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 *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF RESPONDENT

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Question Presented

Whether a state court judgment denying defendant relief should be entitled to deference when the state court decision condones counsel's failure to conduct any investigation or render any legal advice—lapses that violate his fiduciary duties of competence, communication and loyalty, and which clearly demonstrate the effects of the conflict of interest created by the lawyer's acquisition of media rights.

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Interest of *Amicus Curiae* Ethics Bureau at Yale[1]

The Ethics Bureau at Yale—a group of thirteen law school students supervised by an experienced practicing lawyer/lecturer—provides professional responsibility advice to not-for-profit legal services providers, drafts amicus briefs in cases concerning professional responsibility, and assists defense counsel with ineffective assistance of counsel issues relating to professional responsibility matters.

The Ethics Bureau at Yale respectfully submits this brief as *amicus curiae* because of its abiding interest 1) in promoting full recognition of the rules of professional conduct in the federal courts as one critical measure of whether criminal defense counsel is effective; and 2) in ensuring that the Sixth Amendment right to the effective assistance of counsel protects every defendant's entitlement to competent, diligent and unconflicted representation at every critical stage of a criminal proceeding.

The failure to remediate lawyers' violations of these ethical standards not only damages the integrity of the trial at issue, but also undermines the fairness and legitimacy of the broader legal system.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and their counsel has made a monetary contribution to its preparation and submission.

Statement of Facts

In January 2001, Vonlee Titlow was arrested and charged with the first-degree premeditated murder of her uncle, Donald Rogers. That charge carried a mandatory life sentence without parole in the state of Michigan. Resp't's Br. 3.

The evidence against Ms. Titlow was overwhelming. Ms. Titlow's first lawyer, Richard Lustig, negotiated a favorable plea agreement for a 7-to-15-year sentence on Ms. Titlow's behalf. At a plea hearing in October of 2001, Ms. Titlow pled guilty, and the state trial court accepted the plea and scheduled a sentencing hearing. *Id.*

While Ms. Titlow was confined at a facility awaiting her sentencing hearing, however, she was approached by Sheriff's Deputy Eric Ott. Though Ms. Titlow never claimed innocence to him or anyone else, Mr. Ott convinced her that if she was innocent, she should hire another lawyer. Pierson Aff. 3a. Specifically, he referred her to his own lawyer, who in turn recommended she speak with Frederick Toca. *Id.* at 4a. Mr. Ott would later be suspended without pay for his interference in Ms. Titlow's case. J.A. 298.

Mr. Toca and his firm sought to represent Ms. Titlow in exchange for jewelry and the media rights to her case. *Titlow v. Burt*, 680 F.3d 577, 583 (6th Cir. 2012); Pierson Aff. 4a. Ms. Titlow agreed that Mr. Toca and his firm should "sell her story and/or do any and all interview, publicity, etc., related to this matter in order to help derive $100,000 [a

handwritten initialized notation says 80,000] which would serve as trial fee." Mr. Toca's improper acquisition of media rights would later be an aggravating factor contributing to his disbarment. J.A. 312.

Just days after replacing Mr. Lustig as Ms. Titlow's lawyer, Mr. Toca filed a motion to withdraw Ms. Titlow's guilty plea. 680 F.3d at 584. The evidence presented before the Michigan Court of Appeals, in the opinion of the Sixth Circuit, revealed that "Toca did not obtain Titlow's file, inspect the government's discovery materials, or speak with Lustig (Titlow's former counsel) about the case until January 10, 2002, approximately a month and a half *after* the plea-withdrawal hearing." *Id.* Lustig swore under oath that "Mr. Toca did not pick up the discovery materials from [Mr. Lustig's] office, nor discuss the facts of the case with [him] until January 10, 2002" although the "file was made available to him on or about November 29, 2001"—a statement that is corroborated by the Acknowledgement of Receipt signed by Mr. Toca. Lustig Aff. 6a-6.5a.

Before moving to withdraw Ms. Titlow's guilty plea, Mr. Toca did not ask for an extension so he would have time to review these files, despite complaining "he had been 'retained last week' and that there was 'a lot of material' he still needed to review prior to Titlow's trial." *Id.* Furthermore, there is no evidence that Mr. Toca ever discussed with Ms. Titlow the elements necessary for a conviction or the sentences she might face if she went to trial. 680 F.3d at 590.

After requesting that the court delay the trial, Mr. Toca moved to withdraw as counsel less than one month before the trial was set to start. He cited a breakdown in communication and "some other issues." As it turned out, those other issues were financial: the book deal for the case had fallen through, and Mr. Toca had taken on Ms. Titlow's case knowing that he could not seek appointment by the court if Ms. Titlow were unable to compensate him. Resp't's Br. 8. All in all, Mr. Toca stepped in only to withdraw Ms. Titlow's guilty plea, a step he took having conducted no research. After rebuking Mr. Toca, the court appointed another lawyer to represent Ms. Titlow.

The case proceeded to trial in March 2002. The jury convicted Ms. Titlow of second-degree murder, and the court sentenced her to 20 to 40 years in prison, 680 F.3d at 584, nearly three times the punishment she was offered under the plea agreement negotiated by her first lawyer. *Id.* at 591.

Ms. Titlow claimed that Mr. Toca had been ineffective in permitting her to withdraw her manslaughter plea. The Michigan Court of Appeals rejected her claim; the Michigan Supreme Court denied leave to appeal. App. to Pet. 120a. In federal habeas proceedings, the district court ruled that Ms. Titlow had failed to establish the deficient-performance prong of her ineffective-assistance claim. 680 F.3d at 577. The Sixth Circuit reversed, noting that the court below had not considered substantial evidence that Ms. Titlow would not have withdrawn her initial plea if not for her lawyer's "clearly deficient" performance. *Id.* at 591. The court

directed the State to reinstate the original plea agreement and ordered the trial court to fashion an appropriate sentence remedying the violation of Ms. Titlow's right to effective assistance. *Id.* at 592.

Summary of Argument

Operating under a demonstrably prejudicial non-waivable conflict of interest and without conducting any investigation, substitute counsel withdrew the client's guilty plea and then effectively abandoned the client. Under these circumstances, deferring to the Michigan Supreme Court's finding that Ms. Titlow's counsel was barely effective would transform the doctrine of deference into one of abject capitulation. Moreover, failing to set aside Ms. Titlow's conviction would undermine the standards for effective assistance of counsel in criminal cases involving substitution of counsel and would ignore the serious public policy principles underlying the absolute bar on accepting media rights as compensation for representation.

Argument

This Court is engaged in a quest to give meaning to the constitutional mandate that the accused receive effective assistance of counsel. In the view of *amicus*, effective assistance of counsel demands compliance with the applicable rules of professional conduct, which provide a critical touchstone for resolving the particular issues raised in this case.

The rules are not simply lawyer obligations promulgated by the American Law Institute or the

American Bar Association, as important and standard-setting as their efforts should be. These rules have been adopted by state and federal courts as minimum legal requirements for lawyer conduct. Their infringement can and should result in possible disbarment—as they were for respondent's counsel here—precisely because they reflect the common law fiduciary duties that are essential to the lawyer-client relationship and that are critical to the constitutionality of the outcome of any criminal proceeding.

For notwithstanding the fact that lawyers are viewed as the agents of their clients, the real relationship between lawyer and client is one of total client dependence: lawyers have all of the knowledge of both the law and the justice system, and clients look to lawyers to guide them through the complexity of a system whose power can be overwhelming. Thus, this Court has repeatedly recognized that lawyers are required to be competent, communicate with their clients, explain the alternatives, and provide clients with candid advice—in sum, to effectively represent the client at all critical stages.

Mr. Toca's representation of Ms. Titlow was remarkable for its extreme deficiency; it was misconduct writ large and in black and white. By endorsing the setting aside of Ms. Titlow's conviction, this Court has the opportunity to remedy a clear case of constitutionally deficient representation.

The significance of this case, however, extends far beyond the correction of injustice in a particular instance. By accepting media rights as compensation for criminal defense, Ms. Titlow's lawyer created a non-waivable conflict of interest that automatically rendered the entire representation deficient. To uphold Ms. Titlow's conviction would be to ignore the uncontested importance of the special rule barring such arrangements to the integrity of the criminal justice system. In contrast, treating the violation of a non-waivable conflict of interest as grounds for finding counsel's performance *per se* deficient would create a clear and easily applied rule that ensures that no criminal defendant is forced to permanently suffer the consequences of such misconduct. Prejudice in this case, however, need not be presumed; it is manifest.

Moreover, Petitioner's suggestion that successor counsel is entitled to rely exclusively upon predecessor counsel's representation in order to discharge his own duties of diligence and competence fundamentally misstates lawyers' ethical duties. If accepted, such a rule would irreparably undermine the provision of effective assistance of counsel in criminal cases involving substitution of counsel.

Petitioner trivializes a lawyer's legal duties by claiming that full obligations of competence and diligence do not govern the conduct of the lawyer whose client wishes to withdraw her plea or expresses the belief that she may be innocent. Endorsing this principle would leave countless clients effectively unrepresented, effectively abandoned.

I. Ms. Titlow's Lawyer Failed to Perform with Minimal Competence by Violating Basic Duties under the Rules of Professional Conduct

Two facts about Mr. Toca's representation of Ms. Titlow are undisputed: he undertook no investigation, and he offered Ms. Titlow no advice. He simply withdrew the plea that Ms. Titlow had submitted under the guidance of previous counsel. His decision to do so despite lacking any familiarity with the case and his subsequent failure to meaningfully represent Ms. Titlow attest to his failure to fulfill two independent and critical fiduciary duties: to perform a competent investigation and to communicate with his client.

A. Ms. Titlow's Lawyer Violated His Duty to Investigate

In order to provide a defendant with constitutionally effective assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how to best represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). This investigation must include "an independent examination of the relevant facts, circumstances, pleadings and laws." *Foster v. Dugger*, 823 F.2d 402, 405 n.9 (11th Cir. 1987). For example, a lawyer must obtain discovery of and evaluate the government's evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). As an obvious step towards fulfilling this obligation, substitute counsel must, with his client's informed

consent, obtain prior counsel's file and records of prior proceedings.

The Michigan Rules of Professional Conduct, which derive from the ABA Model Rules of Professional Conduct,[2] codify the importance of a complete and thorough investigation to providing competent and diligent representation. Under Rule 1.1, a lawyer may not "handle a legal matter which . . . the lawyer is not competent to handle; handle a legal matter without preparation adequate in the circumstances; or neglect a legal matter entrusted to the lawyer." Mich. Rules of Prof'l Conduct R. 1.1. The comments to the rule further explain: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners," as well as "adequate preparation." *Id.* cmt. 5; *see also* Mich. Rules of Prof'l Conduct R. 1.3 (describing the lawyer's duty to exercise "reasonable diligence").

As this Court recently noted, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). In its ethical guidance, the American Bar Association (ABA) puts the "common sense" obligation to investigate "in terms no one could misunderstand." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (referring to "defense counsel['s obligation

[2] The Model Rules form the basis of the rules of every jurisdiction, save California.

to] obtain information that the State has and will use against the defendant").

Where multiple lawyers are involved in a case, the constitutional and ethical obligation to investigate includes speaking to predecessor counsel and obtaining his file, with the client's consent.[3] *See Wharton v. Jones*, 282 S.E.2d 310 (1981) (finding a guilty plea involuntary where "the second lawyer did not have sufficient time to investigate the case" and "[t]he first public defender did not discuss the. . . case with the second one at any time"); *Cincinnati Bar Ass'n v. Emerson*, 909 N.E.2d 635 (Ohio 2009) (suspending a lawyer in part for "fail[ing] to obtain his client's file from a previous lawyer and . . . not review[ing] court records"); *In the Matter of Mekler*, 669 A.2d 655 (Del. 1995) (suspending a lawyer who delayed reading a client's file for five months). The ethical rules and case law go to great lengths to ensure that prior counsel diligently maintain his or her file and cooperate with successor counsel, so as

[3] There is no allegation here that Mr. Toca did not have Ms. Titlow's consent to speak to her former counsel or obtain former counsel's file.

not to prejudice the former client's defense.[4] But all of these admonitions are useless if successor counsel cannot be bothered to pick up the file.

The need for investigation is particularly acute in plea negotiations. Not only is plea bargaining "an essential component of the administration of justice," *Santobello v. New York*, 404 U.S. 257, 260 (1971), but "the decision whether to plead or to go to trial [is] 'probably the most important single decision in any criminal case,'" *Turner v. Tennessee*, 664 F. Supp. 1113, 1119 (M.D. Tenn. 1987), *aff'd*, 858 F.2d 1201 (6th Cir. 1988), *cert. granted*, *vacated sub nom. Tennessee v. Turner*, 4922 U.S. 902 (1989), *vacated*, 883 F.2d 38 (6th Cir. 1989), *and aff'd*, 940 F.2d 1000 (6th Cir. 1991) (quoting 1 Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, 2-143 (1967)). As this Court has noted, given the number of cases that end in plea bargains, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 132 S. Ct. at 1407 (internal citations omitted).

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[4] *See*, *e.g.*, Mich. Rules of Prof'l Conduct R. 1.16(d) ("Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled . . . ."); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 Hofstra L. Rev. 1181, 1187 (2003) ("Once [client] consent is obtained, . . . former counsel can proceed to share everything with his or her successor and in my view is required to do so. Full cooperation should be the watchword of the relationship.").

Here, there is no evidence that Ms. Titlow's second lawyer did *anything at all* to investigate her case, to be informed as to the applicable law, or to assist his client in assessing what amounted to an extremely favorable plea agreement before withdrawing the plea. All the evidence is to the contrary. As the Sixth Circuit observed, "Toca did not obtain Titlow's file, inspect the government's discovery materials, or speak with Lustig (Titlow's former counsel) about the case until January 10, 2002, approximately a month and a half *after* the plea-withdrawal hearing." 680 F.3d at 584. By failing to even attempt an investigation, Mr. Toca did not merely violate his most fundamental obligation as Ms. Titlow's lawyer: he set himself up to violate *all* of his obligations as her lawyer.

B. Having Conducted no Investigation, Titlow's Counsel Failed in His Duty to Offer Informed Opinion

In representing a client considering a plea or plea-withdrawal, a lawyer must evaluate pertinent legal criteria, weigh the advantages and disadvantages of each potential outcome, and understand and convey to the client all important sentencing consequences. In a proposed withdrawal of a guilty plea, this would include a full explanation to the client of the legal predicament the client faced; the risks of alternative courses of action; the benefits of leaving the plea agreement intact; the opportunities available to simply reopen plea negotiations; the legal requirements for entering a plea; and the unpredictability of the result of any trial. The lawyer must then offer his best

recommendations as to how the client should proceed, balancing the client's exclusive right to decide whether to plead with the reality that the lawyer, by virtue of education and experience, will have a more informed view than his client.

Lawyers, moreover, are required to provide objective advice to clients. All prevailing professional standards acknowledge this duty of counsel, particularly in the context of a guilty plea. Mich. Rules of Prof'l Conduct R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, with respect to a plea to be entered . . . .") (emphasis added). This advice must be an honest reflection of the lawyer's best judgment. *See* Mich. Rules of Prof'l Conduct R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *id*. cmt. 1 ("A client is entitled to straightforward advice expressing the lawyer's honest assessment."). The Michigan Rules of Professional Conduct emphasize that this duty thus requires lawyers to discuss facts or law that may not please the client. *See id*. cmt. 1 ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

Under this Court's jurisprudence, a lawyer's failure to render such advice constitutes deficient performance within the meaning of the Sixth Amendment. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("[C]ounsel *must*, after making an

independent examination of the facts, circumstances, pleadings and laws involved, offer his informed opinion as to what plea should be entered.") (emphasis added); *see also*, *e.g.*, *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973) ("The key words are 'effective assistance of counsel.' Much of the language of our recent cases in the area refers to whether the assistance was 'effective.' We must not ignore the equally important first requirement that appointed counsel actually and substantially *assist* his client in deciding whether to plead guilty.") (emphasis added); *United States v. Villar*, 416 F. Supp. 887, 889 (S.D.N.Y. 1976).

This duty to offer informed and competent advice is no different in the context of withdrawing a plea from the context of entering a plea. Just as counsel has a duty to advise a defendant pleading guilty of the available options and possible consequences, it is "equally essential that the attorney advise a defendant of possible consequences where . . . the defendant withdraws a negotiated plea and stipulated sentence in the minimum range and instead stands trial and faces the maximum sentence." *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981); *see People v. Lewandowski*, 436 N.W.2d 660 (1989) (same); *see also In re Alvernaz*, 2 Cal. 4th 924, 925 (1992). As explained by the Seventh Circuit:

> Both alternate decisions—to plead guilty or instead to proceed to trial—are products of the same attorney-client interaction and involve the same professional obligations of counsel.

> Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to a trier of fact.

Toro v. Fairman, 940 F.2d 1065, 1068 (7th Cir. 1991); *see Turner*, 664 F. Supp. at 1120-21 (noting that the decision whether to go to trial is "the most critical stage in the criminal process" and concluding that ineffective advice to reject a plea offer constitutes a Sixth Amendment deprivation). *Lyles v. State*, 382 N.E.2d 991, 998 (Ind. Ct. App. 1978) (finding ineffective assistance of counsel where defendant went to trial after counsel failed to communicate plea bargain offer).

Indeed, incompetent advice regarding the chances of success at trial can be more insidious than a total failure to inform the accused of the offer. This is because "a defendant ignorant of a plea offer nonetheless may have a perfectly well-informed assessment of his chances at trial," whereas a defendant who rejects a plea offer on the basis of unreasonable advice "not only [has] lost an opportunity to make a bargain, he also is embarking upon a trial with a fundamentally distorted view of his prospects." *Turner*, 664 F. Supp. at 1120 n.17 (citing *Beckham*, 639 F.2d at 267).

Because Ms. Titlow's lawyer breached his duty to investigate, he also necessarily abdicated his responsibility to offer Ms. Titlow "his informed

opinion as to what plea should be entered." *Von Moltke*, 332 U.S. at 721. The record contains "no details about Toca's conversations with Titlow," if any, before the plea withdrawal hearing. 680 F.3d at 583. To put a finer point on it, he had no informed opinion and did not even go through the motions of offering one.

II. Ms. Titlow's Counsel Was Burdened with a Non-Waivable Conflict of Interest

Mr. Toca's conduct so *grossly* deviates from the standard of care—given his failure to even obtain and review a box of files prior to advising his client to withdraw her guilty plea—that it would be virtually inexplicable if not for Mr. Toca's grave, obvious, and non-waivable conflict of interest: he acquired a financial interest in the media rights to Ms. Titlow's story, which, by the terms of the retainer agreement, he could only collect by convincing Ms. Titlow to proceed to trial.

As *amicus* has observed many times, conflicts of interest are different in degree and in kind from other failures of representation because they infect every aspect of the attorney-client relationship and inflict harms that may be difficult to objectively gauge. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (noting the seriousness of conflicts of interest, due in part to the difficulties inherent in assessing the impact of the conflict on the attorney's representation). But the noxious effects of the conflict in this case are readily apparent.

The law has long specifically recognized the evils inherent in and the conflicts thereby created by a defendant's assignment of literary or media rights to his or her lawyer prior to the conclusion of the representation.[5] Rule 1.8 of the Michigan Rules of Professional Conduct flatly prohibits such agreements prior to the conclusion of representation of a client. Mich. Rules of Prof'l Conduct R. 1.8; *see also* ABA Standards for Criminal Justice: Defense Function, Standard 4-3.4 (3d ed. 1993) ("[T]he ABA's model standards for criminal defense lawyers forbid any agreement 'with a client or a prospective client' by which a lawyer acquires 'an interest in literary or media rights' to an account based in substantial part on information relating to the representation."); Restatement (Third) of the Law Governing Lawyers § 36 (2000).

The rule's underlying policy is "obvious"[6]: such an agreement drives a wedge between the lawyer's own personal, financial interests and the interests of his client. Mich. Rules of Prof'l Conduct R. 1.8 cmt. 3; ABA/BNA Lawyers' Manual on Prof'l Conduct ("This inherently divided loyalty is the primary reason for

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[5] *See*, *e.g.*, *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (vacating twenty-five first degree murder convictions where attorney had entered into literary rights contract); *see also People v. Gacy*, 530 N.E.2d 1340, 1347 (Ill. 1988); *Corona*, 80 Cal. App. 3d at 721, 145 Cal. Rptr. at 915 (1978); *People v. Bonin*, 765 P.2d 460, 475 (Cal. 1989); *United States v. Hearst*, 638 F.2d 1190, 1193-94 (9th Cir. 1980); *Ray v. Rose*, 535 F.2d 966 (6th Cir. 1976).

[6] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering*, § 12.10 at 12-28 (3d ed. 2004 Supp.).

banning lawyers' acquisition of media or literary rights in accounts about their clients before the end of the representation." (citing Model Rules of Prof'l Conduct R. 1.8 cmt. 9 (2013); EC 5-24; Restatement (Third) of the Law Governing Lawyers § 36(3); *id.* cmt. d (2000))).

The story of a defendant who pleads guilty, let alone to a lesser offense, is boring and virtually worthless from a marketing perspective.[7] *See* Mich. Rules of Prof'l Conduct R. 1.8 cmt. 3 ("Measures suitable in the representation of the client may detract from the publication value of an account of the representation."); Hazard, Hodes and Jarvis, *supra* at 12-28 ("A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choices of tactics and by the recommendations he makes to the client (not to plead guilty to a lesser charge, for example).").

Ms. Titlow's lawyer's performance was a textbook example of why such agreements have been uniformly decried. Saddled with this conflict, Mr. Toca performed precisely as expected. He was interested in Ms. Titlow's case only should it proceed to trial, and he was determined to have her plea withdrawn using whatever ruse necessary. From the moment Mr. Toca signed the retainer agreement, he "was devoted to two materials with conflicting interests [and] he was forced to choose between his

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[7] Mr. Toca was not even entitled to the rights under the retainer agreement should the case not proceed to trial. The retainer agreement labels the rights explicitly as his "trial fee."

own pocketbook and the best interest of his client, the accused." *Corona*, 80 Cal. App. 3d at 720, 145 Cal. Rptr. at 915.

The lawyer's financial interest "is so likely to conflict with the lawyer's interest in procuring the best result for the client that the prohibition of Rule 1.8(c) is absolute . . . . Rule 1.8(c) does not allow for the possibility of waiver in any circumstances," D.C. Bar Legal Ethics Comm., Op. 334 (2006), and defiance of this rule is among the select group of "non-waivable" conflicts of interest that often results in suspension or disbarment. *See*, *e.g.*, *In re Kepple*, M.R. No. 12026 (1/23/96) (attorney suspended for one year in part for obtaining a proprietary interest in a client's case by conditioning representation of the client on an interest in literary rights); *Harrison v. Mississippi Bar*, 637 So. 2d 204 (Miss. 1994) (disbarment where attorney, *inter alia*, signed movie contract for his "life story" with section on ongoing representation of client).

Mr. Toca himself was disbarred in part for his flagrant and gross violation of this Rule.[8] Misconduct so egregious as to require measures to prevent the lawyer from inflicting harms on future clients also demands remedy for the affected client.

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[8] S*ee*, *e.g.*, *United States v. Soto-Lopez*, 475 F. App'x 144, 147 (9th Cir. 2012) ("When the serious doubts about De Olivas's professionalism and honesty occasioned by his contemporaneous conduct are combined with the facts of his representation of Soto-Lopez, the record supports Soto-Lopez's claim that De Olivas provided him ineffective assistance of counsel.").

III. Petitioner's Excuses for Mr. Toca's Misconduct Are Without Merit

Under the guidance of her counsel, Ms. Titlow pled guilty. Under the guidance of a new lawyer burdened by an egregious conflict of interest, Ms. Titlow then embarked on a course that began—and ended—with the withdrawal of her plea. The facts lead inexorably to the conclusion that Mr. Toca was ineffective, abdicating all responsibility to Ms. Titlow. The four excuses that Petitioner offers for this misconduct are not merely unavailing; the decision to dignify them could deny effective counsel to countless criminal defendants deciding whether or not to plead guilty—the most critical choice one can make in the course of a criminal proceeding.

A. The Lawyer Must Investigate even if the Client Claims Innocence

Petitioner argues that since Ms. Titlow retained new counsel after being told that she was "innocent" by the county guard, her subsequent lawyer had no independent obligation to address the wisdom of withdrawing the plea. This claim is wholly devoid of merit.

First, under this logic, defendants who at any point state a belief in their innocence endanger their right to have their lawyers conduct *any* investigation or offer informed advice as to the wisdom of submitting or withdrawing a plea.[9] The implications are profound, given that clients routinely protest

[9] Taken to its logical extreme, this would include individuals who entered a preliminary plea of not guilty to a charge.

their innocence to their lawyers during the course of representation, whether or not they actually believe or have grounds for believing that they are innocent. *People v. Collazo*, 11 Misc. 3d 1052(A) (N.Y. 2006); Robert Mostettler, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 Santa Clara L. Rev. 1, 37, 41 (2010); Margaret Raymond, *The Problem with Innocence*, 49 Clev. St. L. Rev. 449 (2001); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1310 (1975) ("Most defendants do not understand our system of justice and cannot be made to understand. They are, in the main, too optimistic: they believe that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted."). Every day, after claiming their innocence in the face of overwhelming evidence to the contrary, criminal defendants are found guilty.

Second, innocence is a difficult topic to address, both as a matter of fact and as a matter of law. Clients may consider themselves innocent because they view their role in the matter as not giving rise to any criminal responsibility;[10] because they believe there was legal justification for their conduct;[11] because they do not understand the

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[10] *Criminal Justice Prosecution Function and Defense Function Standards* 4-4.1 cmt. (noting that "an essential function of the advocate is to make a detached professional appraisal independent of the client's belief that he or she is *or is not* guilty").

[11] *People v. Wilkins*, 141 N.W.2d 664 (1966).

elements of the crime;[12] because they underestimate the strength of the prosecution's case;[13] or because they are simply confused, scared to admit criminal responsibility, worried that otherwise their lawyers will not fight vigorously on their behalf, or have convinced themselves of the truth of their version of the facts when all reasonable views are to the contrary.[14] Michigan courts have recognized that a client's assertion *during the plea colloquy itself* that he "still think[s] [he's] innocent, though" does not necessarily constitute "a protestation of innocence or a 'qualification' of the plea of guilty . . . which would

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[12] *See*, *e.g.*, *State v. Barnett*, No. 0311017379, 2006 WL 3308211 (Del. Super. 2012) (explaining that the defendant "had difficulty with the concept that he committed a burglary because they just opened the door and walked in as opposed to breaking in or forcing their way in," despite being "an intelligent person who had never hesitated to question what was going on"). Particularly in cases of accomplice liability, it is "difficult for defendants to apply the 'liability conduct of another' to themselves." *Barnett*, 2006 WL 3308211 at 5. *See*, *e.g.*, *State v. Woods*, A06-1483, 2007 WL 2472331 (Minn. Ct. App. 2007) (quoting *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007) (attributing the defendant's assertion of innocence to a misunderstanding of accomplice liability)).

[13] *See*, *e.g.*, *United States v. Osorio*, 7 F.3d 236 (6th Cir. 1993) (per curiam) (rejecting the defendant's attempt to withdraw his plea based on the observation that he "was under the mistaken notion that only direct evidence of guilt could have been introduced at trial").

[14] Smith, *supra*, at 491 ("[U]ncovering a client's autonomous wishes is more complicated than simply asking the client what he or she wants to do. *The words "I ain't takin' no plea" can mean many different things: I'm scared about what is happening to me; I don't like any of the choices available to me; I don't trust you; I don't trust anyone."*).

require the rejection of the plea." *See People v. Wilkins*, 141 N.W.2d 664, 667 (1966).

As a result, the lawyer must assess the implications of a client's claim of innocence. In the context of plea negotiations, this involves conducting a thorough investigation and offering the client the lawyer's best judgment as to whether the client should accept a guilty plea or confront the likely result of the client's continuing to assert the client's innocence.

It is universally recognized that lawyers' professional responsibilities exist to the same extent regardless of their clients' statements as to their guilt.[15] *See Criminal Justice Prosecution Function and Defense Function Standards* 4-4.1 cmt. ("The lawyer's duty to investigate is not discharged by the accused's admission of guilt to the lawyer or by the accused's stated desire to enter a guilty plea."); *see also Rompilla*, 545 U.S. at 387 (2005); *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.").

To rule that an untutored client's claim of innocence ends the lawyer's responsibilities to investigate and advise would be to defeat the claim

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[15] *See*, *e.g.*, *Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation).

to ineffective assistance of counsel in any case in which a client announces he or she is "innocent." This would run contrary to the principles embraced by the courts. For example, in *Turner v. Tennessee*, the Sixth Circuit affirmed the decision of a district court that found that a client's profession of innocence does not excuse the failure to offer that client advice as to whether to accept or reject a plea bargain. *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir. 1988), *cert. granted*, *vacated sub nom. Tennessee v. Turner*, 492 U.S. 902 (1989). In that case, the defendant insisted upon his innocence both publicly and privately, yet the court held that the defense lawyer had an obligation to analyze the evidence with his client and to confront him with that evidence, if necessary, to ensure he understood the import of his decision to reject the plea offer. *Turner*, 664 F. Supp. at 1120-22.

Any other standard would not only hinder open and honest communication between lawyer and client (rendering effective advocacy impossible), but also further encourage lawyers to avoid the difficult but necessary task of providing honest advice to their clients. Competent, diligent lawyers do not "abdicat[e] [their] professional responsibility . . . [by] tak[ing] a client's ill-considered, irrational, or immature 'no' for an answer" or "simply acquiesce[ing] to their foolish wishes" out of "laziness, for being afraid to really engage with a client, or worse." Smith, *supra*, at 491; *see also* Alschuler, *supra*, at 1309 ("An attorney has an obligation to give his client the benefit of his experience, to offer his advice on the most important question that the client faces, and to insure that the

client understands as fully as possible the likely consequences of his choice.")

Further, even if it were the case that a lawyer has no duty to investigate or to advise his or her client of the desirability of a plea where his client *credibly* and *consistently* maintains his or her innocence (a position *amicus* strongly rejects), this was not the case here. The Petitioner claims that Ms. Titlow asserted her "innocence" only after speaking to a jail house guard who advised her not to plead guilty. At no point did Ms. Titlow offer a factual or legal basis for her assertion.[16] Recognizing how susceptible defendants are to such misadvice,[17] courts have found similarly induced "assertions of innocence" to be not only wholly devoid of credibility, but also ill-advised bases for the withdrawal of a guilty plea.[18] *See Osorio*, 7 F.3d at 2 (rejecting the defendant's newfound claim of innocence as a basis

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[16] In fact, the Petitioner does not even endeavor to distinguish between "factual innocence" and "legal innocence." It is unclear which of these forms applied to Ms. Titlow and equally ambiguous which type of "innocence claim" would absolve counsel of any duty to investigate or render advice other than to proceed to trial.

[17] One court detailed how difficult it is for even factually-guilty clients to plead guilty: "First of all, during a plea, a defendant must discard the security and mighty presumption of innocence. Secondarily, the defendant admits what has typically been steadfastly denied. And, oftentimes, the admission is exchanged for an agreement to receive a considerable period of incarceration." *Collazo*, 11 Misc. 3d at 5.

[18] *Id.* ("Clearly before he had been coached by 'jail house lawyers,' he had weighed the merits of a plea against the perils of a trial and had selected the former." (footnote omitted)).

for withdrawing his plea where a "'jailhouse lawyer' asserted that he had reviewed the government's evidence against the defendant and the defendant was innocent"); *Barnett*, 2006 WL 3308211 at 2 (noting that the defendant "has not provided any basis to now assert his innocence," despite trying to do so after "consult[ing] directly with a 'jail house lawyer'" who advised him to withdraw his plea).

Finally, it cannot be said that Ms. Titlow was adamant about not pleading guilty and would have withdrawn her plea irrespective of her lawyer's constitutionally deficient advice. This would suggest that Ms. Titlow refused to cede in the face of her lawyer's contrary advice. Because there is no evidence that her lawyer gave her *any* advice about the benefits of pleading guilty, it is logically impossible to make this claim. Further, the record offers no mention during the plea hearing itself of any assertion of innocence by "either Titlow or Toca." 680 F.3d at 583. What the record does show are conversations between the prosecution and Mr. Toca concerning a dispute over the proper sentencing range, and a plea hearing in which that disputed range was Mr. Toca's stated reason for withdrawal.

The eleventh-hour maneuvering of Ms. Titlow's lawyer to get the plea offer *modified* rather than *withdrawn* alone is a glaring indication that he believed that Titlow would not have been deaf to accepting the offer from the government under any circumstances. *See*, *e.g.*, *Alvernaz v. Ratelle*, 831 F. Supp. 790 (S.D. Cal. 1993) ("Had Petitioner been adverse to the idea of a plea bargain, the second settlement offer would not have taken place. The

Sixth Circuit has held that a plea counter-offer constitutes sufficient 'objective' evidence to corroborate the type of ineffective assistance claim at issue.").

B. The Client Has the Authority to Decide to Plead Guilty, but the Lawyer Has the Duty to Advise the Client in Making this Decision.

The Petitioner's second attempt to excuse Mr. Toca's ineffectiveness ironically relies on a misreading of the rules of professional conduct. Because Rule 1.2 vests the ultimate authority to choose whether to plead guilty with the client, Mich. Rules of Prof'l Conduct R. 1.2(a), the Petitioner asserts that the lawyer is somehow relieved of his duties to investigate and to advise the client as the client makes this decision. Nothing could be farther from the truth.

To suggest that the client's final decision-making authority somehow relieves her lawyer of his responsibility to advise her in making this decision renders this Court's recognition of the need for effective assistance of counsel in connection with guilty pleas a nullity. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that lawyers must advise their clients if their pleas carry the risk of deportation); *Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.").

Moreover, this argument wholly misconstrues the text, clear intent, and spirit of the Michigan Rules of Professional Conduct. Although Michigan Rule 1.2 gives clients power over decision-making, "counsel *may and must* give the client the benefit of his professional advice on this crucial decision." 1 Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, 2-143 (1967) (emphasis added). As the courts have repeatedly recognized, the client's decision-making can only take place after she has been advised by a well-informed lawyer who has thoroughly investigated the case both factually and legally and provided the client with his best advice. *See Lewandowski v. Makel*, 754 F. Supp. 1142, 1148 (W.D. Mich. 1990); *People v. Pollard*, 282 Cal. Rptr. 588, 594 (Cal. App. 1991) (noting that when counsel fails to "advise or has misstated some aspect of the law important to the intelligent evaluation of the [plea] offer, deficient representation has been demonstrated"); *Pennsylvania v. Napper*, 385 A.2d 521, 524 (P.A. 1978) (stating that counsel's failure to make clear the risks, hazards, or prospects of the case constitutes ineffective assistance).

Under prevailing professional norms, "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain." *People v. Maguire*, 67 Cal. App. 4th 1022, 1028 (1998). Both the Model Rules of Professional Conduct and the constitutional guarantee of effective assistance "embod[y] a realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty."

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). Thus, it is a matter of common sense that "[n]o diligent, client-centered lawyer would blithely accept a client's repudiation of an excellent plea offer without intense engagement." Abbe Smith, *The Lawyer's Conscience and the Limits of Persuasion*, 36 Hofstra L. Rev. 479 (2007).

This Court's prior jurisprudence and the ethical rules demand that when a defendant is considering a guilty plea, his lawyer must analyze his case's strengths and weaknesses, consider those details in the context of his knowledge and experience, provide his client with his unvarnished evaluation of the case, and *only then* rely on his client's decision. By suggesting otherwise, Petitioner's argument stands the dynamics of the lawyer-client relationship on its head.

C. Predecessor Lawyer did not Absolve Substitute Lawyer of Ethical Responsibility

The quality of predecessor counsel's performance is irrelevant to establishing substitute counsel's deficient performance. Each lawyer has an "*independent* duty to investigate and prepare," *Sanders*, 21 F.3d at 1457 (emphasis added), which "includes at a minimum an *independent* examination of the relevant facts, circumstances, pleadings and laws," *Foster*, 823 F.2d at 405 n.9 (emphasis added). Because "[e]ach attorney has an independent duty to represent the client," "when an attorney takes over a case *the rule is that counsel [is] not in fact . . . allowed to rest on the laurels of prior counsel*." *Colvin*

v. Warden, State Prison, No. CV094002812, 2012 WL 4465845 (Superior Ct. 2012) (emphasis added). Of course, here, it cannot even be said that Ms. Titlow's second lawyer allowed himself to "rest on the laurels of prior counsel," since in addition to failing to undertake his own investigation, Mr. Toca did not even bother to pick up the file detailing the investigation undertaken by his predecessor.

Whether one lawyer provided accurate or sufficient advice does not bear on another lawyer's failure to consequently render accurate or sufficient advice. For example, in *United States v. Soto-Lopez*, the Ninth Circuit recently rejected a similar argument that the petitioner "had the tools he needed to make an intelligent decision about rejecting the plea deal" because prior to receiving the deficient advice from a second lawyer, he "was properly advised by the Federal Defenders." 475 F. App'x at 145 and n.1. The court explained that the petitioner's "ineffective assistance claim center[ed] on whether [the second lawyer's] 'representation fell below an objective standard of reasonableness.'" *Id.* at n.1. "The Federal Defenders' performance [was] irrelevant to this inquiry, especially because during the time he represented Soto-Lopez, [the second lawyer] advised him that the Federal Defenders had provided the wrong advice." *Id.*

The rule reflects the simple fact that the ethical failure of one lawyer can undo the competent efforts of another. Any informed decision Ms. Titlow may have been able to make based on Lustig's representation was vitiated by the unethical and illegal actions of Mr. Toca when he interfered with

the established relationship between Ms. Titlow and her lawyer and told Ms. Titlow that the prior advice she had received had been inadequate. This conduct violated Rule 7.3 of the Michigan Rules of Professional Conduct, which prohibits a lawyer from soliciting a client, either in-person or over the telephone, for pecuniary gain. Mich. Rules of Prof'l Conduct R. 7.3(a); *see also Nostrame v. Santiago*, 61 A.3d 893, 903 (N.J. 2013) (describing the lawyer's "ethical obligation not to interfere with an existing or ongoing attorney-client relationship.").

In forbidding such solicitation, Rule 7.3 recognizes that "trained advocate[s]" can exert undue influence on clients, who may not only be especially vulnerable but who "may find it difficult to evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately." Mich. Rules of Prof'l Conduct R. 7.3 cmt. 1. Such solicitation is particularly egregious here given that Mr. Toca preyed upon a criminal defendant, one who was inherently "more vulnerable to suggestion or promises of performance than an ordinary person." Ohio Board of Comm'rs on Grievances and Discipline, Adv. Op. 90-21, 1990 WL 640516 (1990). To rule otherwise would be to leave all plea bargaining defendants—in other words, most defendants—at the mercy of unethical lawyers prepared to swoop in on sensational cases.

Finally, even if a lawyer could discharge his ethical obligations in some instances by relying on the assumption that a prior lawyer had imparted

adequate and accurate information, here the first lawyer offered advice as to a different issue: whether to *plead* guilty. Under prevailing professional standards, that advice cannot be relied upon to satisfy the lawyer's ethical obligation to fully and completely advise his client about the risks and consequences of *withdrawing* from a plea agreement, which is a separate decision with very different implications from the decision to enter a plea in the first instance. To focus on the advice given by Ms. Titlow's first lawyer actually reinforces the point that he was prejudiced by the erroneous advice that he was subsequently given at the plea withdrawal stage. *See Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991).

D. Time Constraints did not Prevent Ms. Titlow's Lawyer from Investigating or Providing Counseling

The State further claims that Mr. Toca did the best he could under the circumstances given the lack of time to perform competently, thereby ignoring the fact that it was Mr. Toca who intervened in an existing lawyer-client relationship and convinced Ms. Titlow to withdraw her plea, in violation of Rule 7.3. This contention as well fails on multiple levels.

First, Ms. Titlow's lawyer should never have agreed to undertake this representation if he lacked the time to adequately advise his client as to the merits of withdrawing her plea. While a lawyer is entitled at the outset of a representation to define the representation's scope, the lawyer may not

unreasonably limit that scope so as to eliminate the lawyer's underlying legal and ethical duties. Mich. Rules of Prof'l Conduct R. 1.2 and cmt. 5. Limitations are inherently unreasonable "if the limitation constitutes a breach of the duty of competence, or any other ethical duty," *In re Seare*, 2013 WL 2321664 at 21 (Bankr. D. Nev. 2013).

A lawyer cannot blindly accept a client's assertion that she has independently ascertained that it is in her best interest to withdraw a plea any more than he can blindly accept a client's assertion that it is in her best interests to file for bankruptcy.[19] The State misstates the power of a lawyer to limit the scope of a representation when it suggests that the competent advice of Ms. Titlow's former counsel enabled Mr. Toca to represent Ms. Titlow for the limited purpose of the plea withdrawal hearing despite Mr. Toca's failure to conduct an adequate investigation.

Second, *any* restriction on the scope of representation, *no matter how reasonable*, must be accompanied by "consent[] after consultation," which was clearly lacking here. *See* Mich. Rules of Prof'l Conduct R. 1.2(b); *see also* Model Rules of Prof'l Conduct R. 1.0(e) (defining informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated

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g[19] *See*, *e.g.*, *In re Seare*, *supra*, at 18-19 (explaining that a lawyer unreasonably limited the scope of the representation by "improperly plac[ing] the burden on the Debtors to make [a] legal conclusion" as to whether it was in their interests to file for bankruptcy and noting that a client's "pre-consultation expectations may be unreasonable or unachievable").

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"). Mr. Toca's retainer letter did not inform Ms. Titlow that he intended to limit his duties in any way; that if his client accepted his uninformed advice that she would be proceeding at her peril; or that Mr. Toca's dedication to the client's cause was contingent on his obtaining a book deal.

Third, the common-sense expectation is that a lawyer in need of more time to competently represent his client will request more time. *United States v. Osorio*, 929 F.2d 753, 758 (1st Cir. 1991) ("Generally, we have viewed the failure to ask for a continuance as an indication that defense counsel was himself satisfied he had sufficient opportunity to use the evidence advantageously."). Courts have rightly considered the failure to request a continuance in assessing the validity of claims of insufficient time. For example, defense counsel's failure to request a continuance for purposes of examining newly disclosed material vitiates a later Brady claim. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Aviles-Colon*, 536 F.3d 1, 26 (1st Cir. 2008) (noting that defense counsel must typically request a continuance to preserve a claim of prejudice by delayed disclosure of evidence); *United States v. Andrews*, 532 F.3d 900, 907 (D.C. Cir. 2008) (rejecting defense counsel's claim that it lacked time to review evidence submitted late by the government, based in part on the fact that defense counsel had squandered two opportunities to request a continuance).

Finally, judging strictly from Mr. Toca's performance within the short time between his substitution and the hearing on withdrawal, he failed to make any good-faith efforts to attempt an investigation, since in even the time allotted he could have learned an enormous amount. This undermines any claim that time constraints explain, much less excuse, his failure to counsel his client. Mr. Toca's decision to do nothing in the time available only confirms his complete disinterest in his client's cause. Just as greed compelled Mr. Toca to intervene in the case, greed compelled him to abandon it. As soon as it became clear that there were no media rights to be had, Mr. Toca lost all desire to even pretend to serve as Ms. Titlow's advocate.

Conclusion

Where, as here, a lawyer conducts no investigation, possesses insufficient information to render a competent legal opinion, and labors under a crippling conflict of interest of his own design, the client's Sixth Amendment rights have been violated, especially when the representation offered to the client serves only to eviscerate the competent representation of previous counsel. In providing legal advice and services to Ms. Titlow during the withdrawal of her plea, Mr. Toca was not entitled to rely on the efforts of Ms. Titlow's former counsel or Ms. Titlow's claim to innocence to excuse his own gross incompetence. To hold that he was would be to recast the right to effective assistance of counsel *at all critical stages* of the criminal proceeding as the right to effective assistance of counsel at only *certain*

critical stages of a proceeding. *Amicus* encourages the Court to take the opportunity this case presents to reaffirm the full extent of the constitutional obligations of competence, communication, diligence and loyalty that all criminal defense lawyers—indeed, all lawyers—owe their clients.

Respectfully submitted,

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