g., *McClanahan* v. *Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) (dismissing certiorari as improvidently granted where "the record does not adequately present [the] question"); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944) (same).

B. No Controversy Exists As To The Proper Meaning And Application Of *Cooper*

In the two years since this Court's decision in *Lafler* v. *Cooper*, no disputes have emerged as to *Cooper*'s effect on the ways in which state courts may remedy Sixth Amendment violations. There is good reason for this lack of controversy: *Cooper* affirmed state courts' discretion in this area, avoiding potential federalism problems and allowing for flexibility in its application to specific facts. This case only serves to demonstrate that flexibility. Here, the Sixth Circuit unambiguously left open the possibility that the state court might not accept the original plea agreement, especially in light of "any concerns that the State might have regarding the loss of [Ms.] Titlow's testimony against her aunt." Pet. App. 25a. Nothing prevents the State from arguing that the court should not accept the plea, just as nothing prevents Ms. Titlow from arguing to the state court that Mr. Toca's constitutionally deficient representation was the reason for both her plea withdrawal and the prosecution's subsequent loss of her testimony.

In the absence of any disagreement or confusion, it is too soon to preempt *Cooper*'s observation that "[p]rinciples elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors

that should bear upon the exercise of the judge's discretion [to determine a remedy]." *Cooper*, 132 S. Ct. at 1389.

C. The Sixth Circuit Properly Applied *Cooper*

Here, the Sixth Circuit did not order the state court to resentence Ms. Titlow—it required the State to "reoffer Titlow the original plea agreement or, failing that, to release her. If the State in fact reoffers the plea agreement and Titlow accepts, the state court *may then* exercise its discretion to fashion a sentence for Titlow that both remedies the violation of her constitutional right to effective assistance of counsel and takes into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a (emphasis added). The Sixth Circuit also observed that if the agreement were reoffered by the State and accepted by Ms. Titlow, "the state trial court would then have the discretion 'to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.'" Pet. App. 24a.

The State incorrectly asserts that the phrase "fashion a sentence" somehow means that the Sixth Circuit ordered resentencing. See Pet. Br. 47 ("[T]he Sixth Circuit indicated that the trial court should 'exercise its discretion to *fashion a sentence*' for Titlow.") (emphasis added). As quoted above, however, the Sixth Circuit's language was conditional ("the state court *may then* exercise its discretion to fashion a sentence"), and the Sixth Circuit made clear that the state court had the discretion to "leave the conviction undisturbed." Pet. App. 24a. Accordingly, there is no reasonable reading of the Sixth Circuit's opinion that requires resentencing in all such cases or, for that matter, even requires resentencing in this case. The

Sixth Circuit did nothing more than quote *Cooper* itself, and its decision simply reiterates this Court's directive.

The State and *Amici* also distort the Sixth Circuit's holding by overemphasizing its statement that the trial court should "'consult' the plea agreement" as a "baseline" when fashioning a remedy. Pet. App. 24a-25a. The Sixth Circuit explained that this suggestion was based on the court's concern about the potential for the *Cooper* remedy to "become illusory *if* the state court chooses to merely reinstate [Ms.] Titlow's current sentence." *Id*. (emphasis added). Besides the fact that the Sixth Circuit was again quoting *Cooper*, it was doing so within a discussion of how the trial court might exercise its discretion over Ms. Titlow's sentence if she and the state court accepted the reoffered plea agreement. This consultation is appropriate because the state court may exercise its "discretion in all the circumstances of the case." *Cooper*, 132 S. Ct. at 1391. Consultation of a plea agreement by a state court in light of *Cooper* is hardly a novel suggestion, and is certainly a necessary step in the process of shaping any appropriate remedy.[21]

Finally, the Sixth Circuit's opinion likewise provides no basis for the *Amici* States' complaint that resentencing here would "unnecessarily infringe[] upon . . . competing interests" in appropriate convictions and sentences. Br. of Conn., et al. 11. In articulating Ms. Titlow's remedy, the Sixth Circuit did not disregard the State's competing interests. As this Court

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[21] Furthermore, these statements are dicta, and were not central to the Sixth Circuit's reasoning. They were "unnecessary to the judgment and . . . not binding." *S. Union Co.* v. *United States*, 132 S. Ct. 2344, 2352 n.5 (2012) (citing *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006)).

stated in *Cooper*, "a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant . . . ." 132 S. Ct. at 1388 (internal citation omitted) (quoting *United States* v. *Morrison*, 449 U.S. 361, 365 (1981)). A windfall does not await Ms. Titlow in the trial court. Rather, the Sixth Circuit directly contemplated that if the trial court alters her sentence, its remedy will "take[] into account any concerns that the State might have regarding the loss of Titlow's testimony against her aunt." Pet. App. 25a. This exactly comports with *Cooper*. 132 S. Ct. at 1388 ("Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" (quoting *Morrison*, 449 U.S. at 364)).[22]

D. The State's Interest In Determining The Appropriate Remedy For A Sixth Amendment Violation Is Minimal

If this Court were nonetheless inclined to revisit its recent holding in *Cooper* as to the remedial scope, the remedy question should be re-litigated in full. If anything, the *Cooper* remedy should be made clearer and more specific to ensure that habeas petitioners whose counsel have been found to be constitutionally ineffective are not left with no remedy whatsoever.

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[22] The State's complaint about the order in this case is curious for the additional reason that the Sixth Circuit's adherence to *Cooper* reflects a retrenchment from broader remedial orders. *See*, *e.g.*, *Lewandowski* v. *Makel*, 949 F.2d 884, 889 (6th Cir. 1991) (ordering specific performance of original plea bargain and sentence as the "only way to effectively repair the constitutional deprivation" suffered by withdrawal of plea on advice of constitutionally ineffective lawyer).

The State exaggerates its own interest in the proper remedy for Ms. Titlow's Sixth Amendment violation. Although Ms. Titlow can no longer provide the State with the agreed-to benefit of the plea bargain (specifically, testimony against her aunt, Billie Rogers), her Sixth Amendment rights are not contingent upon bartering with the State. The proper remedy for a Sixth Amendment violation should not look to wholly post hoc events, just as *Strickland*'s deficiency prong insists that we look to the attorney's conduct at the time the relevant decisions were made. Indeed, as this Court has stated, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379. In remedying Sixth Amendment violations, then, the focus is properly on the defendant whose rights were violated, not whatever benefit the State negotiated in a plea deal. Conditioning Ms. Titlow's constitutional relief on the relative value of her lost testimony would strongly conflict with the history of habeas corpus, and would mark a radical departure from the decisions of this Court, not the least of which is *Cooper* itself. Relief correcting constitutional deprivations is not subject to such a balancing test.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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