No. 10-209

IN THE

Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

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

BRIEF OF RESPONDENT ANTHONY COOPER

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QUESTIONS PRESENTED

1. Is a defendant denied his Sixth Amendment right to the effective assistance of counsel where counsel's affirmative misadvice causes the defendant to decline a favorable plea offer, and the defendant is subsequently convicted at trial and sentenced to a substantially longer term of imprisonment?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTRODUCTION

The parties in this case agree that respondent Anthony Cooper received advice from his counsel that was objectively unreasonable. That advice was simple and breathtakingly wrong; namely, that Mr. Cooper could not be convicted of assault with intent to murder because the gunshots he fired struck the fleeing victim only below the waist.

The results of counsel's affirmative misadvice are equally clear on the record. Mr. Cooper relied on the advice, rejected a favorable plea offer he otherwise would have accepted, stood trial, and suffered the very consequence his counsel had assured him was impossible: a conviction for assault with intent to murder. The minimum sentence he actually received was demonstrably greater—by more than 8 and one third years—than the minimum sentence he would have received under the proffered plea. Mr. Cooper thus amply demonstrated, as both the Eastern District of Michigan and the Sixth Circuit properly held, that he was prejudiced by his counsel's affirmative misadvice. The Michigan Court of Appeals' ruling to the contrary was an unreasonable application of this Court's established Sixth Amendment precedents holding that plea bargaining is a critical stage in criminal proceedings and that counsel's bad advice at that stage warrants relief.

That Mr. Cooper had a trial is no cure for his lawyer's bad advice. There should never have been a trial. Had Mr. Cooper received competent advice, he would have pled guilty and received a sentence consistent with the prosecution's plea offer.

Habeas courts have long had broad authority to fashion remedies in cases such as this one. Here, the

district court properly exercised that authority to correct the constitutional error that occurred at the plea stage. Mr. Cooper seeks no windfall or extraordinary benefit. Instead, he seeks to make the *informed* choice that his counsel's affirmative misadvice had taken from him and to accept the same deal that the State had previously and openly offered. Cases involving similar, but less stark, circumstances have resulted in similar remedies. Such a remedy comports with the traditional authority of habeas courts to tailor a proper right for such a grievous constitutional wrong.

STATEMENT OF THE CASE

Incident

Kali Mundy, anxiously awaiting the arrival of a friend, approached a vehicle as it arrived, thinking her friend was inside. It was Mr. Cooper, however, who exited the car. He walked toward her, pulled out a gun and started shooting at her, chasing her and firing as she ran away. Pet. App. 25a-26a. Ms. Mundy was twice hit from behind with bullets that struck her below the waist, and was hospitalized for potentially fatal wounds. Pet. App. 27a.

Mr. Cooper was arrested and charged with assault with intent to murder (AWIM), felon in possession of a firearm, felony firearm, and possession of marijuana. AWIM was the most serious offense, carrying a possible life sentence.[1]

Plea Negotiations

Prior to trial, Mr. Cooper sent the trial court two letters, each indicating his desire to plead guilty. Pet. App. 31a.

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[1] Mich. Comp. Laws § 750.83.

The State's plea offer at the final pretrial conference was for Mr. Cooper to plead guilty to the AWIM and felony firearm charges,[2] with dismissal of the two other charges and the sentencing enhancement.[3] The State offered a minimum sentence range[4] of 51 to 85 months,[5] even though the guidelines called for a minimum sentence range of 81 to 135 months. Counsel rejected the offer because he felt the prosecution could not prove AWIM at trial:

> [A]fter [] the medical report, Your Honor, I believe that the Prosecution does not have the evidence to try to [sic] this case … [the prosecutor at the pretrial conference] is not trying the case, I would like to discuss this matter with the attorney who has will [sic] make the case for the Prosecution. I think he would be a little more reasonable about making a more reasonable offer so that we won't have a trial. Pet. App. 49a.

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[2] A conviction for felony firearm mandates a two year sentence to be served consecutively to the sentence for the felony to which it attaches. *See* Mich. Comp. Laws § 750.227b.

[3] All plea negotiations involved the same terms with regard to the charges and sentencing enhancement. Thus only the AWIM charge will be referenced as that was the controlling charge for plea bargaining and appellate purposes.

[4] Michigan uses an indeterminate sentencing system. Michigan's sentencing guidelines provide ranges that encompass the options available to a sentencing judge in determining the court-imposed minimum sentence. The maximum sentence is set by statute, except where, as here, the statutory maximum is "imprisonment for life or any number of years." Mich. Comp. Laws § 750.83.

[5] The sentencing guidelines range applies only to the AWIM charge.

In response, the prosecutor at the hearing noted that there "will be no offer on trial date because that's policy. I withdraw this offer." Pet. App. 50a. At the conclusion of the hearing, counsel stated that, "I've talked to Mr. Cooper about what it is and what the offer was. I talked to him in the Wayne County Jail yesterday. We're just rejecting the offer." Pet. App. 51a.

Prior to jury selection, a different prosecutor extended yet another plea offer on the AWIM count with minimum sentencing guidelines, per her calculation, of 126 to 210 months. Counsel refused that plea offer as well. Pet. App. 29a.

The jury convicted Mr. Cooper as charged. Mr. Cooper is serving a 185 to 360[6] month term of imprisonment for the AWIM conviction.[7]

Post-Conviction Hearing

Mr. Cooper appealed by right and trial counsel testified at the post-conviction hearing.[8] He acknowledged that Mr. Cooper expressed interest in resolving the case with a plea. With respect to rejecting the plea offer to AWIM with an agreed upon minimum sentencing range of 51-85 months, counsel felt that he could receive "a more reasonable offer" later in the process from the prosecutor who would be trying the case. In spite of his expressed desire to

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[6] Mr. Cooper's sentence was subject to enhancement as a second offender. Mich. Comp. Laws § 769.11

[7] Mr. Cooper's sentencing points placed him in the E-IV grid, which resulted in a range for the minimum sentence of 135-281 months. Resp't App. 6a.

[8] Michigan has a unified appellate system. As part of the direct appeal appellate counsel may file a motion in the trial court for a new trial or other relief. *See* Mich. Ct. R. 7.208(B)

obtain a more favorable plea agreement, counsel knew from experience that the offer at trial generally would not improve over a pretrial offer. Pet. App. 31a. However, after his review of the medical records, counsel did not feel the AWIM charge was colorable. Pet. App. 31a.

Despite his belief that the record evidence was legally insufficient to support the AWIM charge, counsel failed to file a motion to quash the bindover on this offense. Such a motion would have challenged the sufficiency of the evidence to support trial on the offense. See Pet. App. 3a-4a.

Mr. Cooper corroborated counsel's account of their plea conversations. Just as he expressed in two letters to the court, Mr. Cooper testified that he intended to plead guilty because he shot Ms. Mundy. Mr. Cooper rejected the offer of a minimum sentence in the range of 51 to 85 months based on the advice of counsel: "My lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist." Pet. App. 31a. Instead, counsel informed Mr. Cooper that he could get a plea for great bodily harm[9] with a guidelines range on the minimum sentence of 18 to 84 months. *Id*.

Prior to trial, counsel never discussed how to defend the case. As Mr. Cooper testified, "We never really got a chance to discuss a strategy." "[I] never knew I was going to trial until the trial started." Resp't App. 19a, 24a.

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[9] Assault with Intent to Commit Great Bodily Harm less than Murder (GBH) has a ten-year statutory maximum penalty compared to AWIM's maximum penalty of life or any term of years.

Counsel never informed Mr. Cooper that a jury might find him guilty of AWIM, and that he could face two to three times the 51 to 85 months offered by the prosecuting attorney. Rather, "[h]e told me that the prosecution couldn't prove his case because the person was shot below the waist and that's not attempted murder. It was [great-bodily] harm and that he was going to get me a plea bargain." Pet. App. 31a (alterations in original). Mr. Cooper would have accepted the 51 to 85 month offer if counsel had explained that a jury could find him guilty of AWIM. Pet. App. 15a-16a.

Trial Court's Ruling

The trial court found that counsel informed Mr. Cooper that a conviction for assault with intent to commit murder "could not" occur given the medical evidence. The trial court concluded that Mr. Cooper and his counsel "were convinced that [conviction of assault with intent to murder] couldn't occur" Pet. App. 15a (alterations in original). The trial court nonetheless ruled against Mr. Cooper stating: "Mr. Cooper made his own choices." Pet. App. 7a.

Michigan Appellate Court Rulings

The Michigan Court of Appeals affirmed. It too rested its decision[10] exclusively on the fact that Mr. Cooper chose not to plead guilty, without regard to whether he made that choice based on his lawyer's erroneous advice. Pet. App. 45a. The court rejected Mr. Cooper's ineffective assistance claim with the statement that "the record shows that defendant

[10] Mr. Cooper presented three issues on direct appeal, all of which involved ineffective assistance of counsel claims. The issues of counsel's failures at trial were not brought in federal court.

knowingly and intelligently rejected two plea offers and chose to go to trial." Pet. App. 45a. The Michigan Supreme Court denied leave to appeal. Pet. App. 43a.

Federal District Court

Mr. Cooper timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, arguing that the decision of the Michigan Court of Appeals "unreasonably applied clearly established federal precedent" in rejecting his claim of ineffective assistance of counsel by improperly focusing on "the legitimacy of [Mr. Cooper]'s plea decision, [rather than] the validity of counsel's underlying advice." Petition for Writ of Habeas Corpus 18.

The district court granted relief, holding "the Michigan Court of Appeals decision unreasonably applied the standards set forth" by this Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), when it relied on Mr. Cooper's decision to reject the plea, without taking into account that the decision was based on counsel's objectively unreasonable advice. Pet. App. 38a. The court found that counsel had provided constitutionally deficient advice by "rely[ing] on a misapprehension of the law and facts in advising [Mr. Cooper] to reject the plea." Pet. App. 41a.

The court conditionally granted the writ, and found "that the most appropriate remedy is to grant a writ of habeas corpus ordering specific performance of Petitioner's original plea agreement, for a minimum sentence in the range of fifty-one to eighty five months, the plea Petitioner would have accepted if counsel had been competent." Pet. App. 41a.

Sixth Circuit

The Sixth Circuit unanimously affirmed the district court's conditional grant of relief. Pet. App. 1a. It agreed that counsel "informed [Mr. Cooper] of an incorrect legal rule . . . in advising [Mr. Cooper] not to accept the state's plea offer," and that "such erroneous advice . . . is obviously deficient performance." Pet. App. 14a. It further agreed that counsel's erroneous advice prejudiced Mr. Cooper, who "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel." Pet. App. 19a.

Accordingly, the Sixth Circuit found that the Michigan Court of Appeals had unreasonably applied this Court's precedent. It explained that the Michigan Court of Appeals had "failed to appreciate the nature of [Mr. Cooper]'s claim. Rather than addressing [Mr. Cooper]'s argument that he received legally erroneous advice from his counsel, the [Michigan] court of appeals rejected entirely different—and considerably weaker—claims of ineffective assistance of counsel [at trial]." Pet. App. 10a. As a consequence, the court of appeals held that "[e]ven full deference under [the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C § 2254 (2011) (AEDPA)] cannot salvage the state court's decision." Pet. App. 11a.

The court of appeals also affirmed the district court's choice of remedy, holding that it was within the trial court's broad discretion in forming a habeas remedy. Pet. App. 22a. The court of appeals also rejected the State's argument that the district court's choice of remedy was inappropriate under AEDPA, holding that "[t]he absence of clearly established law

by the Supreme Court is not relevant when fashioning a habeas remedy." Pet. App. 20a.

SUMMARY OF ARGUMENT

Criminal defendants are entitled to effective assistance of counsel during all critical stages of a criminal prosecution, including plea negotiations. *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480-81 (2010). While the protections embodied in the Sixth Amendment undoubtedly guarantee a fair trial, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). To conclude otherwise would contravene the central principles of this Court's long-established Sixth Amendment jurisprudence.

Where counsel offers affirmative misadvice regarding the applicable law during plea negotiations, his performance is objectively unreasonable. *Padilla*, 130 S. Ct. at 1483. Petitioner concedes that counsel's performance is constitutionally deficient in this case.

In order to make out a cognizable Sixth Amendment claim, a defendant must also show that he was prejudiced by his counsel's defective performance. A defendant satisfies the prejudice requirement by showing a "reasonable probability" that but for his counsel's constitutionally defective advice, the outcome of the relevant proceeding would have been different. *Strickland*, 466 U.S. at 694; *Hill*, 474 U.S. at 59.

Here, Mr. Cooper's counsel provided affirmative misadvice with regard to a specific plea offer, depriving Mr. Cooper of his right to intelligently consider an offered plea deal. On counsel's advice, he declined this favorable plea offer, and proceeded to

trial, where he was convicted and sentenced to a much more severe term of imprisonment. Mr. Cooper has demonstrated prejudice under *Strickland* because he has shown more than a reasonable probability that but for his counsel's gross errors, he would have accepted the offered plea bargain, entered a guilty plea before the court, and been sentenced pursuant to the negotiated plea deal.

Where, as here, counsel provides faulty advice that denies a defendant the right to knowingly consider an offered plea deal, the constitutional injury occurs during the plea bargaining stage. Counsel's objectively incorrect advice denied Mr. Cooper the right to make an informed choice regarding the State's offered plea bargain. His subsequent trial did not restore this lost right.

The Michigan state courts' opinions to the contrary are incompatible with this Court's clearly established test for ineffective assistance claims under *Strickland*. Neither the trial court nor the Michigan Court of Appeals considered Mr. Cooper's claim under *Strickland*'s two-prong test. Accordingly, the opinions are not entitled to deference under AEDPA. Even if full deference is given under AEDPA, the Michigan courts' opinions are unreasonable applications of *Strickland* under 28 U.S.C. § 2254(d)(1) because the Michigan courts unreasonably failed to consider counsel's admittedly constitutionally defective conduct and its prejudice to Mr. Cooper's ability to knowingly consider the offered plea.

As Mr. Cooper has shown a Sixth Amendment violation, and that the state courts' opinions to the contrary are unreasonable, he is entitled to habeas relief. In this case, the district court's choice of remedy—a writ conditioning release on the

reinstatement of the plea offer—is well within the broad discretion historically committed to habeas courts to fashion remedies when confronted with constitutional violations and a common form of relief ordered by habeas and state courts in similar circumstances. Here, the conditional writ is the most rational remedy because it is narrowly tailored to the injury Mr. Cooper suffered and does not unnecessarily infringe upon competing state interests.

ARGUMENT

I. TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED MR. COOPER DURING A CRITICAL STAGE.

Counsel's objectively unreasonable advice was that Mr. Cooper should not plead to the assault with intent to murder charge because he had only shot his victim below the waist. Michigan law, however, is patently clear that the victim need not suffer any injury at all. See *infra* p. 13. By any measure, and certainly any objective one, counsel's affirmative misadvice rendered his performance deficient. See *Strickland*, 466 U.S. at 688.

The record further demonstrates that, but for his counsel's erroneous advice, Mr. Cooper would have accepted the offered plea deal and avoided the lengthier sentence that followed trial. Counsel's deficient performance therefore prejudiced Mr. Cooper, and this prejudice could not be cured by the subsequent proceedings. Because the state courts' decisions to the contrary were unreasonable under the clearly established precedents of *Strickland* and *Hill*, Mr. Cooper is entitled to relief.

A. Trial Counsel's Affirmative Misadvice with Respect to an Offered Plea Deal Is Deficient Performance.

1. Plea Bargaining Is a Critical Stage in Criminal Prosecutions.

Affirmative misadvice in the course of plea bargaining necessarily corrupts the remaining criminal processes. As here, such advice can result in a trial and a sentence that, for good reason, is very likely higher than what a prosecutor may have agreed to or what a judge may have meted out had the authorities and the court not been put to the burden of a trial. Conversely, an overlooked defense (or one that is not investigated) can lead to a plea bargain and a sentence that is unwarranted given the posture of the case. Thus, "*the negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486 (citing *Hill*, 474 U.S. at 57; *McMann* v. *Richardson*, 397 U.S. 759, 770-71 (1970)) (emphasis added).

The State's odd proposal, that it is only the act of "*acceptance* of a plea offer that is a 'critical stage,'" Pet. Br. 12, n.3 (emphasis in original), is not only fundamentally incompatible with *Padilla*, but also contrary to this Court's longstanding precedent that a defendant is entitled to his counsel's effective assistance *in the course of* deciding whether to plead guilty. See *McMann,* 397 U.S. at 770. Competent counsel is necessary for any defendant to determine what, in fact, he or she might be guilty of in the first instance, 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) (noting that "plea bargains are the result of complex negotiations suffused with

uncertainty," during which attorneys must "make careful strategic choices in balancing opportunities and risks").

2. The Medical Evidence in this Case Did Not Negate the Intent Element of the Assault Charge.

Even if the State had not conceded that Mr. Cooper's counsel rendered patently erroneous advice, Pet. Br. 9, n.2; *Id.* at 31; Pet. Cert. Reply at 14, n. 34, there is no doubt that failing to understand the basic elements of the charged crime fits comfortably within the hornbook definition of ineffective assistance. The applicable standard for judging an attorney's performance is identical in the plea and trial contexts. *Hill*, 474 U.S. at 57-58; see also *Padilla*, 130 S. Ct. at 1482. "Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused." *Premo*, 131 S. Ct. at 742. There is no plausible interpretation of this objective standard that would countenance the affirmative misadvice offered by Mr. Cooper's counsel in this case.

During the final pretrial hearing, Mr. Cooper's counsel stated on the record that he was advising Mr. Cooper to reject the offered deal because he believed there was no factual basis for the AWIM charge. See *supra* p. 3; Pet. App. 49a. It is undisputed, however, that under Michigan law, a victim need not suffer any injury at all to satisfy the intent element of AWIM. See *People* v. *Brown*, 407 N.W.2d 21, 23 (Mich. Ct. App. 1987); *People* v. *Cochran*, 399 N.W.2d 44, 45 (Mich. Ct. App. 1986). As first-year law students learn, a criminal assault, just like the tort, does not require that a "battery" take place at all. Wayne R. Lafave, Criminal Law § 16.1 (a) (4th ed.

2003); *I de S et ux* v. *W de S*, Y.B. 22 Edw. iii, f. 99, pl. 60 (1348). Instead, the question is whether the victim reasonably feared for his or her life and whether the perpetrator intended to cause that level of fear. *Id.* Where a deadly weapon is used and where it is fired directly at the victim, whether the victim was hit at all, much less where the victim was actually struck, has little bearing on these elements. See *People* v. *Harrington*, 487 N.W.2d 479, 483 (Mich. Ct. App. 1992).

Thus, counsel's affirmative misadvice that Mr. Cooper could not be convicted of this offense, causing Mr. Cooper to decline the offer, constitutes constitutionally defective performance. See *Padilla*, 130 S. Ct. at 1483; see also *id.* at 1492 (Alito, J., concurring) ("[A]ffirmative misadvice [during the plea bargaining process] may constitute ineffective assistance").

The State perplexingly reads the record as demonstrating "the ease by which criminal defendants and habeas petitioners may second-guess the pre-conviction plea advice that trial counsel provided," Pet. Br. 9, n. 2, as if counsel had exhibited merely bad judgment. But here, counsel did not suggest that Mr. Cooper decline the plea offer out of strategic considerations, nor merely fail to advise Mr. Cooper regarding the likelihood of his conviction following trial. Compare *Padilla*, 130 S. Ct. at 1492-94 (Alito, J., concurring) (emphasizing the deleterious effects of affirmative misadvice during plea bargaining) with *Premo*, 131 S. Ct. at 741 (cautioning against overly broad review of strategic decisions made by counsel during plea stage); see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 385 (1986) (ignorance of the law is inexcusable constitutionally deficient performance). Here, counsel provided

affirmative misadvice regarding the *elements* of the charged crime, and the record reflects numerous instances in which counsel himself revealed both that he misunderstood the law and that his advice to Mr. Cooper to decline the plea offer was based upon that misunderstanding. See Pet. App. 30a-31a, 49a-50a; Resp't App. 10a-12a. The only reasonable reading of this record is that Mr. Cooper's declination of the plea offer was solely the result of counsel's affirmative misadvice.

The State's suggestion that remedying constitutional violations such as this one might have negative effects on the ability of parties to negotiate and enter into plea bargains is without merit. See Pet. Br. 17. Unlike a situation where a defendant is "second guessing" his counsel's strategic decisions or inaction, as in the case on which the State relies, *Premo*, 131 S. Ct. at 738, 742-43, creating incentives for counsel to understand and communicate the elements of a crime with which his client is charged will increase the effectiveness of the plea bargaining process. Without competent advice on such matters "a defendant would be at a disadvantage when pitted . . . against the legally trained agents of the state." *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting); *id.* (Counsel is required to advise his client regarding "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction."). It is the insulation of claims such as Mr. Cooper's from review advocated by the State and the Solicitor General, see *infra* pp. 22-23, 43, that would have such detrimental effects on the plea bargaining system. See *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and

seems to call the fairness and integrity of the criminal proceeding itself into question."). As discussed below, moreover, see *infra* p. 43, the powerful institutional interests at stake in preserving the plea bargaining process fatally undermine the Solicitor General's suggestion, see S.G. Br. 29, that the State would radically modify its plea process to avoid the de minimus risk of a successful habeas claim.

B. Trial Counsel's Affirmative Misadvice Caused Immediate Prejudice to Mr. Cooper That Was Not Cured by His Subsequent Trial.

If not for counsel's inexplicable advice that the prosecution's AWIM charge lacked sufficient factual support, Mr. Cooper would have accepted the plea offer, entered a guilty plea, and been sentenced in accordance with the plea bargain. Mr. Cooper has more than amply shown that he was prejudiced by his counsel's concededly defective performance.

1. Subsequent Proceedings Did Not Cure Mr. Cooper's Lost Opportunity.

In cases such as this, *Strickland*'s prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected *the outcome of the plea process*." *Hill*, 474 U.S. at 59 (emphasis added). See also *Padilla*, 130 S. Ct. at 1480-81. Accordingly, the relevant inquiry is whether counsel's admittedly deficient performance affected the outcome of the plea process—*i.e.*, whether but for counsel's flawed advice, Mr. Cooper would have accepted the state's offer and chosen to enter a guilty plea.

The State and the Solicitor General devote substantial portions of their briefs to the argument that Mr. Cooper cannot show prejudice pursuant to

Padilla and *Hill* because his conviction and sentence followed a trial, not a guilty plea. See Pet. Br. 13-23; S.G. Br. 9-24. They rely entirely upon a red herring: there should not, and would not have been a trial in this case at all had Mr. Cooper received minimally competent advice.

The State and the Solicitor General would ask this Court to carve out an exception to *Padilla* and *Hill* that has no basis in the law.[11] In their view, it matters not whether counsel renders blatantly defective assistance at the plea bargaining stage, so long as counsel is adequately competent during the trial. See Pet. Br. 21; S.G. Br. 12, 17. But, in *Padilla*, this Court held that "*[b]efore deciding whether to plead guilty*, a defendant is entitled to the 'effective assistance of counsel.'" 130 S. Ct. at 1480-81 (emphasis added). While the State and the Solicitor General seize upon this Court's statement that "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," they ignore this Court's admonition that "it does not follow that [Sixth Amendment] rights can be disregarded so long as the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145. The position of the State and the Solicitor General is also squarely at odds with this Court's recent reaffirmation that "[i]f a 'particular guarantee'

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[11] The State's reliance on dictum in *Breard* v. *Greene*, 523 U.S. 371 (1998), for the proposition that this Court would generally hold that a final judgment should not be overturned without some showing that the alleged violation had an effect on the trial, is unconvincing. That case did not involve ineffective assistance of counsel, or any other type of Sixth Amendment claim. Moreover, the *Breard* Court based its holding on procedural grounds, making the language that petitioner cites non-precedential dictum. *See Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J.).

of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o additional showing of prejudice is required to make the violation 'complete.'" *Bullcoming* v. *New Mexico*, No. 09-10876, 2011 WL 2472799, at *9 (U.S. June 23, 2011) (quoting *Gonzalez-Lopez*, 548 U.S. at 146).[12]

As "plea bargains are the result of complex negotiations suffused with uncertainty," the competent advice of an attorney "in balancing opportunities and risks" is necessary to protect a defendant's right to make an informed choice about whether or not to plead guilty.[13] *Premo*, 131 S. Ct. at 741. For purposes of the right to the effective assistance of counsel, a defendant who, after considering an offered plea, decides to accept the offer and plead guilty is no different than a defendant who considers the same offer but does not plead guilty;

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[12] Nor does the position of the State and the Solicitor General square with other authority from this Court that has consistently held that the right to counsel attaches at all critical pretrial stages. *See Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961); *Massiah* v. *United States*, 377 U.S. 201, 205-06 (1964); *United States* v. *Wade*, 388 U.S. 218, 236-38 (1967); *see also Powell* v. *Alabama*, 287 U.S. 45, 57 (1932) ("[D]uring perhaps the most critical period of the proceedings against . . . defendants … from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, . . . [criminal defendants are] as much entitled to [the aid of counsel] during that period as at the trial itself.").

[13] This Court has recognized the importance of a criminal defendant's right to make informed choices in other contexts. In *Miranda* v. *Arizona*, for example, the Court emphasized that the procedural safeguards required by the Fifth Amendment were necessary in light of defendants being "thrust into an unfamiliar atmosphere," to ensure that defendants' statements "were truly the product of free choice." 384 U.S. 436, 457 (1966).

both are equally in need of competent counsel when making the crucial decision of whether or not accept the offered plea deal. Contra Pet. Br. 10-11, 12; S.G. Br. 17-20.

2. The State and Solicitor General's Position is Contrary to the Unanimous Consensus of the Federal Courts of Appeals.

The State and the Solicitor General's arguments are also contrary to the universal consensus of the federal appellate courts. For the reasons outlined above, all of the federal courts of appeals agree with the Sixth Circuit that a defendant can show prejudice under *Strickland* where his counsel's deficient performance causes him to reject a plea bargain, even if he is subsequently convicted at trial.[14] *United State*s v. *Rodriguez Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) (per curiam) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on [S]ixth [A]mendment grounds if counsel's performance during plea bargaining fell below 'the range of competence demanded of attorneys in criminal cases'") (quoting *Strickland*, 466 U.S. at 687); *United States* v. *Gordon*, 156 F.3d 376, 380-81 (2d Cir. 1998) (per curiam); *United States* v. *Day*, 969 F.2d 39, 43-45 (3d Cir. 1992); *United States* v. *Brannon*, 48 F. App'x 51, 53 (4th Cir. 2002) (per curiam); *Beckham* v. *Wainwright*, 639 F.2d 262,

[14] In light of this unanimous consensus of the federal courts of appeals, and the fact that such precedents are longstanding, dating back nearly thirty years, *see, e.g.*, *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435 (3d Cir. 1982), the State's argument that affirming the Sixth Circuit in this case would cause a flood of new ineffective assistance claims, *see* Pet. Br. 20, is unavailing. *See infra* pp. 40-41.

267 (5th Cir. 1981); *Turner* v. *Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989), *reinstated and reaffirmed*, 940 F.2d 1000, 1001 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Julian* v. *Bartley*, 495 F.3d 487, 498-500 (7th Cir. 2007); *Wanatee* v. *Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (it was "an objectively unreasonable application of *Strickland*'s prejudice prong" for the state court to "h[o]ld that [defendant] could not show that he had been prejudiced by any inadequate advice at the plea bargaining stage because he ultimately received a fair trial"); *Nunes* v. *Miller*, 350 F.3d 1045, 1052 (9th Cir. 2003); *Williams* v. *Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 3385 (2010); *Oliver* v. *United States*, 292 F. App'x 886, 887 (11th Cir. 2008), *cert. denied,* 129 S. Ct. 2023 (2009); *United States* v. *Gaviria*, 116 F.3d 1498, 1512-13 (D.C. Cir. 1997) (per curiam).[15]

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[15] The majority of state courts to consider the issue have adopted a similar rule. *See, e.g., In re Pers. Restraint of McCready*, 996 P.2d 658 (Wash. Ct. App. 2000) (finding Sixth Amendment violation where counsel's misadvice regarding maximum and minimum sentences deprived defendant of ability to make informed choice regarding plea offer); *State* v. *Lentowski*, 569 N.W.2d 758 (Wis. Ct. App. 1997) (defendant entitled to relief where he rejected plea offer based on counsel's incorrect representations that defendant had viable defenses at trial); *People* v. *Curry*, 687 N.E.2d 877, 882 (Ill. 1997) ("[I]t has been well established that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial."); *Williams* v. *State*, 605 A.2d 103 (Md. 1992) (same); *In re Alvernaz*, 830 P.2d 747, 749 (Cal. 1992) ("[W]e conclude . . . that when a defendant demonstrates that ineffective representation at the pretrial stage of a criminal proceeding caused him or her to proceed to trial rather than to accept an offer of a plea bargain . . . the defendant has been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment . . . even if

3. Common Sense Supports this Universal Consensus.

A decision based upon erroneous advice in any number of contexts, even beyond criminal proceedings, will irretrievably affect all of the proceedings that follow. Thus, it does not matter that a surgeon performs flawless surgery if patient consent was obtained based on a wholly erroneous diagnosis—that the event occurred at all is malpractice and harmful. Nor would it matter if a contractor perfectly constructed a building on property that the contractor improperly surveyed. And in the context of a criminal proceedings, it would be equally prejudicial—and much like this case—for counsel to advise going to trial based upon erroneous information as to the sentence that would result.[16]

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defendant thereafter receives a fair trial."); *Larson* v. *State*, 766 P.2d 261, 262-63 (Nev. 1988); *Commonwealth* v. *Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *People* v. *Alexander*, 136 Misc. 2d 573, 518 N.Y.S.2d 872, 880 (N.Y. Sup. Ct. 1987); *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex. Crim. App. 1987); *Tucker* v. *Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *Lloyd* v. *State*, 373 S.E.2d 1, 3 (Ga. 1988); *State* v. *Simmons*, 309 S.E.2d 493, 498 (N.C. Ct. App. 1983); *Lyles* v. *State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

[16] In fact, Mr. Cooper faced just such a situation as the result of his counsel's incompetence. The maximum statutory penalty for AWIM is imprisonment for life or any number of years. Mich. Comp. Laws § 750.83. In contrast, the maximum statutory sentence Mr. Cooper faced for the lesser included offense of Assault with Intent to Do Great Bodily Harm Less than Murder—the highest offense that counsel erroneously thought could possibly be proven given the evidence—was fifteen years. *See* Mich. Comp. Laws §§ 750.84, 769.10. Given that the maximum minimum sentence permitted under Michigan law is two-thirds of the statutory maximum, *see* Mich. Comp. Laws § 769.34(2)(b), counsel and, as a result, Mr. Cooper went to trial believing that they could not do much worse than

That the trial went off without a hitch makes no difference to a defendant who agreed to suffer it thinking throughout that the worst he could do was better than the plea offer. See *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting) (competent advice is required with regard to "the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction") (internal quotation marks omitted); see also, *e.g.*, *Julian*, 495 F.3d 487, 496-500 (defendant was prejudiced by loss of guilty plea where counsel unreasonably misunderstood this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and incorrectly advised client that his maximum sentence would be thirty rather than sixty years of imprisonment).[17]

Under the State and the Solicitor General's mistaken reading of this Court's precedents, any constitutionally defective performance—no matter how grievous—during plea bargaining would be entirely shielded from review where the defendant proceeded to trial. This position is illogical and

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the high end of the minimum sentence range that had been offered. It therefore also defies common sense to hold, as the Michigan Court of Appeals did, that Mr. Cooper made his own choice not to plead guilty when his attorney assured him that he could not be convicted of the life offense.

[17] *See also Gordon*, 156 F.3d at 377-81 (defendant was prejudiced where he rejected plea offer based on counsel's representation that his maximum sentence exposure was 120 months when in reality he faced a maximum sentence under the guidelines of 327 months); *Day*, 969 F.2d at 43-45 (defendant may show prejudice where counsel's grossly incorrect advice regarding actual sentencing exposure—which was more than double the length of imprisonment that counsel represented—likely affected his decision regarding whether or not to accept plea offer).

would foreclose relief to a defendant whose counsel—based on a misunderstanding of state law—assured him that he could not receive the death penalty for his crime and advised him to decline a plea offer to a crime that had a maximum sentence of life imprisonment, resulting in the defendant proceeding to trial, where he was convicted and sentenced to death in accordance with the law. Surely such grossly incorrect advice by counsel, and such a disastrous result for the defendant, should be remediable.

4. Mr. Cooper Has Amply Shown a Reasonable Probability That But For His Trial Counsel's Deficient Performance He Would Have Accepted the Plea Offer.

Contrary to the State's arguments, Pet. Br. 15-17, 20, the Sixth Circuit—and every other court of appeals to consider the issue—has not applied a "watered down" "best-outcome" version of the *Strickland* prejudice standard. To the contrary, and unlike the Michigan courts that considered Mr. Cooper's claim, the Sixth Circuit and others[18] have rigorously applied the well-established two-part test, made applicable in clear and plain terms to the plea bargaining process in *Hill*, and which this Court very recently reaffirmed in the habeas context[19]: namely,

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[18] *See, e.g., Day*, 969 F.2d at 44-45 ("Even if Day received substandard assistance from counsel, to justify relief he must prove sufficient prejudice."); *Turner*, 858 F.2d at 1206 ("[A] Sixth Amendment claim of ineffective assistance is not constitutionally cognizable unless it can be shown that the attorney's conduct was both incompetent and prejudicial.").

[19] In *Harrington* v. *Richter*, the Court reaffirmed that:

whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694—*i.e.*, that the outcome of the plea process would have been Mr. Cooper's acceptance of the State's offered plea to a minimum sentence range of 51 to 85 months.

Mr. Cooper has more than made the required showing. Mr. Cooper and his counsel repeatedly stated on the record—during two separate pretrial hearings as well as the post-conviction hearing—that Mr. Cooper was willing to admit his guilt and had always intended to enter a guilty plea. Pet. App. 49a-50a; Resp't App. 14a. It is plain from the record that the only reason that Mr. Cooper did not accept the offered plea deal is because of his counsel's indefensible advice that the prosecution's AWIM charge was unfounded. Pet. App. 49a; Resp't App. 15a-16a, 17a. Mr. Cooper need not rely upon his own testimony that his counsel's advice caused the loss of the plea deal because his counsel affirmatively stated—both before and after trial—that he had advised Mr. Cooper to decline the plea bargain as a result of his defective understanding of the law. See Resp't App. 8a-9a. Moreover, contemporaneous

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"[i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is *reasonably likely* the result would have been different. This does not require showing that counsel's actions more likely than not altered the outcome. . . ." 131 S. Ct. 770, 791-92 (2011) (internal quotation marks and citations omitted) (emphasis added).

evidence confirms Mr. Cooper's intent to plead guilty and avoid trial.[20]

The stark difference between the minimum sentence that Mr. Cooper was offered in the plea deal—a range of 51 to 85 months—and the minimum sentence he ultimately received following trial—185 months—is further evidence that Mr. Cooper would have accepted this opportunity for a reduced sentence but for his counsel's ineptitude. It is more than "reasonably probable" that Mr. Cooper would have accepted the offered plea if he had been aware that the minimum sentence he faced following trial was nearly ten years longer than the minimum sentence range offered. See, *e.g.*, *Day*, 969 F.2d at 45 ("[W]e do not find it at all implausible that a young man would think twice before risking over 3800 extra days in jail just to gain the chance of acquittal of a crime that he knew that he had committed."). Instead, Mr. Cooper believed his counsel's assurance that he would somehow get a different, and better, deal because the AWIM charge was legally unsupportable; the only reasonable inference was that proceeding to trial carried no risk.

5. No Greater Showing Is Required to Entitle Mr. Cooper to Relief.

It is immaterial to the prejudice inquiry that prosecutors have discretion to choose whether or not

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[20] Prior to trial, Mr. Cooper sent two letters to the trial judge indicating that he wanted to plead guilty to the lesser-included offense of felonious assault. Mr. Cooper's request in the letters that the Court allow him to plead guilty to Felonious Assault, and not to Assault with Intent to Do Great Bodily Harm, further demonstrates his misapprehension of his ability to be convicted of the crimes charged following his counsel's affirmative misadvice.

to enter into plea negotiations. In this case, the prosecutor actually offered Mr. Cooper a favorable plea deal that he would have accepted but for his counsel's affirmative misadvice. Contrary to the Solicitor General's contentions, Mr. Cooper is not required to show that the prosecutor would not have withdrawn the plea offer or that the trial court would have accepted the guilty plea and imposed the negotiated sentence. See S.G. Br. 21-22.

In *Strickland*, this Court held that a defendant must show only that there is a "reasonable probability" that but for counsel's deficient performance, the outcome would have been different, specifically rejecting the more demanding standard that the government advocated in that case. Even allowing some theoretical *possibility* that the prosecutor or judge may have later withdrawn or rejected the plea deal, Mr. Cooper has more than made the requisite showing that there is a "reasonable probability" that, if not for his counsel's grossly unreasonable advice, the proceeding would have resulted in Mr. Cooper's accepting the initial plea deal.

Even if Mr. Cooper were required to demonstrate more than a "reasonable probability" that the outcome of his criminal proceedings would have been different, he can do so here. First, the transcript of the pretrial hearing shows what the plea offer was (the prosecutor deliberately put that on the record) and that it was open until counsel rejected it on the ground that the medical evidence was insufficient to sustain the charge. Pet. App. 49a. Only then did the prosecutor withdraw the offer.[21] *Id.* Second, the

[21] In Michigan, as a general matter, once a defendant accepts a plea offer, a prosecutor only withdraws the offer (before

Solicitor General has provided no factual basis to support an inference that pleas like the one offered to Mr. Cooper are regularly rejected. Finally, while it is true that Michigan trial court judges have the discretion to sentence outside the minimum range, this is rarely done and only under circumstances that also are not present here. Accordingly, there is no factual support for the Solicitor General's speculation that the prosecutor might have rescinded the plea offer, that the trial court might have rejected it, or that the trial court might have sentenced Mr. Cooper to anything other than a sentence within the agreed upon minimum range.

Nor is the State correct in arguing that this Court's opinion in *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993) "refined" the *Strickland* standard. See Pet. Br. 12. Contrary to the State's position, this Court has repeatedly stated that *Fretwell* was an exceptional case and that *Strickland* remains the rule. *Williams*, 529 U.S. at 391 ("The [lower court] erred in holding that our decision in *Lockhart* v. *Fretwell* modified or in some way supplanted the rule set down in *Strickland*."); *Glover* v. *United States*, 531 U.S. 198, 203 (2001) (holding that the lower court "was incorrect to rely on *Lockhart* to deny relief" based on its mistaken belief pursuant to *Lockhart* that "the

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submission to the trial court) if the offer was originally unauthorized in some way. *See, e.g., People* v. *Heiler*, 79 Mich. App. 714, 716 (1977) (stating that the plea was withdrawn "because the bargain was contrary to the prosecutor's charging policy"). Similarly, under federal law, "plea bargains are like contracts," *see Puckett* v. *United States*, 129 S. Ct. 1423, 1430 (2009) (citing *Mabry* v. *Johnson,* 467 U.S. 504, 508 (1984)), and "when a defendant agrees to a plea bargain, the Government takes on certain obligations." *Puckett*, 129 S. Ct. at 1430.

sentence increase does not meet some baseline standard of prejudice").

Fretwell and *Nix* v. *Whiteside*, 475 U.S. 157 (1986), the two cases upon which the State and the Solicitor General rely heavily, involved "situations in which it would be *unjust* to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Williams*, 529 U.S. at 391-92 (emphasis added). In *Nix*, for example, the Court held that even though a defendant's false testimony might have persuaded the jury to acquit him, counsel's interference with his intended perjury did not create cognizable prejudice under *Strickland*. 475 U.S. at 175-76. Similarly, in *Fretwell*, this Court concluded that, even though a different outcome was likely if counsel had been aware of a legal rule applicable at the time of the defendant's sentencing, granting relief would constitute a windfall to *Fretwell* because that legal rule had since been overruled. 506 U.S. at 371. Accordingly, in both *Fretwell* and *Nix*, wholly separate legal considerations—perjury and repeal—weighed against granting relief. Mr. Cooper's case does "not implicate the unusual circumstances present in cases like [*Fretwell*] or *Nix*," and therefore, the lower court's "emphasis on outcome was entirely appropriate." *Williams*, 529 U.S. at 415 (O'Connor, J.).

The State and the Solicitor General's argument that Mr. Cooper cannot show prejudice because he has no constitutional right to a plea bargain, and therefore has not been deprived of a substantive or procedural right to which he is entitled, is similarly unavailing. See Pet. Br. 21; S.G. Br. 19-20. While it is true that Mr. Cooper had no constitutional guarantee that a prosecutor would initiate plea negotiations, see *Weatherford* v. *Bursey*, 429 U.S. 545,

561 (1977), that inquiry is irrelevant in this case where a specific and favorable plea bargain had been offered and was open at the time counsel rendered his constitutionally defective advice. See Pet. App. 48a-50a (offer remained open at the pretrial hearing and was withdrawn only after counsel rejected it based on his mistaken belief that there was insufficient evidence to support the AWIM charge). See also *Williams*, 571 F.3d at 1091 ("[W]e are not dealing with the government's discretion to make or withdraw a plea offer. Rather we are dealing with an offer that was rejected because of counsel's ineffective assistance, with disastrous results for [the defendant]. In the end, this ineffective assistance and the resulting prejudice is attributable to the State.").

An affirmance would not "reward" Mr. Cooper with some benefit to which he is not legally entitled, as was true in *Fretwell* and *Nix*. The prosecutor offered Mr. Cooper a plea that was proper, and pursuant to which he would have been convicted and sentenced if not for his counsel's affirmative misadvice. There is no dispute that the initial offer was open and that its rejection was the result of counsel's incompetence. The record amply reflects that stark fact. Pet. App. 49a-51a. Because of that affirmative misadvice, Mr. Cooper is now serving a much higher sentence than that offered in the plea bargain. Mr. Cooper has demonstrated that he suffered prejudice, and that this prejudice was not cured by his subsequent trial. *Cf. Glover,* 531 U.S. at 203 (2001) (holding that a defendant suffered prejudice under *Strickland* where, following a fair trial, his counsel provided ineffective assistance during the sentencing phase, resulting in an increase in the jail time he would serve).

C. Neither of the State Court Opinions Is Entitled to Deference under AEDPA Because the Case Was Decided Using the Incorrect Test.

Contrary to the State's assertions, Pet. Br. 27, under any possible reading, the state courts decided Mr. Cooper's claim using the wrong legal test. The Michigan Court of Appeals decided Mr. Cooper's ineffective assistance claim using a simulacrum of the constitutional standard for the validity of a guilty plea[22] rather than the clearly established two-part *Strickland* test. After restating Mr. Cooper's claim, that court summarily concluded that Mr. Cooper "knowingly and intelligently rejected the plea offer." Pet. App. 45a. Even if "knowing and intelligent" were relevant to the inquiry in this case, this Court has clearly established that "[w]here . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56.

Although *Harrington* v. *Richter* made clear that federal habeas courts must presume that state courts have adjudicated a petitioner's claims on the merits even when faced with an ambiguous or summary opinion, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct at 785 (citing *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803-04 (1991). If a claim has been adjudicated on the merits

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[22] *See North Carolina* v. *Alford*, 400 U.S. 25, 30 (1970) (the "standard was and remains whether the plea represents a voluntary and intelligent choice").

in a state court, then it must be assessed under the deferential standards set forth in 28 U.S.C. § 2254(d)(1). Because it is manifest that the state courts disposed of Mr. Cooper's claims using the incorrect legal test, their opinions are not entitled to heightened deference under AEDPA. *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1410 (2011) (citing *Williams*, 529 U.S. at 395-97). Furthermore, even if it could be argued that the opinion should be analyzed under § 2254(d)(1), the district court properly concluded that the state court opinion relied on an unreasonable application of clearly established law.

The precise boundaries of the "range of competence" are susceptible to varying interpretations, but affirmative misadvice as to an element of the charged crime is a mistake so basic that no reasonable jurist could disagree that counsel's performance "betray[ed] a startling ignorance of the law,"[23] *Kimmelman*, 477 U.S. at 385, and the State concedes as much. Pet. Br. 9 n.2. Counsel assured Mr. Cooper that he could not be convicted of assault with intent to murder, when in fact such a result was a near certainty in light of the complete absence of any viable defense. His affirmative misadvice was recorded in open court and repeated in his testimony at the post-conviction proceedings.

Even if it were appropriate to look beyond the "last reasoned opinion on the claim," *Ylst*, 501 U.S. at 803, the trial court also based its decision on erroneous application of the deficient performance element. The State points to an excerpt from the post-

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[23] It is well-settled that even a single isolated error may constitute deficient performance under *Strickland*. *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

conviction hearing transcript in which the trial judge states that counsel may have been considering a self-defense argument at trial. Pet. Br. 29. But that claim was wholly unsupported by the facts, disavowed by counsel himself and never in fact raised at trial, included in the jury instructions or even proposed by the defense as a jury instruction.

Aside from the obvious difficulties that shooting a fleeing, unarmed victim in the back pose to a claim of self-defense, no rational finder-of-fact could conclude from the record before the trial court that Mr. Cooper had a self-defense argument informed by competent counsel. The letters from Mr. Cooper to the trial judge—who relied upon them extensively in the post-conviction hearing—support only two reasonable conclusions: Mr. Cooper wanted to plead guilty and he lacked a basic understanding of his legal options. There is no evidence that supports a contrary conclusion.

Further, at sentencing, Mr. Cooper denied making a statement that he had shot the victim to protect himself and his friends. Resp't App. 2a-3a. At the post-conviction proceeding, Mr. Cooper testified that his counsel never discussed the case with him, Resp't App. 20a-21a, and was unresponsive to Mr. Cooper's letters, Resp't App. 21a-22a. In the same proceedings, counsel reaffirmed his patently incorrect understanding of the charges and admitted to misadvising his client. Resp't App. 10a-11a.

The trial court's post-hoc rationale for denying Mr. Cooper's claim, in contrast, lacks any support in the record, and the court's own reasoning admits as much. The court acknowledged that "it's obvious that Mr. Cooper and [counsel] didn't believe that the facts as presented . . . would support a finding of assault with the intent to murder. Both were convinced that

that couldn't occur." Pet. App. 53a. The trial court concluded that the decision to decline the offer "might have been based on the representations of [counsel] and on hindsight sometimes they would say . . . that was an out there kind of claim." Pet. App. 53a-54a. In spite of these conclusions, the court puzzlingly concluded that Mr. Cooper "made his own choices." Pet. App. 54a.

Under these facts, all of which are in the record, Mr. Cooper's decision to decline the offer could not have been "knowing and intelligent." The state court incorrectly applied its own inapposite test. Having conceded that Mr. Cooper's counsel was deficient, the State implausibly contends that both the Michigan Court of Appeals and the trial court opinions could conceivably be read as resting on the prejudice element of the *Strickland* test. Pet. Br. 27-28. But both state courts focused solely on whether Mr. Cooper's choice to reject the plea offer was knowing and intelligent, which is dependant on receiving at least minimally competent advice from counsel. Therefore, the district court appropriately considered Mr. Cooper's claim *de novo*. *Porter* v. *McCollum*, 130 S. Ct. 447, 452-53 (2009) ("Because the state court did not decide whether [defendant's] counsel was deficient, we review this element of [defendant's] *Strickland* claim *de novo*."); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts [erroneously] found the representation adequate, they never reached the issue of prejudice, . . . and so we examine this element . . . *de novo*."); see also *Cullen*, 131 S. Ct. at 1410.

For the same reasons, even if it could be argued that the state opinions are deserving of heightened deference under AEDPA, the district court properly concluded that the state court unreasonably applied

the standard established in *Strickland* and *Hill* for determining deficient performance. There can be no dispute that such a startling ignorance of the law falls below the "objective standard of reasonableness" for attorney competence.[24] Because no fairminded jurist could disagree, *Harrington*, 131 S. Ct. at 786 (citing *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)), that counsel's performance was constitutionally deficient, both state opinions fail even doubly-deferential AEDPA review.

II. THE APPROPRIATE REMEDY IS TO ALLOW MR. COOPER TO ACCEPT THE PLEA OFFER THAT HE WOULD HAVE ACCEPTED BUT FOR TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE.

The remedy ordered below—a conditional writ requiring reinstatement of the plea offer—comports with the broad discretion traditionally exercised by habeas courts in correcting constitutional errors and is narrowly tailored to correct the constitutional deprivation. According to the State, this Court must not only upend the universal consensus of the circuits that Mr. Cooper suffered a constitutional deprivation, but also adopt the unprecedented proposition that there is a constitutional deprivation that a habeas court must refuse to remedy. The State's remarkably

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[24] *See Jones* v. *United States*, 224 F.3d 1251 (11th Cir. 2000) (counsel failed to object to wiretap on "clear" ground); *Dixon* v. *Snyder*, 266 F.3d 693 (7th Cir. 2001) (counsel failed to cross-examine sole witness based on misunderstanding of state law and the Fifth Amendment); *Glover* v. *Miro*, 262 F.3d 268 (4th Cir. 2001) (counsel ignorant of state law permitting defendant to compel out of state witnesses to appear); *Dando* v. *Yukins*, 461 F. 3d 791, 798 (6th Cir. 2006) ("flatly incorrect" legal advice regarding defendant's entitlement to a state-provided expert witness).

narrow view of the core function of the writ would render the explicit guarantees of the Sixth Amendment merely hortatory.

A. Federal Habeas Courts Have Broad Discretion to Fashion Appropriate Habeas Corpus Relief.

The federal habeas statute authorizes federal courts to dispose of petitions for habeas corpus "as law and justice require." 28 U.S.C. § 2243. This language has been broadly interpreted "to permit relief short of release," *Wilkinson* v. *Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring), and the Court "has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987). Today, conditional writs are "by far the most common habeas remedies." 2 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 33.3, p. 1904 (6th ed. 2011). The relief ordered by the district court in this case falls squarely within this broad discretion.

In arguing that "there is no rational remedy," Pet. Br. 23, the State turns the core purpose of the great writ on its head and asks this Court to declare, for the first time, that a habeas court must deny relief in the face of a demonstrable deprivation of a criminal defendant's Sixth Amendment rights. Habeas corpus "has been for centuries esteemed the best and only sufficient defen[se] of personal freedom," *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869), which is why the "scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded

by courts and lawmakers." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969).

This Court has construed the "law and justice" language of the 1867 Habeas Corpus Act, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86, to confer jurisdiction over constitutional deprivations that is of "the most comprehensive character," and so broad that it is "impossible to widen." *Ex parte McCardle*, 73 U.S. 318, 325-26 (1868). At the time *In re Bonner*, 151 U.S. 242 (1894), was decided—holding that a writ should issue invalidating a petitioner's sentence but permitting the state to impose a new sentence consistent with the conviction—"the Court interpreted the predecessor of § 2243 as vesting a federal court 'with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus.'" *Hilton*, 481 U.S. at 775 (citing *Bonner,* 151 U.S. at 261). Additionally, because "judgments about the proper scope of the writ are 'normally for Congress to make,'" *Felker* v. *Turpin*, 518 US 651 (1996) (citing *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996)), there is no sound justification for limiting the authority of habeas courts today.

In the decades following *Bonner*, the federal courts developed conditional release orders as a logical means of effectuating the broad remedial purposes of the writ.[25] This Court again approved of such

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[25] *See, e.g., Coffin* v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) (granting request for leave to file habeas corpus petition challenging conditions of confinement, but not the legality of the prisoner's custody); *Biddle* v. *Thiele*, 11 F.2d 235 (8th Cir. 1926) (granting the writ but permitting the state to retain custody of a prisoner until legally resentenced); *Bryant* v. *United States*, 214 F. 51, 53 (8th Cir. 1914) (permitting the trial court to retain jurisdiction over defendant pursuant to a lawful conviction for

conditional release orders in *Dowd* v. *United States* ex rel. *Cook*, 340 U.S. 206 (1951), in which a prisoner was ordered released if the state failed to provide an appeal within a reasonable time. Indeed, by the middle of the twentieth century, "the conditional release order had virtually replaced the unconditional release order as the preferred form of relief in all but a limited category of habeas corpus cases." Marc M. Arkin, Speedy Criminal Appeal: A Right Without A Remedy, 74 Minn. L. Rev. 437, 506 n.225 (1990). Today § 2243 is properly understood to include many forms of relief beyond release or retrial of guilt that are tailored to correct the specific constitutional deprivation. See Hertz and Liebman, *supra* at § 33.4.

Given the historic trend towards flexibility in fashioning appropriate relief for constitutional violations, it is unsurprising, and fitting, that different habeas courts have tailored different remedies to the facts of each case.[26] It is no different

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the purpose of imposing a legal sentence); *McCoy* v. *McCauley*, 20 F. Supp. 200, 202 (D. Wash. 1937) (ordering that the writ issue and the prisoner released if not resentenced within 30 days).

[26] Similarly, state courts have demonstrated flexibility in designing remedies where the defendant received ineffective assistance at the plea stage and proceeded to trial, many of which aim at allowing the defendant to take advantage of the original plea offer. *See, e.g., HPT* v. *Comm'r of Correction,* 14 A. 3d 1047 (Conn. App. Ct. 2011) (vacating sentence and ordering that defendant be resentenced in accordance with plea offer); *People* v. *McCauley*, 782 N.W.2d 520, 525 (2010) (appropriate remedy is to "conditionally vacate defendant's convictions and sentences and remand this case to allow the prosecution to reinstate its original plea offer, and to allow defendant, with the assistance of counsel, to consider that offer and enter a plea in accordance with its terms"); *Jiminez* v. *State,* 144 P.3d 903 (Okla. Crim. App. 2006) (ordering a modification of defendant's sentence); *Becton* v. *Hun*, 205 W. Va. 139, 145 (1999)

for cases involving ineffective assistance with regard to plea offers.

First, the most common form of relief offered in cases involving forgone plea offers is a conditional writ requiring the state to reinstate the original offer. See*, e.g.*, *Satterlee* v. *Wolfenbarger,* 453 F.3d 362 (6th Cir. 2006) (affirming grant of conditional writ requiring reinstatement of plea offer and subsequent grant of unconditional writ ordering defendant's release); *Hoffman* v. *Arave*, 455 F.3d 926 (9th Cir. 2006) (ordering "the district court to direct the State to release [the defendant] unless, . . . the State offers [the defendant] a plea agreement with the 'same material terms' offered in the original plea agreement."); *Nunes,* 350 F.3d at 1057; *Turner*, 858 F.2d at 1204 (ordering a "new plea hearing during which a rebuttable presumption of vindictiveness would attach to any plea offer made by the State in excess of its original . . . offer"); *United States* v. *Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994) (remanding for consideration of ineffective assistance claim and instructing that defendant "should have the choice between going forward with a new trial or accepting the government's original plea offer."); see also *Day*, 969 F.2d 39 (approving of the remedy of ordering the state to reinstate the offer).

Second, some courts have found it appropriate to order a defendant released where time served was

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(remanding with instructions to consider a reduced sentence); *People* v. *Snyder*, 14 Cal. App. 4th 1166, 1177 (1993) (ordering lower court to reinstate plea if evidentiary hearing demonstrates that defendant would have accepted the plea); *Williams*, 605 A.2d at 111 (ordering that the trial court offer the terms of the original plea offer, and, if defendant refused, to reinstate the original sentence); *Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987) (remanding for new trial).

longer than the plea offer on which the ineffective assistance was rendered. See*, e.g., Boria* v. *Keane*, 99 F.3d 492 (2d Cir. 1996); *Williams* v. *Jones*, No. 03-cv-201, 2010 U.S. Dist. LEXIS 103596 (E.D. Okla. Sept. 29, 2010) (adopting agreement of both parties to issue writ and release defendant). Finally, other courts have issued conditional writs that allow the defendant to plead guilty or proceed to a new trial. See*, e.g.*, *Gordon*, 156 F.3d at 381-82; *Beckham*, 639 F.2d at 267 n.7.

B. The Appropriate Remedy Here Is a Conditional Writ Ordering the State to Reinstate the Plea Deal That Mr. Cooper Lost as a Result of Trial Counsel's Affirmative Misadvice.

The conditional writ issued by the district court was rational and narrowly tailored to remedy the deprivation of Mr. Cooper's Sixth Amendment right to effective assistance of counsel at all critical stages of the prosecution. The "competing interests" proffered by the State and the Solicitor General—no more evident here than in any typical habeas proceeding—are not unreasonably burdened by the remedy. Furthermore, they urge consideration of these interests in a manner that subjects Mr. Cooper's valid Sixth Amendment claim to a balancing test on the question of whether any relief should issue, a theory that strongly conflicts with the history of habeas corpus and would mark a radical departure from the decisions of this Court.

1. The Conditional Writ Fashioned by the District Court Was Narrowly Tailored to Remedy Mr. Cooper's Sixth Amendment Claim.

The federal district court, consistent with its broad discretion and in accord with many other federal and state courts, issued a conditional writ requiring the State to reinstate the plea offer that Mr. Cooper declined because of counsel's affirmative misadvice. In doing so, the court narrowly tailored the remedy to place Mr. Cooper in as close a position as possible to the position Mr. Cooper would have been in but for the Sixth Amendment violation.

Remedies for deprivations of the right to effective counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The district court's chosen remedy—a conditional writ ordering the reinstatement of the plea offer—is not only within the scope of permissible remedies and a common form of relief afforded by both federal and state courts in cases involving a forgone plea offer, but also best restores both Mr. Cooper and the State to the circumstances prior to the deprivation. Additionally, because the district court expressed no opinion as to whether the state court can reject the plea bargain in accordance with Michigan's sentencing guidelines or in a manner otherwise consistent with state law, the remedy also takes account of the State's competing interests and the trial court's discretion.

The State's argument that granting relief here would "open[] the floodgates to post-conviction litigation," Pet. Br. 20, is groundless in the face of the perfect unanimity of the federal circuits in

holding that the facts of this case constitute a Sixth Amendment deprivation. See *supra*, pp. 19-20. But even if this were not the case, the legal obstacles that an applicant for habeas must overcome are extensive. First, a holding in this case will only apply to the small fraction—far less than 10 percent[27]—of criminal prosecutions that are not resolved by a guilty plea. *Cf. Bullcoming*, 2011 WL 2472799, at *13 (citing *Melendez Diaz*, 557 U.S., at __ (slip op., at 20) (2009)) (noting the "'small fraction of . . . cases' that " 'actually proceed to trial'" in response to a floodgates argument in a Confrontation Clause case). Second, in order to demonstrate that relief is warranted, a defendant must meet both elements of the *Strickland* test, which this Court has warned is "never an easy task." *Harrington*, 131 S. Ct. at 788 (quoting *Padilla*, 130 S. Ct. at 1485 ("a flood did not flow in [*Hill's*] wake")). Third, a criminal defense attorney's performance is subject to "doubly" deferential review under AEDPA. Where § 2254 applies, a federal habeas petitioner must demonstrate not just that his counsel's actions were unreasonable, but that there is no reasonable argument that counsel's performance was adequate under *Strickland*'s deferential performance prong. *Harrington*, 131 S. Ct. at 788.

Contrary to the State's assertions, Mr. Cooper would not be in a better position as a result of the ordered remedy. To substantiate this "windfall" argument, the State and the Solicitor General miscast the interest at issue as a right to a plea bargain rather than the Sixth Amendment right to

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[27] In 2006, for example, 94% of felony convictions in state courts were the result of defendants entering pleas of guilty. *See* Bureau for Justice Statistics, Felony Convictions in State Courts, 2006 – Statistical Tables (December 30, 2009), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2152.

effective counsel at all stages of the prosecution.[28] It is undisputed that Mr. Cooper was deprived of the advice necessary to make an informed decision at a critical stage of the prosecution, and Mr. Cooper is still suffering the consequences of that misadvice. The district court, in ordering that the plea offer be reinstated, demanded no more than what the State had already demonstrated it was voluntarily willing to offer Mr. Cooper. Just as if the court were considering the plea bargain during the pretrial stage, a state court may choose, within the discretion afforded to it under the applicable sentencing scheme, the final sentence in accordance with state law.

Additionally, the concern raised by the Solicitor General that correcting the constitutional violation would encourage "sandbagging"[29] by criminal

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[28] In contrast to Mr. Cooper, the hypothetical defendant, posited at S.G. Br. 28, who accepts a guilty plea that is later withdrawn by the prosecutor or rejected by the court suffers no cognizable Sixth Amendment deprivation; there is simply nothing to remedy. Here, it is uncontested that counsel's advice was constitutionally deficient and alone caused Mr. Cooper to reject the State's initial, and open, plea offer. Pet. Br. 9 n.2.

[29] If "sandbagging" is meant to imply an incentive for collusion between counsel and the defendant in the hope that they will get two bites at the apple, the Third Circuit has, in a case with similar facts, succinctly stated:

"Deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. For these reasons and because incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate. Moreover, to the extent that petitioners and their trial counsel may jointly fabricate these claims later on, the district courts will have ample opportunity to judge credibility at evidentiary hearings." *Day*, 969 F.2d at 46 n.9.

defendants is without merit. S.G. Br. 29. Defendants are unlikely to decline favorable plea offers and take their chances at trial, where they usually face more severe sentences, on the off-chance that a reviewing court might later reverse their convictions upon collateral review. Even if it were a danger, however, habeas courts have extensive experience discerning whether counsel's performance constitutes "an abdication—not an exercise—of professional judgment," *McQueen* v. *Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). There is no sound reason to believe that habeas courts are now incapable of differentiating trial strategy—regardless of counsel's motivation—from prejudicial error. Here, it is uncontested that counsel, on the record, Pet. Br. 6, erroneously advised his client to reject the plea offer based on his mistaken belief that the State could not prove AWIM because the victim was shot in the buttocks.

Finally, a rule that adequately vindicates petitioner's Sixth Amendment right to counsel would enhance the "mutuality of advantage," *Brady* v. *United States*, 397 U.S. 742, 752 (1970), for both sides during plea bargaining and provide a much greater incentive for defense attorneys to fulfill their duty to provide adequate assistance at all critical stages of the prosecution. Without the benefit of a finding of ineffective assistance in cases such as Mr. Cooper's, there will be little motivation to ensure that the quality of advice does not fall below what the Sixth Amendment requires. Put simply, the position of the State and the Solicitor General would insulate affirmative misadvice, pocketed pleas, and other forms of non-communication from further review on habeas. Such a scenario is to the detriment of both criminal defendants and to prosecutors who rely on

plea bargaining for the efficient administration of justice.

2. The Ordered Remedy Does Not Burden Any Competing State Interests, but Even If It Did, Relief Correcting Constitutional Deprivations Is Not Subject to a Balancing Test.

The ordered remedy does not "unnecessarily infringe on competing interests," *Morrison*, 449 U.S. at 364. The district court's chosen remedy, like that of dozens of other courts to consider the question under similar facts, complies with this requirement. The Solicitor General, on the other hand, incorrectly treats *Morrison* as if a defendant's right to relief is subject to a balancing test.

The Solicitor General makes two related arguments, both of which are unavailing. First, he claims that ordering the trial court to permit Mr. Cooper to consider the plea offer with assistance of counsel interferes with functions normally committed to the executive. S.G. Br. 30. While the State has a legitimate interest in choosing how to enforce its laws, this Court has been clear that the "Sixth Amendment mandates that the State *bear the risk* of constitutionally deficient assistance of counsel." *Kimmelman*, 447 U.S. at 379 (emphasis added). In the plea offer context, "even if one might perceive that the government's competing interest might be infringed by requiring that the original offer be reinstated, a contrary result would impermissibly shift the risk of ineffective assistance of counsel from the government to" the defendant. *Blaylock*, 20 F. 3d at 1469. Any conceivable burden on the prosecution's discretion pales in comparison to the importance of protecting the Sixth Amendment's guarantee of

effective counsel at all critical stages of the prosecution.

Second, the Solicitor General argues that the narrowly tailored remedy in this case is an impermissible interference with the sentencing discretion of the trial court. S.G. Br. 30-32. While this is indeed a legitimate interest, modification of a state prisoner's sentence is squarely within the range of remedies available to a habeas court to correct a constitutional wrong. See Hertz and Liebman, *supra* at § 33.4. Regardless, under the remedy formulated by the district court in this case, the trial court would be able to consider any plea agreement in accordance with state law, just as it would have if the agreement had been properly presented to the court during the plea stage.

Finally, it is worth noting that in *Morrison*, the Court held that the defendant failed to demonstrate a Sixth Amendment violation, not that her deprivation was not remediable. In that case, the defendant did not allege that the outrageous behavior exhibited by federal agents during her detention had any effect on her choice of counsel or her counsel's ability to provide constitutionally adequate representation during the prosecution, 449 U.S. at 366, facts that stand in stark contrast to the patently erroneous advice that plainly prejudiced Mr. Cooper here. More importantly, the Court did not suggest that a meritorious Sixth Amendment claim could be rendered irremediable because of these other concerns, only that these factors should be considered when fashioning relief.

* * *

The State's burden of persuasion is a heavy one: it must articulate why a court entrusted with the broadest possible powers to correct miscarriages of justice must refuse to remedy an unambiguous deprivation of a defendant's constitutional rights. That the State has failed to meet this burden here is unsurprising. While the barriers to showing a meritorious claim for relief, whether at common law or under AEDPA, are undoubtedly high, there is no basis in this Court's opinions for declining to remedy a constitutional violation that is properly presented to a habeas court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 18, 2011

APPENDIX

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE
CRIMINAL DIVISION

File No. 03-4617

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

ANTHONY GLADNEY COOPER,
Defendant.

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE BRUCE U. MORROW, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 404, Detroit, Michigan, on August 11, 2003.

APPEARANCES:

PAUL BERNIER, Assistant Wayne County Prosecutor, appearing on behalf of the People.

BRIAN McCLAIN, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

August 11, 2003
Detroit, Michigan
10:13 A.M.

* * *

[3] THE COURT: This is the People of the State of Michigan versus Anthony Cooper, Case Number 4617. This is an 03 case.

MR. McCLAIN: Brian McClain, your Honor, for the Defendant, Mr. Cooper.

MR. BERNIER: Morning, your Honor. Paul Bernier on behalf of the People.

MR. McCLAIN: Your Honor, my client and I have gone through the presentence report. We do have some additions and corrections to make for the record. Firstly, under the agent's description of the offense it doesn't support—it doesn't include information that was even alleged against my client.

The last sentence says the Defendant was arrested and found to have two plastic bags have marijuana and a point .380 caliber with twelve spent casings. The gun was never found and the casings were found on the scene, but the only thing that was found and ever alleged to be found on the Defendant was the marijuana so—

[4] THE COURT: I'll strike the rest of it.

MR. McCLAIN: Thank you. Under the Defendant's description of the offense I went over that with Mr. Cooper and the last sentence he denies making. He denies making that last sentence.

THE COURT: Which one, that I didn't shoot her to kill her in any way?

MR. McCLAIN: No, the very last sentence.

THE COURT: That is the very last sentence—

MR. McCLAIN: Oh, I'm sorry.

THE COURT: —Mr. McClain, or part of the last sentence.

MR. McCLAIN: Oh, okay. The first part of the last sentence before the comma. I went to kill her to protect all of us. I'm not sure. Are you saying you didn't say any of that last sentence or just the first part of the last sentence? Which part?

(Whereupon the defense attorney and the Defendant are conferring)

MR. McCLAIN: The first part of the last sentence where it says, I meant to kill her to [5] protect all of us, he denies making that statement.

THE COURT: Well—

MR. McCLAIN: And the last part, was the calculation of the guidelines and I—

THE COURT: Do you have all of my guidelines?

MR. McCLAIN: Pardon me?

THE COURT: Do you have all of the guidelines or just a page of the guidelines?

MR. McCLAIN: I have one page—I'm sorry. There was two pages here.

THE COURT: What I'm saying is I don't have any guidelines.

MR. McCLAIN: Oh, I see. Yeah, I guess so. There's two copies and the one—yes.

THE COURT: What are you saying is incorrect, the prior record variables?

MR. McCLAIN: I have no problem with the scoring of fifty for the prior record variable.

THE COURT: So what are you contesting?

MR. McCLAIN: We're contesting offense variable—offense variable number four. It was scored ten points

for psychological injury to the victim. I believe it should be scored zero because [6] there's no evidence that that occurred. In fact—

THE COURT: Mr. Bernier, anything in the presentence report that would support that score?

MR. BERNIER: Your Honor, I saw nothing in the presentence report that would justify necessarily that. This Court saw the witness testify and I would leave it to this Court's discretion.

THE COURT: All right. I'll change that to zero. I didn't see anything in the presentence report that would suggest that that should receive any score. Anything else?

MR. McCLAIN: Twelve, your Honor. They scored twenty-five for having three or more contemporaneous felonious acts involving crimes against a person. The only—from what I see, the only crime against a person was the AWIM. The others would be under the category of other contemporaneous criminal acts and those would have been felon in possession, possession of marijuana and felony firearm so there would be three other criminal acts.

THE COURT: So it would be ten instead of the other twenty-five.

MR. McCLAIN: Yes, your Honor.

THE COURT: I think ten would [7] be correct which would make the total sixty for offense variable—thirty, forty—

MR. McCLAIN: Oh, seventeen—I'm sorry.

THE COURT: —sixty, seventy, sir.

MR. McCLAIN: I'm sorry. Then offense variable number seventeen we're contesting because it says

only score this with offense that involves operation of vehicle, vessel, a snowmobile, aircraft or a locomotive so that should be scored a zero as well.

THE COURT: So we have thirty, forty, fifty, sixty points.

MR. McCLAIN: Yes, your Honor.

MR. BERNIER: Which would make the guidelines range one thirty-five to two eighty-one with a habitual second.

MR. McCLAIN: Under a habitual sentencing, your Honor, it would be under E-4 which would be one thirty-five. Under the habitual it would be one thirty-five. Habitual third it would be one thirty-five to three thirty-seven.

THE COURT: Okay. Those corrections being made, any other corrections you need [8] brought to the attention of the Court?

MR. McCLAIN: I'm sorry, your Honor?

THE COURT: Any other corrections that you would like—

MR. McCLAIN: No, your Honor.

THE COURT: —to bring to the attention of the Court?

MR. McCLAIN: No, your Honor.

THE COURT: Okay. Anything you want to say on behalf of your client before sentencing?

MR. McCLAIN: Yes, your Honor. We would like to ask the Court to consider going under the guidelines for certain compelling reasons on behalf of Mr. Cooper. Mr. Cooper is a—actually a child of a foster

care system. He spent all of his life in foster care. He comes from a supportive family.

His foster care sister, Tyla Simon (ph), who did testify on his behalf, is here on his behalf. He did reunite once he was released from Louisiana, he came to Detroit to reunite with his biological mother who, she had no contact with him for all his life, and since being paroled in 2002 he has completed his education. He did that in June of 2002 and he was enrolled in school at the Michigan Barber

* * *

APPENDIX B

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT
CRIMINAL DIVISION

Case No. 03-04617

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

ANTHONY GLADNEY COOPER,

Defendant.

MOTION

Proceedings had and testimony taken before the HONORABLE BRUCE U. MORROW, Circuit Court Judge, Frank Murphy Hall of Justice, Detroit, Michigan, on Friday, May 28, 2004.

APPEARANCES:

FRANK BERNACKI, Esq., Attorney of the People
Appearing on behalf of Defendant Anthony Cooper.

* * *

[5] A. Yes, I reviewed the transcript involving Luke Skywalker.

Q. Correct, and what I want to talk about is the fact that in that transcript you—talk quite a bit about the fact that you had just received the medical records.

A. Yes.

Q. And there's a discussion about a plea offer and you indicated on that record that the plea offer is unreasonable.

A. Yes.

Q. Can you give the Court a little bit of background about what happened with the medical records and why you made those assertions on the record?

A. Well, before the date of the hearing I had spoke with Mr. Skywalker I believe in his office and at that point we did not—or he did not have the medical records yet. It may have in fact been at a hearing, a prior hearing When he told me that he was expecting the medical records at a future date and that I was to contact him and I believe I contacted him more than once and there was quite a bit of delay before either he got them or he produced them to me. So I believe at the date of this hearing that you're speaking of I had just received the medical records and reviewed them with my client and had not had an opportunity to [6] further discuss those records as it related to a possible plea.

Q. And you stated on the record that you had met with Mr. Cooper at the Wayne County Jail to discuss Mr. Skywalker's plea offer. At that time when you met with Mr. Cooper, did you have the medical records at that time?

A. The last time I met with Mr. Cooper before the hearing with Mr. Skywalker I believe I did have them and I reviewed them with him in the Wayne County Jail.

Q. And what was your assessment when you met with him in terms of the assault with intent to murder charge?

A. It appeared to me and I remember highlighting some information in the report that the information in the medical report did not support the claims of the victim at the Preliminary Exam and did not support the charge of assault with intent to murder

based on the nature of the injuries reported in the medical report.

Q. And did you express that to Mr. Cooper?

A. Yes.

Q. So you thought there was a legitimate issue regarding the assault with intent to murder charge?

A. Yes.

Q. And did you have an opinion about what an appropriate charge would be?

[7] A. Yes. I felt that I could successfully negotiate a plea under the amended charge of assault with intent to do great bodily harm less than murder.

Q. And you spoke with Mr. Cooper on other occasions, I take it, in court?

A. Yes.

Q. And did he ever tell you that he wanted to enter into a plea agreement?

A. We did discuss pleading and he was opened to a plea offer and you know I told him that I would do my best, but I needed to review all the evidence and so, yes, he was opened to discussions of a plea offer.

Q. So he wanted to plead and you were negotiating and at that hearing you indicated that you thought the offer was unreasonable and therefore you were going to try and negotiate with the trial prosecutor; is that correct?

A. That's correct. After review of the medical testimony and talking with Mr. Cooper, the first opportunity I had to speak with the prosecutor about that evidence was at the hearing with Mr. Skywalker at which point he indicated he was not going to be the trial attorney and therefore I wanted to speak or discuss an offer with the person who would be trying the matter because I wanted to discuss the evidence that that attorney would [8] have to present and I felt like I had a better chance of a more reasonable offer

speaking with the person who had the burden of proof at trial and not the person who was not going to try it.

Q. And did you at any time at that hearing on July 17th, and it's not on the record, but I'm going to ask you in case it's not on the record and it happened, did you ever ask the judge, hey judge, I need a few minutes in the back with my client or I need some time with Mr. Cooper to discuss, you know, alternatives and explain to him, you know, what's going on at this point?

A. I don't believe on the record I asked the judge for more time.

Q. Did you ever take him in the back?

A. I did. I did talk to Mr. Cooper in the back about what the offer was briefly, but it was still my desire to discuss those medical reports because I had no earlier opportunity to discuss those reports with anyone. In other words, those reports weren't part of any plea offer or negotiation until that point.

MS. NEWMAN: Okay. That's all I have for now.

CROSS-EXAMINATION

BY MR. BERNACKI:

* * *

[13] BY MS. NEWMAN:

Q. But you had conveyed to Mr. Cooper that you thought there was a good defense to the assault with intent to murder?

A. I did. I told him that my intent was to—I wanted to negotiate a deal based upon GBH and the numbers would have been lower than 4 to 7 that was being offered under the AWIM. So my discussion with him was that I wanted to—I felt that the medical reports did not support the charge AWIM.

THE COURT: Excuse me for a second. Have you had a chance to read the pre-trial?

A. Of July 17th?

THE COURT: Right.

A. Yes, I did.

THE COURT: Today?

A. Yes.

THE COURT: Okay.

MS. NEWMAN: I gave it to him this morning, Your Honor.

THE COURT: Okay.

MS. NEWMAN: Did you have a specific question regarding that, Your Honor? I mean if there's anything you're unclear on, I would like to follow-up.

THE COURT: Well, when I looked at page two [14] Mr. Skywalker starts off "Good morning, Your Honor. Luke Skywalker and Mr. McClain, good morning. Mr. Skywalker and I met a couple of days ago to discuss a plea offer. Mr. Cooper is reading the agreement and I want to put that on the record. Mr. Skywalker: The offer is for today only. Your Honor, it's not a reasonable offer Mr. McClain said. Mr. Skywalker: He's charged with habitual offense. He was a felon in possession of a firearm. We're agreeing that the guidelines would be substantially higher. Felon in possession it would be 81 to 135 instead of 51 to 80. So it states what the offer is and then Mr. McClain states his case and he says on page 3 after reviewing the medical records, Your Honor, I believe that the prosecution does not have the evidence to try this case. We're willing to go to trial, but in the interest of justice and due to the fact that Mr.

Skywalker is not trying the case, I would like to discuss—this with the attorney who will make the case for the prosecution". This seems to suggest that you had the medical records, you reviewed the medical records and it was your assessment based on your reviewing the medical records that the offer that was then given could not be supported by the evidence. That's the way I read this.

[15] A. That's the way I felt. That the offer could not be supported by the evidence.

THE COURT: Right. The medical evidence and all. the other evidence?

A. Correct.

THE COURT: Okay.

MS. NEWMAN: What we talked about last week and that's why we—that's the way I read the transcript as well. In talking about the offer and that he conveyed that to Mr. Cooper and that he didn't think the medical records—

BY MS. NEWMAN:

Q. And when you first spoke with Mr. Skywalker you didn't have those medical records. You got them after you spoke which is why Mr. Skywalker says the offer was reasonable when we spoke.

A. Right.

Q. But you didn't have the medical records?

A. Exactly.

MS. NEWMAN: I have nothing further.

THE COURT: Whose decision was it to go to trial? Was it Mr. Cooper's?

A. Well, my client made the decision to go to trial. didn't make it for him, Your Honor.

THE COURT: Okay. Did Mr. Cooper tell you

* * *

[28] A. Yes, I do.

THE COURT: Now, he hasn't been to law school. So does he know what that means?

BY MS. NEWMAN:

Q. I explained it to him, Your Honor. Did I explain it and—do you understand what that means?
A. Yes, you did.
Q. That anything you told Mr. McClain, he could have testified about and there's no secrets?
A. Correct.
Q. You wrote a couple of letters to the judge in this case;—is that true?
A. Yes, I did.
Q. And in those letters, what did you ask the judge for?
A. A Cobbs agreement, I believe. Yeah, a Cobbs agreement, plea, bargain.
Q. And I know the judge is going to ask these questions which is why I'm going to go here. Where did you get the language about a Cobbs agreement?
A. I picked up on it in the county jail.

THE COURT: Is that from a lawyer?

A. No.

BY MS. NEWMAN:

Q. There are people who refer to themselves as jailhouse lawyers?
[29] A. Correct.
Q. And they like to give advice?
A. Correct.
Q. Did you at any time in these proceedings, starting with the Preliminary Examination forward

contest with Mr. McClain that you had in fact shot Miss Mundy? Did you ever tell him that you didn't shoot Miss Mundy?

A. No, I didn't.

MR. BERNACKI: Your Honor, I'll just make the objection. I'll ask that it not be leading now at this particular time.

THE COURT: I think she wants to push him in a direction so, you know, she's not forcing him to give an answer. So I don't think it's leading.

MR. BERNACKI: Okay.

MS. NEWMAN: Thank you, Your Honor.

BY MS. NEWMAN:

Q. Why don't you, just tell us; Did you talk with Mr. McClain about a plea?

A. Yes, I did.

Q. And was it your intention to go to trial or to enter into a plea?

A. Hopefully I was intending to enter into a plea.

Q. And why was that?

A. Because I was guilty.

[30] Q. And had—you asked Mr. McClain to negotiate a plea on your behalf?

A. He said he was going to negotiate.

Q. He told you that?

A. Right.

Q. And we know from the record that he came to you a few days prior to this—July 17th hearing and talked with you about a plea offer that Mr. Skywalker had made.

A. Correct.

Q. Could you just tell us a little bit about your conversation with him?

A. I had been in the county jail and I hadn't heard from Mr. McClain since a couple of months prior to this, I believe it was May and I was suppose to have a court date June the 13th I believe it was to come over here and discuss a plea and he didn't show-up. So a couple of days, I believe three days before my trial, he came to the county and he told me he had a medical report and in the medical report the victim was shot below the waist and he told me that wasn't attempted murder and that my guidelines—he was going to get it dropped down to great bodily harm and my guidelines for—that was 18 to 84 months and he asked me how did that sound. I said that's good.

Q. So what impression did that leave you with at that [31] point?

A. That I was going to get 18 to 84 months.

Q. You interpreted that conversation that that's what the offer was going to be?

A. Correct.

Q. And were you willing to accept that offer?

A. Yes.

Q. And when you came into court on July 17th the record indicates that you were reading a plea agreement while Mr. McClain was talking with Mr. Skywalker on the record.

A. Correct.

Q. And do you remember the terms of that offer?

A. Right. It was 4 to 7.

Q. Roughly 51 to 85 months that we've been referring to as 4 to 7?

A. Correct.

Q. And were you willing to accept that plea offer?

A. Yes.

Q. And what happened in the courtroom? Why didn't you accept it?

A. Because my lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist. It was—I couldn't get that charge. He told me I couldn't get it.

[32] Q. You couldn't get it. All right. That's fine. That was your understanding that you couldn't get assault, with intent to murder?

A. Correct.

Q. Based on the medical reports?

A. Correct.

Q. And that's why Mr. McClain was turning down the offer?

A. Right.

Q. Essentially because the facts didn't support the charge?

A. Right.

Q. You've heard the testimony from Mr. McClain today and you and I have had multiple opportunities to chat. If Mr. had taken you aside like I just took you aside and said look, Mr. Cooper, I think you can be convicted of assault with intent to murder even if I think this is really nothing more than a great bodily harm, certainly a jury still might find you guilty of assault with intent to murder. Your guidelines for that are at least double, if not triple, what the prosecutor is offering. We have no really reasonable defense to these charges. Would you have been willing, you know, this is a gamble. That you might be able to go ahead and negotiate something better at the trial date, but I'm telling you it's a big gamble. Did you [33] have any information of that nature?

A. No.

Q. What information did you have, just tell us?

A. He told me that the prosecution couldn't prove his case because the person was shot below the waist

and that's not attempted murder. It was great bodily harm and that he was going to get me a plea bargain.

Q. So—let's go back to that date. I'm, telling you it is assault with intent to murder. No question about it. There's no reasonable viable defense to these charges. The guidelines are at—least half of what they would be if they had been scored properly. Would you have taken the plea offer of pleading to assault with intent to murder with a guideline sentence within the range, a minithum-sentence within the range of 51 to 85 months?

A. Yes.

MS. NEWMAN: I don't have any further questions then.

CROSS-EXAMINATION

BY MR. BERNACKI:

Q. You've been convicted before, hadn't you, prior to this date?

A. Right.

Q. And that was by a plea, wasn't it?

A. Correct.

[34] Q. So you knew what the plea procedure was, being charged and everything?

A. Right.

Q. At the final conference which was like back in May, you didn't plead at that time, did you?

A. No.

Q. Because the offer was too high, it wasn't acceptable to you?

A. In May?

Q. Yes.

A. I didn't get a plea offer in May.

Q. When was the first time you were aware that you had a plea offer? I mean you always could have pled guilty. You knew that, didn't you?

A. Right.

Q. You wanted a lesser? You didn't want to be convicted of assault with intent to murder, correct?

A. I wanted a plea offer.

Q. Well, what did you want? Did you—want probation?

A. I know I couldn't get probation.

Q. You wanted to get rid of the felony firearm?

A. No.

Q. You wrote a letter to the judge asking if he could may be get you a plea to felonious assault?

A. Right.

* * *

[37] THE COURT: And you shot her because you thought that she was going to harm Mrs. Smith and may be harm you?

A. At that time, yes.

THE COURT: Now, I know Mr. McClain told you that you can think somebody is armed and be mistaken and still be found not guilty. You knew that. You know, you don't have to be right. If you have an honest and reasonable belief you can defend yourself and later turn out to be wrong. He told you that I know.

A. No.

THE COURT: You didn't know that?

A. You—said did he tell me that?

THE COURT: Did you know that?

A. What's the question?

THE COURT: Did you know that the law says that if you reasonably and honestly believe that you're about to be seriously hurt, that you can defend yourself even if later it turns out that you were wrong

about what you thought you believed. If I see you reaching for your waistband and I think you have a gun in there, I don't have to see that gun and let you shoot me before I can shoot you back.

A. Okay.

[38] THE COURT: You know that, right?

A. Right.

THE COURT: So you knew that—if you saw a gun, you didn't have to wait for her to shoot at you first. That you could shoot at her first to defend yourself and Mrs. Smith, right?

A. Okay, right.

THE COURT: Didn't you argue with Mr. McClain about, man, I did—I was defending myself? I want to go to trial because I was defending myself?

A. No.

THE COURT: When did you give up on the self-defense claim?

A. We never really got a chance to discuss a strategy never knew I was going to trial until the trial started. So we didn't discuss that until the trial started.

THE COURT: So at the final conference when he said that that offer is rejected and when you signed the final conference form that gave the trial date, you're telling me you didn't know you were going to trial?

A. Right. I knew I was going to trial then. I never talked to him—after that.

THE COURT: When you were sitting down [39] looking at the plea offer because there's reference in

the transcript that my client is looking at the offer right now. Do you remember doing that?

A. I didn't sit down. I was standing right there. I remember looking at the plea offer.

THE COURT: And what did you think? Did you think, dang, this is a good offer? I better—jump on this joker because I'm wrong as all get out?

A. Can I tell you what happened?

THE COURT: Did you think that? That was my first question.

A. At the time, no, because he was telling me that I couldn't be found guilty. The plea bargain was unreasonable.

THE COURT: Was it his opinion? You took it as his opinion, didn't you?

A. I didn't know what made the charge different between attempted murder and great bodily harm.

THE COURT: Help me out now because you asked me about felonious assault. So you must have had some understanding about what felonious assault was. Come on, Mr. Cooper.

A. Right.

THE COURT: Let's lay it all out. You heard his argument at the Preliminary Examination about the

* * *

[43] A. Right.

THE COURT: And how long did you all discuss the case or you didn't really discuss the case?

A. No, we didn't discuss—the case.

THE COURT: So what did you discuss?

A. He came over and told me that he got the medical report and that my guidelines for great bodily harm was 18 months to 84 months and that we go to court tomorrow because I didn't even know I was suppose to come to court the next day.

THE COURT: And you didn't ask him any questions of course?

A. No. I was happy to get the 18 to 84 months.

THE COURT: Well, you didn't say I got a self-defense claim?

A. No.

THE COURT: She had a gun?

A. No.

THE COURT: So you were willing to plead guilty to something you thought you had a defense to?

A. Yes.

THE COURT: So you were, what, not going to mention that she had a gun and you shot in self-defense when you took the plea? You were going to leave that little part out?

* * *

[48] MS. NEWMAN: I do.

BY MS. NEWMAN:

Q. Did you write a letter to Mr. McClain as well?
A. Yes, I did.
Q. And in that letter did you explain some of the things, the same things that you explained to the judge?
A. I wrote him. I was telling him I wanted a plea bargain.—I really can't remember exactly what I

wrote Mr. McClain. It was may be like, may be in April.

Q. But you wanted a plea and was he visiting with you on a regular basis at the Wayne County Jail so you could talk about your case?

A. No, I never seen him.

Q. Did he ever write you letters and ask you to provide him with any information about your case?

A. No.

Q. Did he ever talk, if you know, talk to anybody else to see if they could provide information about your case? Not that I know of.

A. He never came and said, Mr. Cooper, I know I haven't been meeting with you, but I've been talking with all these other people?

Q. No.

A. So you're sitting in the county jail. You've expressed to him repeatedly that you want a plea and what's your

* * *

[51] the county and told me that I was coming over here to get 18 to 84 months. So I called my family. I told my family not to come to court that particular day because I was just coming to get 18 to 84 months. When I stepped in the courtroom, Mr. McClain and the prosecutor was already talking. They was already kind of arguing. So I stepped over here in front of the bench and my attorney was saying that—telling the judge that the plea was unreasonable. Now, I'm thinking it was 18 to 84 months. So I asked him what is he talking about. So he showed me on a notebook paper 4 to 7 and they got—him and the prosecutor got to arguing about this is unreasonable based on the medical report. This is my first time hearing about a 4 to 7. I'm coming in here thinking I'm getting 18 to 84 months. So after they're going back-

and-forth arguing, my lawyer told him that he couldn't prove his case and that we would go to trial and that was it. I didn't know I was going to trial. I came in here thinking I was about to get a plea bargain and that's not what happened.

MS. NEWMAN: Okay. That's it, Your Honor.

Thank you.

MR. BERNACKI: Can we have that letter marked, Your Honor?

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