

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

ORIGINAL

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

ALAN STARR TROWBRIDGE,

Defendant-Appellant.

Supreme Court
No.

Court of Appeals
No.: 300460

Grand Traverse Circuit
Court No.: 2010-011026-FC

*gm 9-25-12
rec 10-31-12*

T. Power

OK

Grand Traverse County Prosecutor
Attorney for the Plaintiff-Appellee
324 Court Street
Traverse City, MI 49684
Telephone: (231) 922-4600

Michael A. Faraone, PC (P45332)
Attorney for Defendant-Appellant
3105 S. Martin Luther King Jr. Blvd. #315
Lansing, Michigan 48910
Telephone: (517) 484-5515

*146357 \$ (66)
expnary
recrd
APP
118
IP*

**DEFENDANT-APPELLANT'S
APPLICATION FOR
LEAVE TO APPEAL**

NOTICE OF HEARING

PROOF OF SERVICE

Michael A. Faraone, PC (P45332)
Attorney for Defendant-Appellant
3105 S. Martin Luther King Jr. Blvd. #315
Lansing, Michigan 48910
Telephone: (517) 484-5515
Fax: (517) 484-6345

FILED

DEC 14 2012

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

Index of Authorities ii
Order Appealed and Relief Sought iii
Question Presented iv
Statement of Facts 1

ARGUMENT

ISSUE ONE

I. DEFENSE COUNSEL TOLD DEFENDANT THAT THE SENTENCING GUIDELINES APPLIED TO HIS CASE, UNAWARE THAT THE CHARGES CARRIED A MANDATORY PENALTY OF NON-PAROLABLE LIFE. SAID ERROR CAUSED PLEA OFFERS TO BE REJECTED BY DEFENDANT AND TRIAL COUNSEL, AND DENIED DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS RECOGNIZED IN THE RECENT *LAFLER v COOPER* DECISION OF THE UNITED STATES SUPREME COURT.

..... 3

Relief Requested 14

Appendix

- Exhibit One: Court of Appeals’ Opinion
- Exhibit Two: Order Denying Reconsideration
- Exhibit Three: Warrant and Complaint
- Exhibit Four: Felony Information
- Exhibit Five: Prosecution Plea Offers
- Exhibit Six: Trial Court’s Findings
- Exhibit Seven: Defendant’s Affidavit
- Exhibit Eight: *Lafler v Cooper*

Notice of Hearing (attached)

Notice of Filing (attached)

Proof of Service (attached)

INDEX OF AUTHORITIES

Case Law

<i>Brady v United States</i> , 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970)	4
<i>Hill v Lockhart</i> , 474 US 52; 106 SCt 366; 88 LEd 2d 203 (1984)	3
<i>Lafler v Cooper</i> , ___ US ___; 132 SCt 1376; 79 USLW 3102 (2012)	2, 3, 4, 8, 10, 12, 13, 14
<i>Magana v Hofbauer</i> , 263 F3d 542 (6th Cir. 2001)	9
<i>Padilla v Kentucky</i> , 599 US __; 130 S Ct 1473, 1482; 176 LEd2d 284 (2010)	9, 14
<i>People v Carbin</i> , 463 Mich 590; 623 NW2d 884 (2001)	3, 7
<i>People v Grove</i> , 455 Mich 439; 566 NW2d 547 (1997)	8
<i>People v LeBlanc</i> , 465 Mich 575; 640 NW2d 246 (2002)	3
<i>People v Odom</i> , 276 Mich App 407; 740 NW2d 557 (2007)	7
<i>People v Pickens</i> , 446 Mich 298; 521 NW2d 797 (1994)	3
<i>Santobello v New York</i> , 404 US 257; 92 SCt 495; 30 LEd 2d 427 (1971)	4
<i>State v Donald</i> , 198 Ariz 406; 10 P3d 1193 (2000)	9
<i>Strickland v Washington</i> , 466 US 668; 104 SCt 2052; 88 LEd 2d 674 (1984)	3, 4, 7, 8, 9, 11
<i>Uniprop, Inc v Morganroth</i> , 260 Mich App 442; 678 NW2d 638 (2004)	11

Statutes

MCL 750.520b	1, 5
--------------------	------

Constitutions

US Const Amends VI	3, 13
US Const Amends XIV	3, 13
Const 1963, art 1, §§ 17, 20	3

ORDER APPEALED AND RELIEF SOUGHT

This Court has jurisdiction. Const 1963, art 1, § 20; MCL 600.215(3); MCL 770.3(6); MCR 7.301(A)(2); and MCR 7.302(C)(2)(a). Defendant seeks leave to appeal a Court of Appeals Opinion, **Exhibit One**. On October 31, 2012, a defense motion for reconsideration was denied, **Exhibit Two**. Specifically, defendant seeks leave to appeal the first issue presented and decided below, a claim of ineffective assistance during plea negotiations. Defendant's claim rests on the 2012 United States Supreme Court decision in *Lafler v Cooper*¹ issued *after* the trial court denied a post-conviction motion brought by the defense.

Under MCR 7.302(B)(3), the issue presented “involves legal principles of major significance to the state’s jurisprudence.” In a request for publication, the prosecution noted that this opinion was one of the first issued since *Lafler*, and wrote “Given the obvious implications of *Lafler* and nuances in the plea bargaining process ... we will likely encounter this issue more and more.” We do not agree that the particular facts of this case will be frequently repeated. But we do agree with opposing counsel that this case provides a good vehicle to address legal principles of major significance to Michigan’s jurisprudence.

MCR 7.302(B)(5) is also met. The Opinion at issue conflicts with Supreme Court precedent. Under a 2006 statutory amendment, defendant’s charges carry a penalty of non-parolable life. Trial counsel confessed at sentencing, and later on an evidentiary record, that he was unaware of that penalty. The prosecution used pre-2006 charging language. No arraigning judge told defendant the correct penalty. Trial counsel further confessed, on the evidentiary record, that defendant would have entered a plea agreement to lesser charges if he had been properly advised, and in fact a late attempt to plead was made on the record. Respectfully, under these facts, said Opinion conflicts with *Lafler* and at least one other decision of the United States Supreme Court.

¹ *Lafler v Cooper*, ___ US ___; 132 SCt 1376; 79 USLW 3102 (2012)

QUESTION PRESENTED

ISSUE ONE

I. DEFENSE COUNSEL TOLD DEFENDANT THAT THE SENTENCING GUIDELINES APPLIED TO HIS CASE, UNAWARE THAT THE CHARGES CARRIED A MANDATORY PENALTY OF NON-PAROLABLE LIFE. SAID ERROR CAUSED PLEA OFFERS TO BE REJECTED BY DEFENDANT AND TRIAL COUNSEL, AND DENIED DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS RECOGNIZED IN THE RECENT *LAFLEER v COOPER* DECISION OF THE UNITED STATES SUPREME COURT.

The trial court answered: "No."

Defendant-Appellant answers: "Yes."

Plaintiff-Appellee answered: "No."

The Court of Appeals answered: "No."

STATEMENT OF FACTS

Defendant-Appellant, Alan Starr Trowbridge, appeared before the Grand Traverse Circuit Court on five counts of first-degree criminal sexual conduct (victim under 13)¹ as a recidivist.² As noted in the Court of Appeals' Opinion, trial counsel neglected to read the offense statute and did not advise defendant that said charges carried a mandatory penalty of non-parolable life.³ Trial counsel erroneously advised defendant that he faced a guidelines offense.⁴ In addition, the charging documents all used pre-2006 language and erroneously told defendant that the charges were punishable by, "[parolable] life or any term of years." The trial court as well never advised defendant of the mandatory penalty.⁵

On July 30, 2010, the prosecution made a plea offer in which defendant could plead to two counts of CSC Third as a habitual offender second. Unaware of said mandatory penalty set forth in the original charges, defendant declined the offer. On August 9, 2010, the prosecution amended its offer to three counts of CSC Third with no habitual. Although still unaware of said mandatory penalty, defendant accepted that offer.⁶ The agreement was, however, rejected by the trial court on grounds that a plea cut-off deadline had passed (TT I 160-162). On August 12, 2010, defendant was convicted by jury as charged (TT IV 247-248). Although the trial evidence is not relevant to the issue raised, defendant acknowledges that he was convicted of a heinous offense.

¹ MCL 750.520b(1)(a).

² Defendant's prior was a 2005 fourth-degree criminal sexual conduct conviction involving a boy under age 13. Under MCL 750.520b(2)(c), a 2006 statutory amendment, a non-parolable life term is mandated for any offender over age 17 found guilty of committing a listed CSC offense against a victim under age 13, who has previously been convicted of a listed CSC offense against a victim under age 13 while the offender was over age 17. Said provision was applicable to this case.

³ See July 21, 2011 evidentiary hearing at 25-26.

⁴ See July 21, 2011 evidentiary hearing at 29 lines 20, 30-31, 46.

⁵ See July 21, 2011 evidentiary hearing at 5, 10. The prosecution conceded they erred as well, July 21, 2011, evidentiary hearing at 54, lines 20-25.

⁶ TT IV at 160-161.

On September 10, 2010, the trial court informed trial counsel that the offense statute carried a mandatory penalty of non-parolable life. The hearing was adjourned to allow counsel to file a written brief on the subject.⁷ On September 27, 2010, the parties reconvened and trial counsel admitted that he failed to advise defendant of the offense penalty because he was unaware of it.⁸ Defendant was thereafter sentenced to non-parolable life. On September 28, 2010, defendant requested the appointment of appellate counsel. On October 4, 2010, the undersigned was appointed.

On May 18, 2011, defendant filed a brief on appeal together with a motion to remand for an evidentiary hearing on a claim that trial counsel provided ineffective assistance when he failed to advise defendant of the offense penalty. The brief and the motion cited *Lafler v Cooper*⁹ which, at the time, was pending before the United States Supreme Court. The relevance of *Lafler* to the case *sub judice* is discussed below. On June 21, 2011, the Court of Appeals remanded for an evidentiary hearing.

On July 21, 2011, the evidentiary hearing was held on said ineffective assistance claim. On July 27, 2011, the trial court issued its decision on the record denying defendant's motion. On March 21, 2012, the United States Supreme Court issued its decision in *Lafler*.¹⁰ On May 10, 2012, this case was submitted to a panel of the Court of Appeals. On September 25, 2012, the Court of Appeals issued an Opinion affirming the trial court, **Exhibit One**. On October 2, 2012, the defense moved for reconsideration. On October 31, 2012, the motion for reconsideration was denied, **Exhibit Two**. Defendant now seeks leave to appeal on the first issue raised before the Court of Appeals.

⁷ (T. 9/10/10 at 30)

⁸ (T. 9/27 Sent. 5-6)

⁹ *Lafler v Cooper*, ___ US ___; 79 USLW 3102 (January 7, 2011)

¹⁰ *Lafler v Cooper*, ___ US ___; 132 SCt 1376; 79 USLW 3102 (2012)

ARGUMENT

ISSUE ONE

I. DEFENSE COUNSEL TOLD DEFENDANT THAT THE SENTENCING GUIDELINES APPLIED TO HIS CASE, UNAWARE THAT THE CHARGES CARRIED A MANDATORY PENALTY OF NON-PAROLABLE LIFE. SAID ERROR CAUSED PLEA OFFERS TO BE REJECTED BY DEFENDANT AND TRIAL COUNSEL, AND DENIED DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS RECOGNIZED IN THE RECENT *LAFLEW v COOPER* DECISION OF THE UNITED STATES SUPREME COURT.

Standard of Review and Issue Preservation. The question of whether defendant was denied the effective assistance of counsel is a question of constitutional law reviewed de novo.¹¹ This issue was preserved at an evidentiary hearing on remand from the Court of Appeals, and earlier by admissions made by counsel on the sentencing record.

Discussion

Defendant is sentenced to life without parole. Trial counsel has admitted that he was unaware of the applicable penalty provision until *after* trial. That error caused the defense to improperly evaluate plea offers. There is a reasonable probability that defendant would have made a timely acceptance of those offers if he had been properly advised. In fact, *unaware of the mandatory penalty*, defendant made a late (by days) acceptance of a plea offer.

I. Applicable Law

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding.¹² In *People v Carbin*,¹³ this Court recited the basic principles applicable to a claim of ineffective assistance:

¹¹ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002)

¹² *Strickland v Washington*, 466 US 668, 104 SCt 2052, 88 LEd 2d 674 (1984); *People v Pickens*, 446 Mich 298, 521 NW2d 797 (1994); US Const Amends VI, XIV; Const 1963, art 1, §§ 17, 20.

¹³ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), *See Hill v Lockhart*, 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1984)(applying *Strickland* to ineffective assistance claim based on a failure to properly advise defendant of the consequences of accepting or rejecting a plea offer)

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington* ... “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. “Second, the defendant must show that the deficient performance prejudiced the defense.” To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Citations omitted].

In *Lafler*, the Supreme Court held that where a defendant can show it is reasonably probable that, but for ineffective advice of trial counsel, the defendant would have accepted an offer, and that the court would have accepted its terms, and that the conviction or sentence under the offer would have been less severe than the judgment and sentence imposed, the ineffective assistance claim survives as a viable claim even after a fair trial. In doing so, the Court acknowledged that plea negotiations are a critical stage of criminal proceedings and require the effective assistance of counsel:

The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice. [*Lafler v Cooper*, ___ S Ct ___, 6; 2012 WL 932019 (March 21, 2012).]

The overwhelming majority of criminal convictions rest on a plea of guilty.¹⁴ The Supreme Court long ago described negotiated pleas an “essential component of the administration of justice.”¹⁵ If defendant Trowbridge had been properly advised, it is *at least* reasonably probable that he would have resolved this case through a plea agreement. With the recent decision in *Lafler*, we now know that this claim survives even a fair trial. If granted relief, defendant will still serve decades in prison. But this case falls squarely under the *Lafler* decision, and we should not circumvent *Lafler* in order to insure that defendant dies in prison.

¹⁴ *Brady v. United States*, 397 US 742, 752; 90 S Ct 1463, 1471; 25 L Ed 2d 747 (1970).

¹⁵ *Santobello v New York*, 404 US 257, 260; 92 S Ct 495, 498; 30 L Ed 2d 427 (1971)

II. The Record

The warrant and complaint filed below incorrectly described the offense penalty as parolable life or any term of years (**Exhibit Three**). On May 6, 2010, a preliminary exam was waived. On May 11, 2010, a felony Information was filed and it too misstates the applicable penalty (**Exhibit Four**). On May 14, 2010, and June 25, 2010, the prosecution's offer was: "[P]lea to 1 ct. of CSC 1st, dismiss balance." On July 30, 2010, a new offer was made: "Plead to 2 cts. of CSC 3rd & habitual 2nd." (The Offers; **Exhibit Five**). On August 9, 2010, the court rejected as too late the defendant's acceptance of a plea offer described as "three counts of CSC third" with no habitual offender finding (TT I 161).

Defendant was convicted on three of the original counts. On September 10, 2010, he appeared for sentencing and trial counsel learned of the 2006 amendment to the offense statute. Counsel erroneously described it as a mere "interpretation of the statute" and continued to argue that the sentencing guidelines were controlling (T. 9/10 Sent. 23-25). Sentencing was adjourned for trial counsel to file a brief. In that brief, counsel states: "At no time did the Prosecutor or defense counsel contemplate a mandatory life sentence."¹⁶ Counsel argued that the prosecution violated due process by not listing the correct penalty in charging documents. On the September 27, 2010, record trial counsel made the same admissions (T. 9/27 Sent. 5-6). The court focused on the late acceptance of a plea offer (T. 9/27 Sent. 7).¹⁷

On appeal, the issue is whether there is a reasonable probability that, if counsel had properly advised defendant on the mandatory penalty, defendant would have made a *timely* acceptance of an offer – including the July 30, 2010, offer. In other words, it is unreasonable to find that

¹⁶ In their September 23, 2010, filing below the prosecution conceded that they used charging language that failed to incorporate the 2006 amendment to MCL 750.520b which is at issue saying, "These changes were not adopted by the warrant manual until July 1, 2009 ... Despite having the new charging code available, the People charged the defendant under a code which did not state that the penalty was life without parole."

¹⁷ The Opinion of the trial court, **Exhibit Six**.

defendant's *willingness* to plead no contest when *improperly advised* is evidence that he would *not* have pleaded guilty and sooner if he had been *properly advised*. The evidentiary hearing on remand established that, if properly advised of the mandatory penalty, defendant would have acted *before* the deadline passed.

Trial counsel testified: That he did not read the penalty portion of the statute and had believed this was a guidelines case (Ev. Hrg. 26); That he did not realize his mistake until sentencing (Ev. Hrg. 42, 49); That he scored guidelines when he conveyed offers to defendant (Ev. Hrg. 30-31, 46); That he scored the guidelines on five counts of CSC 1st without an habitual as 171 to 285 months (Ev. Hrg. 77)¹⁸; That he scored the guidelines with the habitual second at 171 to 356 months (Ev. Hrg. 77); That due to current Parole Board practices regarding sex offenders “[I]t is more important to decrease the maximum, than to worry about the minimum” (Ev. Hrg. 76 line 17); That Parole Board practices change (Ev. Hrg. 79-80) and, at sentencing, defendant was 29 years of age (Ev. Hrg. 81).¹⁹

Trial counsel testified: That “Mr. Trowbridge and I were very interested in resolving this with a plea” beginning in district court (Ev. Hrg. 31, 48, 66); That “[W]e were very close to resolving this case” and the defense made offers “throughout this process of negotiation” (Ev. Hrg. 34); That the trial court was incorrect in suggesting that anyone could make the same claim defendant makes because, unlike a typical case, no arraigning judge advised defendant on penalty (Ev. Hrg. 52-53); That the entire negotiation process “was tainted by my mistake” (Ev. Hrg. 69), and that defendant “Never told me he would never plead guilty” (Ev. Hrg. 69).

¹⁸ Two counts were dismissed at trial.

¹⁹ Defendant was given 191 days credit. Therefore, if defendant had been sentenced to a 356 month minimum (the maximum end of the guidelines range the trial court arrived at when the evidentiary hearing ended, p. 84) defendant would be eligible for parole before turning 60 years of age. As an aside, vague references were made at the evidentiary hearing to the possibility of an upward departure if the guidelines had applied. But no one has ever suggested what a *lawful* guidelines departure, including a doubling of the minimum term to insure that defendant dies in prison, would have been based upon.

Trial counsel testified: That “Alan is not a fighter,” and he was “relying upon my advice and judgment” (Ev. Hrg. 36); That he would have accepted an offer if advised to do so (Ev. Hrg. 37); That if he had been properly advised, defendant would have accepted the July 30th offer (Ev. Hrg. 51 lines 12-13); That defendant accepted the August 9th offer unaware that he faced non-parolable life (Ev. Hrg. 40 at line 24), and:

Q. Finally, in your experience as an attorney, when you tell clients the possible penalty they’re facing, does that help them make proper decisions?

A. Yes. And, you know, the attorneys can emphasize the sentence to influence the result. The attorney can emphasize the likelihood of winning a trial, to influence the choices. The client relies upon the professional judgment of the lawyer in deciding whether to accept or reject a plea” [Ev. Hrg. 69-70].

Counsel described clients who said they were innocent only to “suddenly drop their façade and plead guilty” (Ev. Hrg. 24). He described clients who were innocent but pleaded guilty out of fear when told the penalty they faced (Ev. Hrg. 24). He described the power he had to effect those decisions saying, “...the attorney has a lot of ability to push them one way or another” (Ev. Hrg. 33 at line 14).

III. Analysis

Regarding the first prong of *Strickland*,²⁰ counsel’s performance was objectively unreasonable in light of prevailing professional norms. In fact, the first prong of *Strickland* was conceded by the prosecution (Ev. Hrg. 11-12). Counsel’s failure to advise defendant on the mandatory penalty prevented him from making informed decisions on plea offers. Expecting counsel to read the offense statute and convey accurate advice on sentencing consequences is a minimal standard in any felony case. The amendment in question was enacted in 2006 and this case was not tried until the summer of 2010.

²⁰ *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984), *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007)

The second prong of *Strickland* is also met. Defendant was prejudiced by counsel's erroneous advice because there is a reasonable probability that he would have accepted a plea offer if he had been properly advised. Defendant attempted to accept a plea offer even *before* he learned of counsel's error.²¹ If the prosecution's offer to plead to lesser charges had been accepted, the outcome for defendant (the possibility of parole) would have been significantly more favorable than the outcome received (the certainty of dying in prison).

Trial counsel testified that defendant would have taken any offer trial counsel recommended (Ev. Hrg. 36-37, 51, 69-70). Trial counsel testified that he would have told defendant to plead if he (counsel) had been aware of the 2006 amendment – saying they had under a 5% chance of winning at trial – but that because he believed there was no “significant” difference between the guidelines range on a first-degree versus second-degree conviction, he did not recommend that defendant plead (Ev. Hrg 62, 65). That is why this appeal is governed by the *Lafler* decision and why the Court of Appeals' Opinion is in error.

Nor does anything in the existing record contradict trial counsel's testimony that defendant is weak-willed or “not a fighter” (Ev. Hrg. 36). Defendant nearly admitted guilt before the jury. He told the jury that he was a risk to children.²² He told them that he relates to child pornography the way an alcoholic relates to a bar.²³ He told them about what “triggers” his criminal behavior.²⁴ This was not the testimony of a person in denial of his behavior. In fact, this testimony indicates that defendant was ready to resolve this case through a plea. The Court of Appeal's decision, addressed in detail below, is premised on a finding that defendant was unwilling to enter a guilty plea, and that is belied by the record.

²¹ Defendant missed a plea cut-off date by a matter of days and, under *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997), the trial court ruled that he was too late.

²² (TT IV 68).

²³ (TT IV 30-31).

²⁴ (TT IV 29).

In a 2010 decision, *Padilla v Kentucky*,²⁵ the Supreme Court found that affirmative misadvice and omissions during plea negotiations can constitute deficient performance under *Strickland*. There, counsel provided incorrect advice on the immigration consequence of a plea – a collateral consequence, not a direct consequence as exists in the case *sub judice*. The Court observed that: “Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of ‘advantages and disadvantages of a plea agreement.’”²⁶

In 2001, the United States Court of Appeals for the Sixth Circuit found that an erroneous understanding of a sentencing statute and erroneous advice regarding its application can establish deficient performance.²⁷ The Sixth Circuit then provided a remedy equally applicable to the case *sub judice*:

[W]e... REMAND this case to the district court to grant the writ of habeas corpus within ninety days, conditional upon a new plea hearing in state court at which Magana has the opportunity to consider, with counsel, the state's original plea offer. Should the state choose to offer Magana a plea in excess of ten years, its original offer, the district court must determine whether the state can rebut the presumption of vindictiveness which would attach to its offer. If the state can meet its burden, then the parties are free to negotiate a new plea. If the state cannot overcome the presumption and it refuses to reinstate its original offer, then the writ must be granted.²⁸

IV. The Court of Appeal's Opinion

The Court of Appeals Opinion rests on a finding that the prejudice prong of *Strickland* was not shown; that defendant did not demonstrate that he would have accepted a plea offer if he had been properly advised by counsel on the penalty he faced. We respectfully disagree. Every criminal defendant should be informed of the penalty he faces, and a failure to do so undermines any reasonable confidence that the defendant would have rejected plea offers if he had been

²⁵ *Padilla v Kentucky*, 599 US __; 130 S Ct 1473, 1482; 176 LEd2d 284 (2010)

²⁶ *Padilla, supra* at 1484

²⁷ *Magana v Hofbauer*, 263 F3d 542 (6th Cir. 2001)

²⁸ 263 F3d at 553. See also, *State v Donald*, 198 Ariz 406, 415-416; 10 P3d 1193 (2000).

properly advised. Defendant offers six additional reasons in support of his position that the Court of Appeals erred.

The evidentiary hearing occurred on **July 21, 2011**. It was not until **March 21, 2012**, that *Lafler v Cooper* was decided, 5 – 4. Commentary of legal experts at the time, available via any Internet search, predicted the defense would lose. It was in that context, and after abundant admissions of error by trial counsel during the *Ginther* hearing, that defendant was not called. Given the uncertainty of the outcome in *Lafler*, it seemed unnecessary, cumulative, and perhaps reckless to call an easily manipulated defendant to be cross-examined and admit guilt in reliance upon an undecided case.²⁹

If counsel had done that, and if *Lafler* had been decided for the prosecution, as was generally expected to happen, counsel might have damaged what was left of the appeal – the second claim of error raised below. Unlike other post-*Lafler* decisions of the Court of Appeals, this defendant was serving non-parolable life. As regards an affidavit, it is palpably unreasonable to suggest that an affidavit from defendant without submitting him to cross-examination would have carried any weight with anyone. Nonetheless, although we believe it is unnecessary, we present an affidavit with a motion to expand the record, **Exhibit Seven**.

The Opinion states, “the trial court clearly accorded little weight to [trial] counsel’s after-the-fact speculation” that defendant would have pleaded guilty if he had been properly advised. Respectfully, that testimony was made by trial counsel, on a record and under oath, **against counsel’s personal interest**. Those admissions were made even earlier, when counsel confessed error on the sentencing record. If the Court of Appeals deemed trial counsel’s testimony “after-the-fact,” “speculative,” and of “little weight,” then testimony from defendant, made **in his own self interest**, could not possibly have carried any weight.

²⁹ Issuance of the *Lafler* decision continues to affect this appeal. For example, it has caused the defense to abandon the second and third issues raised below.

The Opinion states, “Trial counsel also testified that in his opinion, if defendant were aware he would be sentenced to life without parole if convicted at trial, defendant would have accepted the final pretrial offer if counsel had recommended it.”³⁰ The most telling feature of this record is defendant’s attempted to enter into a plea agreement. There was no need to “speculate” on his willingness to do so, and reason would dictate that defendant’s willingness to plead in ignorance of the non-parolable life penalty means that he would have been *more eager* to plead if he had known of that penalty.³¹

The undersigned knows of no case, and the Opinion cites no case, for the proposition that defendant was *required* to testify at the evidentiary hearing. The *prosecution and the trial court*, in their detailed written and oral statements, never made that claim. That claim was first made in the Court of Appeals’ Opinion. Appellate counsel drove from Lansing to Petoskey to address any questions the Court had during oral argument. The subject of defendant’s decision to not testify, in fact the very broad subject of prejudice under *Strickland*, never arose. The Court’s questions regarded what relief we were requesting.

Under Michigan law, an attorney acts as his client’s agent, and his authority is governed by what he/she is expressly authorized to do and by his/her implied authority.³² The Opinion implies that counsel may have argued this claim without his client’s approval.³³ Defendant was present for the evidentiary hearing. On the July 21, 2011, transcript, p. 100, the trial court instructed the prosecution to prepare a writ for the July 27, 2012, hearing. Counsel did not learn until after arriving in Traverse City on 27th that no writ was prepared. Rather than adjourn, we heard the ruling, which was the only reason the trial court made us return on the 27th. Counsel was not

³⁰ The Opinion at page two, middle of second full paragraph.

³¹ From defendant’s brief on appeal, “The real issue, unfortunately, is that if trial counsel had simply advised his client, of something as basic as the sentence allowed under the offense statute, his client would have pleaded out *before* the plea cut-off date.”

³² *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004)

³³ Opinion at p. 3, “Before doing so, however, appellate counsel waived defendant’s presence.”

acting independently of defendant.

The Opinion notes, “defense counsel’s testimony established that defendant knew his chances of success at trial were extremely small” and that he knew he was facing “tantamount to a life sentence.” Here, the Opinion adopts the reasoning of the trial judge without recognizing where the trial judge arrived with that reasoning, i.e., the Judge could only state, “Mr. Trowbridge was aware that the minimum could be easily as high as 30 years and still be within or close to the guidelines” (Ev. Hrg. 80). According to the PSIR, defendant was 29 at sentencing. To suggest that parole eligibility at 59 is the same as certain death in prison is absurd. And that assumes that trial counsel correctly scored the guidelines.

The Opinion states that, because defendant maintained his innocence at trial he would have been unable to provide a factual basis for a guilty plea, Opinion at 6. That reasoning conflicts with the very holding of *Lafler* that claims of ineffective assistance during plea negotiations can survive a fair trial. That is, *Mr. Lafler himself had gone to trial and maintained his innocence.*

The Opinion states that the court would not accept a no contest plea and, “A no contest plea is the only plea bargain offer the record indicates defendant was willing to accept.” Opinion 6 – 7. Trial counsel, however, testified that defendant would have taken *any* offer he recommended except a plea to the first-degree offense (Ev. Hrg. 36-37, 51, 69-70). That said, that defendant was willing to enter the functional equivalent of a guilty plea when he believed he faced a guidelines sentence, makes it reasonably probable that he would have pleaded guilty if he had known the truth. The evidentiary record:

[The Prosecution]: So what was discussed with him and what he accepted, was no contest?

[Trial Counsel]: That was what was presented. I was never – **I never gave Alan the choice to plead guilty to three counts of CSC 3rd, with no habitual.** I was given [sic] him the option to plead no contest. So I don’t know what he would have done with the CSC 3rd guilty plea, **because it was not offered.** That wasn’t the way the offer was presented to him [Ev. Hrg. 70-71; Emphasis added].

It is unreasonable to find that defendant's *willingness* to plead no contest when *improperly advised* is evidence that he would *not* have pleaded guilty if *properly advised*. That, respectfully, summarizes a deep flaw in the Court of Appeals' Opinion. The Opinion also overlooks the typical psychology of a sex offender (if not a typical felony defendant). They waver back-and-forth in their willingness to accept responsibility, even their willingness to accept reality. The record evidence, however, overwhelmingly indicates that defendant would have entered the July 30, 2010, offer (and others) if he had been properly advised.

V. Conclusion

In *Lafler*, the Supreme Court stated “[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.”³⁴ In fact, in both *Lafler* and the case *sub judice* the defendant declined a favorable plea offer based on counsel’s erroneous advice, proceeded to a trial, was convicted and received a significantly more severe sentence. In *Lafler*, the Court held that the trial itself caused the prejudice because the “defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence” *Id.* at 7.

It has never been disputed, in the case *sub judice*, that counsel failed to advise defendant that the plea offers, if accepted, would avoid the nearly inevitable consequence of life without parole. The trial court found the first prong of *Strickland* was met – that counsel failed to perform as counsel guaranteed by the Sixth Amendment. Instead, the trial court and Court of Appeals found that the second prong of *Strickland* was not met – prejudice. The record, however, indicates otherwise. Defendant’s *willingness* to plead no contest when *improperly advised* is evidence that he would have pleaded guilty if *properly advised*.

³⁴ *Lafler* at 11. Attached hereto as **Exhibit Eight**.

The direct consequence of life without the possibility of parole is equally, if not more, severe than the collateral consequence of deportation discussed in the *Padilla* decision. The Court of Appeals' opinion is in conflict with *Lafler* and *Padilla*. This is true even though defendant was convicted of doing a horrible act in the past and, in the present matter, was found guilty of doing an unspeakable act. The United States Supreme Court precedent must be applied as written – not with added clauses when the outcome is distasteful.

The defense established *at least* a reasonable probability that defendant would have accepted any plea offer presented to him *if he had been properly advised*. The testimony against defendant described egregious behavior, but the same rules apply regardless of the nature of the offense. Defendant requests a remand for a remedy similar to that set out in the *Magana* decision as discussed above.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant thanks this Court for its time and requests that this Honorable Court grant leave to appeal or, in the alternative, that the Court by way of an Order reverse the Court of Appeals and remand the case to the trial court to place defendant back to where he was before the ineffective assistance occurred. If defendant enters a guilty plea on the record he would be resentenced. If he does not, then the existing Judgment of Sentence would remain in effect.

Respectfully submitted,

MICHAEL A. FARAONE PC



Michael A. Faraone (P45332)
Attorney for Defendant-Appellant
3105 S. Martin Luther King Jr. Blvd. #315
Lansing, Michigan 48910
Telephone: (517) 484-5515

Dated: December 12, 2012