CASE NO. 09-1487

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY COOPER

Petitioner-Appellee

v.

BLAINE LAFLER, Warden

Respondent - Appellant.

Appeal from the United States District Court
Eastern District of Michigan Southern Division
Honorable Denise Page Hood

BRIEF FOR PETITIONER-APPELLEE

STATE APPELLATE DEFENDER OFFICE

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Appellee does not contest this Court's jurisdiction.

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Petitioner requests oral argument as a means to aid the Court to understand and decide the issues on appeal.

STATEMENT OF ISSUE PRESENTED

I. TRIAL COUNSEL RENDERED INCOMPETENT ADVICE DURING THE PLEA BARGAINING PROCESS WHICH DENIED MR. COOPER THE EFFECTIVE ASSISTANCE OF COUNSEL.

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STATEMENT OF THE CASE AND RELEVANT FACTS

Introduction

Petitioner Anthony Cooper was charged with assault with intent to murder (AWIM),[1] possession of a firearm by a felon,[2] felony firearm,[3] and possession of marijuana.[4] A Wayne County jury convicted Mr. Cooper of all four counts on July 28, 2003. *Record (R) 8, Trial Transcript (T) 253.* On August 11, 2003, the Honorable Bruce U. Morrow sentenced Mr. Cooper to a term of imprisonment of 185 to 360 months for the AWIM conviction, plus a mandatory two year felony firearm sentence. R 7, 8/11/03 Sentence Transcript (ST) 12.

The Shooting

On March 25, 2003 at about 7:00 PM, Kali Mundy drove to an apartment building on the corner of Schoolcraft and Glastonbury. *R 8, T 138*. She went to visit Robert Smith, a man whom she knew as "Pumpkin." *R 8, T 138*.

Ms. Mundy wanted to ask Smith about problems that developed earlier in the day at a McDonalds franchise in Dearborn. Ms. Mundy had initially suggested that Smith go to seek employment at that McDonalds. *R 8, T 139*. Ms. Mundy subsequently discovered Smith had an altercation with a cashier and manager. *R 8, T 139, 213*. The altercation reached a point where the McDonalds staffers almost

[1] MCL §750.83
[2] MCL §750.224f
[3] MCL §750.227b
[4] MCL §333.7403(2)(d)

called the police. *R 8, T 139-140*. Tava Simon, a defense witness, confirmed that they left McDonalds to go to Smith's apartment because he had a confrontation with an employee there. *R 8, T 214*. Mr. Cooper and his friend Yolanda rode in the car with them. *R 8, T 213-14*.

Ms. Mundy knocked on Smith's door and following a quick conversation with Smith's fiancé, she went outside, first to use the payphone and then to wait for Smith. *R 8, T 140-141, 158, 159*. According to Noel Pettawana, Smith's fiancé, she ordered Ms. Mundy to leave the apartment "[b]ecause of her intentions. What I felt her intentions were. I had children in the house." *R 8, T 206*. Ms. Mundy denied that Pettawana had asked her to leave. *R 8, T 157-158*.

After the phone call, Ms. Mundy got into her car, when she saw a red Ford Explorer pull up to the apartments. *R 8, T 141*. Ms. Mundy thought that Smith was inside the car, but because it was dark, she was not certain. *R 8, T 141*. Ms. Mundy got out of her car and walked towards the truck. *R 8, T 160*. At the same time, she saw Mr. Cooper, whom she recognized from the neighborhood, get out of the truck. *R 8, T 141*. Mr. Cooper walked towards her, pulled out his gun, and started shooting. *R 8, T 142*. Ms. Mundy initially stood in shock and then she started to run. *R 8, T 143*. Bullets hit her in the buttocks, back and side. *R 8, T 143*. She identified Mr. Cooper as the shooter. *R 8, T 141-142*.

Ms. Mundy managed to get to a neighbor's house, where she knocked on the door. She asked the neighbor, Ms. Manning to call the police. *R 8, T 144*. Officer Aubrey Sargent arrived at the scene of Ms. Mundy's shooting. He found her shot in the stomach and back behind Ms. Manning's house on Greenview Street, just east of Glastonbury. *R 8, T 105-107, 145*. Ms. Mundy gave him a description of the shooter as a man with a dark blue hooded sweatshirt. *R 8, T 105, 145*.

Police Officer Randell Coleman was in the area securing the scene of an unrelated shooting. *R 8, T 30*. At about 7:00 PM, he heard screams and gunshots. *R 8, T 31*. He saw a man in a dark hooded jacket running towards Schoolcraft. Officer Coleman heard additional gunshots and he saw a muzzle flash from a handgun that the man carried. *R 8, T 32*.

Officer Lori Dillon and her partner, Officer Demetrius Brown was also in the area holding a shooting scene. *R 8, T 63*. They heard gunshots and received a radio call from Officer Coleman which indicated that the potential shooter was running west through an alley. *T 65*. Officer Dillon then pulled into the alley, in front of a running man. *R 8, T 65*. Officer Dillon arrested the man, whom she identified as Mr. Cooper. *R 8, T 66*. She patted him down to check for a weapon and recovered two packets of marijuana. *R 8, T 66-67*. Mr. Cooper had a dark hooded sweatshirt on when Officer Dillon arrested him. *R 8, T 70*. Based on this

clothing, Officer Coleman identified Mr. Cooper as the same man he saw firing a gun. *R 8, T 35*.

Officer Dillon recovered four shell casings from an automatic weapon in the area around the apartment building. *R 8, T 72-73*. Neither Officer Coleman nor Officer Dillon recovered a handgun. *R 8, T 35, 79*.

Injuries

Ms. Mundy spent almost three weeks in Sinai Grace Hospital for treatment of multiple gunshot injuries. *R 8, T 146*. Dr. Ilan Rubenstein, a trauma surgeon at Sinai Grace, treated Ms. Mundy. *R 8, T 185*. According to Dr. Rubenstein, she suffered potentially fatal injuries from four gunshot wounds in her abdominal cavity. *R 8, T 186*. Ms. Mundy sustained two bullet holes in her right buttock, one to the hip, and one to the right abdomen. *R 8, T 188*. These injuries were consistent with two bullet entrances from the right buttock. *R 8, T 188*. Ms. Mundy sustained major damage to her small and large intestines, which needed to be repaired by surgery. *R 8, T 189*.

Ms. Mundy claimed she suffered a miscarriage from her injuries. *R 8, T 146*. However, Dr. Rubenstein never testified to a miscarriage and medical records showed that Ms. Mundy was not pregnant at the time of the shooting. *R 10, 5/28/04 Ginther Hearing Transcript (GHT) 23.*

Gunshot Residue

Officer Eugene Fitzhugh of the Crime Scene Unit performed a gunshot residue test on Mr. Cooper at the Sixth Police Precinct. *R 8, T 87*. The test analyzed Mr. Cooper's hands and face for gunshot residue. *R 8, T 90.* Prior to the physical test, Officer Fitzhugh asked Mr. Cooper a series of questions in order to complete a Gunshot Residue Test Information Sheet. *R 8, T 89.* In response to these questions, Mr. Cooper told Officer Fitzhugh that he had neither possessed nor been in the vicinity of a fired gun. *R 8, T 89.*

Mr. Cooper answered these questions at the police station following his arrest and placement in handcuffs. *R 8, T 89.* Officer Fitzhugh did not testify to any waiver of *Miranda* rights before this questioning.

William Steiner, a forensic chemist at the Detroit Crime Lab, tested the samples taken from Mr. Cooper. *R 8, T 95.* All three samples tested positive for gunshot residue. *R 8, T 95.* The residue remains for a few hours after the shooting and signifies an individual either fired a gun, stood in close proximity to a fired gun, or handled a recently fired gun. *R 8, T 94, 96.*

Plea Negotiations

Prior to trial, Mr. Cooper sent Judge Morrow two letters. Each indicated Mr. Cooper's desire to plead guilty. The first letter stated that "I'm writing you this

letter in regards to a Cobbs Agreement." The second letter said "I would like to ask for a Cobbs Agreement with the hopes that you will drop the charge of assault with intent to murder down to felonious assault." *(Letters from Anthony Cooper to Judge Morrow, Appendix A).*

At the pre-trial conference on May 16, 2003, the assistant prosecuting attorney offered a guilty plea to AWIM and felony firearm, agreeing to dismiss the other two charges. *R 3, 5/16/03 Pre-Trial Transcript (PT) 4.* Defense counsel requested a trial date, while he and the prosecuting attorney agreed to continue negotiations. *R 3, 5/16/03 PT 5*.

At the final pre-trial conference on July 17, 2003, the prosecuting attorney offered a plea of 51 to 85 months for AWIM, even though he felt the guidelines called for 81 to 135 months. *R 4, 7/17/03 PT 2.* Defense counsel rejected the offer because he felt the prosecution could not prove assault with intent to murder 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 … Mr. Skywalker 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.

R 4, 7/17/03 PT 3. In response, the prosecuting attorney noted that there "will be no offer on trial date because that's policy. I withdraw this offer." *R 4, 7/17/03 PT*

4. At the conclusion of the hearing, defense 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." *R 4, 7/17/03 PT 5.*

Prior to jury selection, the new prosecuting attorney extended an offer on AWIM within the guidelines, per her calculation, of 126 to 210 months, with an additional two years for the felony firearm charge. R 5, *7/23/03 at 3.* Defense counsel did not accept this significantly higher plea offer. *Id.*

Post-Conviction Hearing

Judge Morrow granted Mr. Cooper's motion for a post-conviction hearing on defense counsel's effectiveness. Judge Morrow found that defense counsel, Brian McClain, provided effective representation. The court accordingly denied Mr. Cooper's motion. *R 10, 5/28/04 GHT 75.*

Defense counsel received medical records just prior to the July 17, 2003 pre-trial conference. *R 10, 5/28/04 GHT. 5-6.* Based a review of the records, defense counsel felt 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." *R 10, 5/28/04 GHT 6.* Defense counsel expressed this view to Mr. Cooper and advised that he "could successfully negotiate a plea under the amended charge of assault with intent to do great bodily harm less than murder." *R 10, 5/28/04 GHT 7.* Accordingly, defense

counsel told Judge Morrow that Mr. Cooper would not plead guilty to Assault with Intent to Murder in exchange for a minimum sentence in the range of 51 to 85 months. *R 4, 7/17/03 PT 3*.

Defense counsel also acknowledged that Mr. Cooper expressed interest in a plea agreement. *R 10, 5/28/04 GHT 7.* However, defense counsel felt that he could receive "a more reasonable offer" later in the process from a different prosecuting attorney at trial. *R 10, 5/28/04 GHT 8.* Defense counsel did not ask Judge Morrow for time to discuss these intricacies with his client, because he wanted to explore an offer after a more thorough review of the medical records. *R 10, 5/28/04 GHT 8*.

Mr. Cooper made the decision to reject the plea offer after counsel told him that he could get a far more favorable offer for the lesser charge of Assault with Intent to Cause Great Bodily Harm. *R 10, 5/28/04 GHT 13.* Defense counsel did not feel the Assault with Intent to Murder charge was colorable in light of the medical records. *R 10, 5/28/04 GHT 6, 10, 15*.

In spite of his desire to obtain a more favorable plea agreement, defense counsel acknowledged that in his experience, the offer at trial generally would not improve over a pre-trial offer. *R 10, 5/28/04 GHT 18.*

Defense counsel indicated that Mr. Cooper did discuss a self-defense claim. *R 10, 5/28/04 GHT 16*. However, he advised Mr. Cooper that given the facts of the case, self-defense was not a meritorious claim. *R 10, 5/28/04 GHT 20-21*.

Mr. Cooper corroborated defense counsel's account of their plea conversations. Just as he expressed in two letters to Judge Morrow, Mr. Cooper intended to plea guilty because he shot Ms. Mundy. *R 10, 5/28/04 GHT 28-29.* Mr. Cooper rejected the offer of a minimum sentence in the range of 51 to 85 months based on the advice of defense counsel: "My lawyer told me that they couldn't find me guilty of the charge because the woman was shot below the waist." *R 10, 5/28/04 GHT 31*. Instead, defense counsel informed Mr. Cooper that he could get a plea for great bodily harm with guidelines on the minimum sentence of 18 to 84 months. *R 10, 5/28/04 GHT 30, 43.*

Defense counsel never informed Mr. Cooper that a jury might find him guilty of Assault with Intent to Murder, and that he could face two to three times the 51 to 85 months offered by the prosecuting attorney. *R 10, 5/28/04 GHT 32-33.* 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." *R 10, 5/28/04 GHT 33.* Mr. Cooper would have accepted the 51 to 85 month offer if counsel had explained that a jury would likely find him guilty of Assault with Intent to Murder.

R 10, 5/28/04 GHT 33. Instead, Mr. Cooper rejected the offer because he came to court on July 17 expecting an offer of 18 to 84 months. *R 10, 5/28/04 GHT 51.*

State Appellate History

On March 15, 2005 in an unpublished per curiam opinion, the Michigan Court of Appeals affirmed Mr. Cooper's convictions and sentence. *R 11, 3/15/05 Order, Appendix B.*

The Michigan Supreme Court denied Mr. Cooper's timely application for leave to appeal the Court of Appeals' decision. *R 12, 10/31/05 Order, Appendix C.*

Federal History

Mr. Cooper, through appellate counsel, petitioned for a writ of habeas corpus in the Eastern District of Michigan. On March 26, 2009, the District Court granted Mr. Cooper's writ, finding that the state courts had unreasonably applied clear U.S. Supreme Court precedent and ordered specific performance of the original plea offer.

The Michigan Attorney-General appealed to this Honorable Court and Mr. Cooper responds, requesting that this Court affirm the findings of fact and law of the District Court below.

ARGUMENT

I. TRIAL COUNSEL RENDERED INCOMPETENT ADVICE DURING THE PLEA BARGAINING PROCESS WHICH DENIED MR. COOPER THE EFFECTIVE ASSISTANCE OF COUNSEL.

Applicable Federal Law & Standard of Review

All criminal defendants enjoy a constitutional right to the assistance of counsel for their defense. U.S. CONST. amend. VI, XIV. As envisioned by the Sixth Amendment, the right to counsel protects the right to the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis supplied). The right to effective counsel is so essential that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (*See United States v. Cronic*, 466 U.S. 648, 659 (1984)).

The plea process and decision to plead guilty has long been considered a stage of the criminal process which is both fundamental and a final decision of the **defendant** rather than his counsel. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal") and *Wainwright v. Sykes*,

433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.").

To prevail on a claim of ineffective assistance of counsel, Mr. Cooper must meet the familiar two-part *Strickland* test. First, he must show that counsel's performance was deficient and fell below and objective standard of reasonableness. 466 U.S. at 687-88. Second, counsel's errors must have prejudiced Mr. Cooper's defense so as to deprive him of a fair trial. *Id.* There must be reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. The likelihood of a different result only need be **reasonable**; a defendant need not prove prejudice by a preponderance of the evidence. *Id.*

The *Strickland* analysis extends to claims of ineffective assistance arising out of the guilty plea process.[5] *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). In terms of prejudice, a defendant must show that but for counsel's errors, a reasonable probability exists that he would have rejected a guilty plea and insisted upon going

to trial. *Id.* at 59. A petitioner who asserts counsel was ineffective for advising him to reject a guilty plea also states a cognizable claim under the Sixth Amendment. *Magana v. Hofbauer*, 263 F.3d 542, 547 (6th Cir. 2001).

In a federal habeas proceeding, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs review of state court decisions. Under 28 U.S.C. § 2254(d), the reviewing court must grant the habeas petition if the state court decision either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section (d)(1) creates two bases for relief: state court decisions can either be "contrary to" or an "unreasonable application" of Supreme Court precedent.

> Under the "contrary to" clause, a federal court may grant may grant habeas relief if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law . . . Under the "unreasonable

[5] The state argues that because the U.S. Supreme Court in 2007 requested briefing on questions similar to this case, the law is not settled. See, *Arave v. Hoffman*, No. 07-110 (the case settled out of court before arguments were heard). In actuality, the Supreme Court frequently hears cases which expand upon clearly established precedent. For example, the Supreme Court recently ruled on an aspect of the *Crawford*, 541 U.S. 36 (2004), doctrine – how it affects expert witnesses – in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009). The fact that a new ruling about *Crawford* has been issued does not make the precedent ambiguous or in dispute. The situation is identical here – the fact that the Supreme Court was interested in reviewing *Strickland* doctrine in the context of guilty pleas does not make the *Strickland* doctrine and its application to the facts of this case somehow ambiguous or disputable.

> application" clause, a federal court may grant habeas relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts. Relief is also available under this clause if the state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context.

District Court Opinion (DC) at 9-10.[6] On appeal, legal conclusions of the District Court are reviewed *de novo* but the reviewing court "will not set aside its factual findings unless they are clearly erroneous." *Fleming v. Metrish*, 556 F.3d 520, 524 (6th Cir. 2009).

Legal Analysis

The District Court was correct in granting habeas relief to Mr. Cooper because the Michigan Court of Appeals unreasonably applied the settled standards for effective counsel as determined by the United States Supreme Court. Defense counsel committed gross errors which were so unprofessional that they prejudiced the outcome of the proceedings. Mr. Cooper is entitled to specific performance of

[6] *See also*, *Magana v. Hofbauer*, 263 F.3d 542, 546-47 (6th Cir. 2001) ("The Supreme Court has clarified that the phrases "contrary to" and "unreasonable application of" . . . have independent meaning. *Penry v. Johnson*, 532 U.S. 782 (2001). In order for a state court to render a decision "contrary to" clearly established Supreme Court precedent, the state court must "appl[y] a rule that contradicts the governing law set forth in [Supreme Court] cases," or "confront[ ] a set of facts that are materially indistinguishable from a decision of" the Supreme Court and nevertheless arrive at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring). An "unreasonable application of" clearly established Federal law may occur, in contrast, when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. An unreasonable application of law is not, according to the Supreme Court, merely incorrect; rather, "that application must also be unreasonable." *Id.* at 411.").

the plea since there is a reasonable probability he would have accepted it upon proper advice. *Hill v. Lockhart, supra*.

1. ***The District Court properly determined that the state court unreasonably applied the ineffective assistance of counsel standards set forth by the United States Supreme Court in Strickland v. Washington***.

The United States Supreme Court, in *Strickland*, announced that "a court deciding an . . . ineffectiveness claim must judge the reasonableness of *counsel's* challenged conduct on the facts of the particular case." 466 U.S. at 690 (emphasis supplied).[7] The District Court below found correctly that the Michigan Court of Appeals "mis-characterized the proper analytical framework" required by the Supreme Court in *Strickland* when it focused on Mr. Cooper's actions. *DC at 13*. Instead, it should have focused on "the validity of trial counsel's underlying advice and whether that advice was objectively reasonable." *Id.*

a. *Trial counsel's advice was deficient and fell below objective standards of competency*

[7] The state attempts to argue, based on *Knowles v. Mirzayance*, 556 U.S. ___, slip op. at 11 (2009), that interpretation of *Strickland* claims by state courts "must be given extra latitude in light of the general nature of the rule." *AG Brief at viii*. *Mirzayance* does not demand that federal courts give more "latitude" to state courts on habeas review when ineffective assistance is at issue. Instead, *Mirzayance* was emphasizing the familiar corollary of AEDPA: a state court can make an incorrect ruling of federal law that does not rise to the requisite level of unreasonableness. *Mirzayance* was also reminding federal district courts that when a case-by-case analysis is required, such as in *Strickland*, state courts must be given latitude when determining if an incorrect decision rises to the level of an unreasonable one. When, as here, the state court has unreasonably applied *Strickland* by making its determination based on the defendant's behavior instead of counsel's behavior, the state court never made a fact-based determination to which the federal court could have given latitude.

Before the final pre-trial conference, the prosecutor made a plea offer. If Mr. Cooper agreed to plead guilty to assault with intent to murder, the guidelines range for the minimum sentence would be 51-85 months. *Record No. (R) 4, 7/17/03 PT 2.* This was significantly less than the 135 to 281 month minimum range recommended under the guidelines as scored following the trial. *R 7, 8/11/03 ST 7.*

Mr. McClain not only advised Mr. Cooper to reject the offer based on a misunderstanding of settled Michigan law and of the pertinent facts in the case, but also stripped Mr. Cooper of his right to make the final decision of accepting or rejecting a plea offer. *R 4, 7/17/03 PT 3-5.* In Mr. McClain's professional opinion, the prosecutor would be unable to meet its burden for proving assault with intent to commit murder (AWIM) because "the information in the medical report . . . did not support the charge." *R 10, 5/28/04 GHT 6.* He said that "after reviewing the medical report, . . . [he was] fully prepared to prove that they do not have sufficimt [sic] evidence [and] . . . the medical evidence will show that." *R 4, 7/17/03 PT 3.* Mr. Cooper testified that Mr. McClain told him the rationale for this belief was that "the victim was shot below the waist and . . . that wasn't attempted murder." *R 10, 5/28/04 GHT 30.* Mr. McClain therefore believed the prosecutor's offer to be "unreasonable" because it "**could not** be supported by the evidence." *R 10, 5/28/04 GHT 5, 10, 15* (emphasis supplied).

Mr. McClain believed, based on his misapprehension about the elements of AWIM, that he would be able to negotiate a better plea bargain. In fact, he told Mr. Cooper "my intent was to – I wanted to negotiate a deal based upon GBH [great bodily harm] and the numbers would have been lower than 4 to 7 [51 to 85 months] 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." *R 10, 5/28/04 GHT 13.*

To prove assault with intent to murder in Michigan, the prosecution need only establish that Mr. Cooper committed (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *People v. McRunels*, 603 N.W.2d 95, 102 (Mich. App. 1999).

The medical reports that Mr. McClain believed **could not** support a charge of AWIM corroborated the testimony given at the preliminary examination by Ms. Mundy and testimony eventually given at trial by the trauma room surgeon. Ms. Mundy testified that Mr. Cooper got out of his car and fired a gun at her from a distance of six feet away and shot her in the back. *R 1, 4/14/03 Preliminary Exam Transcript (PET) 6, 13-19.*[8] According to Ms. Mundy, the bullets pierced her

[8] Although citations to preliminary examination transcripts are rare, we focus here on information available to defense counsel **at the time** of an available plea bargain for Mr. Cooper, before trial began. Mr. McClain's unprofessional errors are apparent without the benefit of hindsight, as required by the *Strickland* test, and citations and quotations from the preliminary examination transcripts demonstrate that he had enough corroborated information to make a reasonable analysis of the likelihood of success by the prosecution on an AWIM charge before trial.

bowel, her stomach and her back. *R 1, 4/14/03 PET 7.* The trauma room surgeon, Dr. Illan Rubenstein, believed that Ms. Mundy had sustained "potentially fatal injuries" and testified to that effect at trial. *R 8, Trial Transcript (T) 185-6.* Dr. Rubenstein's assessment of the injuries as potentially fatal would have been apparent to any competent counsel who reviewed the existing record at that time in conjunction with Ms. Mundy's medical records.[9]

No Michigan court has ever held that the locus of an injury alone could defeat an assault with intent to murder charge. To the contrary, a defendant need not successfully inflict **any** injuries to be guilty of AWIM. *See, e.g., People v. Cochran*, 399 N.W.2d 44 (1986) (finding factual basis to support AWIM guilty plea where appellant shot at police officers while fleeing). AWIM is often established where an accused intentionally discharges a firearm at another at close range, under circumstances that neither justify, excuse or mitigate the crime. *People v. Johnson*, 220 N.W.2d 705, 706 (1974) ("the intentional discharge of a firearm at someone with range is an assault [whose] usual result and purpose … is death.").

Thus, notwithstanding Mr. McClain's strong belief, as communicated to Mr. Cooper, that since "the victim was shot below the waist . . . that wasn't attempted

[9] Again, Dr. Rubenstein's testimony at trial is used here not because *Strickland* requires a perfect ability by trial counsel to predict the trial but rather because it demonstrates the information in the medical reports, which were available to Mr. McClain while the plea bargain was still available.

murder", the location of an injury is at best merely one consideration; the fact that Ms. Mundy was initially shot in her buttocks should not have controlled his analysis. *R 10, 5/28/04 GHT 30.* It certainly did not warrant enough significance to justify dismissing a fair plea bargain outright as "unreasonable."

Mr. McClain had a reasonable professional duty to explain to Mr. Cooper the relative risks inherent in rejecting the 51-85 month plea bargain and the true likelihood of gaining a better plea bargain on the eve of trial. Mr. McClain himself acknowledged that plea offers rarely improve between the final conference and the date set for trial. *R 10, 5/28/04 GHT 18.* Instead, Mr. McClain made a blanket assertion that the 51-85 month plea was "not reasonable," unsupported by the evidence and that Mr. Cooper should not take it. *R 4, 7/17/03 PT 2, 3*; *R 10, 5/28/04 GHT 6, 10, 15.*

Mr. McClain had a professional duty to accurately inform Mr. Cooper of the law and to fully explain how extensively his facts fit the elements of AWIM. *Smith v. U.S.*, 348 F.3d 545, 552-53 (6th Cir. 2003) (observing that criminal defendants may rightfully expect their attorneys to "review the charges … by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available.").

Rather than blindly believing "the prosecution **does not** have the evidence to try this case," Mr. McClain bore a duty to at least acknowledge to his client that a rational jury **could** have inferred intent to kill under the circumstances. *R 4, 7/17/03 PT 3* (emphasis supplied). Had the jury believed the prosecution, their view of the proofs would have looked something like this:

- ❖ Mr. Cooper pulled a gun.
- ❖ He opened fire, and shot her twice from behind.
- ❖ He caused her "potentially fatal injuries," in the words of a trauma surgeon.
- ❖ The bullet wounds punctured her bowels resulting in major intestinal damage.
- ❖ Her bowels required surgery to keep them from leaking stool; and
- ❖ Ms. Mundy endured a two-to-three week hospital recovery.

Mr. McClain discounted this perspective entirely. Instead, he adhered to a one-sided view of the case and incompetently advised Mr. Cooper that the government's offer was unreasonable. During the *Ginther* hearing, the state argued that "this case is not a slam dunk" because intent is difficult to prove, as if this could rehabilitate Mr. McClain's unprofessional assessment of the case as unwinnable by the prosecution. *R 10, 5/28/04 GHT 71*. "Slam dunk" cases are a rare boon for prosecutors – the fact that the trial prosecutor was going to have to

exert some effort to prove intent does not deem Mr. McClain's assessments of the case as unwinnable and a 51 to 85 month plea as unreasonable somehow competent professional advice.[10]

The District Court below found that none of the bases (the injuries did not satisfy the elements; the plea offer was unreasonable; counsel believed a plea to a lesser charge could be negotiated) for Mr. McClain's advice "withstands reason." *DC at 15*. It said:

> First, a jury could, and, in fact, did, in this case, believe that Ms. Mundy's potentially fatal injuries could support a charge of assault-with-intent-to-murder; the testimony revealed that Ms. Mundy was shot from behind–the bullets punctured her bowels, for which she had to have surgery and a hospital stay of about three weeks. Second, the prosecutor's offer of four to seven years was not unreasonable when compared with the possibility that Petitioner could have been
> sentenced to life imprisonment. And, finally, defense counsel's belief that he could negotiate a lesser charge was unreasonable in light of the facts that defense counsel himself admitted–"only in the rare case does the prosecutor's offer improve between the final conference

[10] The state attempts to rely in part upon *In re Alvernaz*, 830 P.2d 747 (Cal. 1992) (the state court did hold that on those facts, counsel had not made unprofessional errors which prejudiced the outcome, but a habeas writ was ultimately granted by the federal district court, which found that ineffective assistance of counsel had occurred), for the proposition that a simple misjudgment does not give rise to a claim under *Strickland*. The state has failed to note that the California Supreme Court also directly rejected its novel argument in this case that a fair trial ameliorates constitutional defects in the plea process when it said that "a defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense. . . . The crucial decision to reject a proffered plea bargain and proceed to trial should not be made by a defendant encumbered "with a grave misconception as to the very nature of the proceeding and possible consequences." . . . For these reasons, we conclude the rendering of ineffective assistance by counsel, resulting in a defendant's decision to reject an offered plea bargain and proceed to trial, constitutes a constitutional violation which is not remedied by a fair trial." 830 P.2d at 755 (citations removed).

> and the start of trial." (*Ginther* Hearing Tr., pp. 18-19.) The Michigan Court of Appeals failed to take into account the foregoing evidence. That failure was an erroneous application of clearly established
> federal law. Therefore, this Court finds that habeas relief is warranted on Petitioner's claim of ineffective assistance of counsel.

Id.

i. Trial counsel's objectively unprofessional errors created a reasonable probability of prejudice

The District Court found that "counsel's failure to provide professional guidance to a defendant regarding his sentence exposure prior to rejecting a plea offer may satisfy both the performance and prejudice prongs of the *Strickland* test. *Smith v. United States*, 348 F.3d 545, 553-54 (6th Cir. 2003)." *DC at 12.*

The pre-trial decision on whether to plead guilty is perhaps the most serious choice a defendant can make in a criminal prosecution. *U.S. v. Gordon*, 156 F.3d 376, 380 (2nd Cir. 1998); *People v. Thew*, 506 N.W.2d 547, 555 (1993). For that reason, it is **critical** that a defendant be able to trust his attorney to give competent advice during this stage. "An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *See also, Gordon, supra* at 380

("counsel may and must give the client the benefit of counsel's professional advice on this crucial decision.").

Where counsel neglects this duty and fails to properly advise his client, the omission raises a constitutional concern, for "a defendant has the right to make a reasonably informed decision whether to accept a plea." *U.S. v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992) (quoting *Hill v. Lockhart* and *Von Moltke, supra*). The real issue becomes whether the plea decision represents "a voluntary and intelligent choice among the alternative courses of action." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

This court can view the violation of Mr. Cooper's constitutional rights in one of two ways: either Mr. Cooper relied on his attorney's unreasonable advice and actually declined the government's offer or else he never even was presented with an opportunity to accept or reject the state's plea bargain because of counsel's gross errors. The result is the same – despite his desire to enter a plea he was unable to do so. However, he was always inclined to pursue a plea since in his words, "[he] was guilty." *R 10, 5/28/04 GHT 29.* Both his own testimony and that of Mr. McClain established that these were his intentions pre-trial. Mr. McClain conceded his client wanted to plead and was open to plea discussions. *R 10, 5/28/04 GHT 7.* On the day Mr. McClain rejected the 51 to 85 month offer, Mr.

Cooper came to court believing he would ultimately plead to an even **lesser** amount of time because of counsel's advice:

> A: [Mr. McClain] 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 point?
>
> A: That I was going to get 18 to 84 months.

R 10, 5/28/04 GHT 30-31, 50-51. Defense counsel corroborated Mr. Cooper's recollection, testifying that he "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." *R 10, 5/28/04 GHT 13.* Mr. Cooper also told the court that he "really wasn't given an opportunity [to accept the plea bargain on July 17]. It kind of happened fast." *R 10, 5/28/05 GHT 35.* Thus, Mr. Cooper either rejected the 51 to 85 month offer based on counsel's unreasonable advice and his resultant understanding that Mr. McClain would secure a more favorable deal or Mr. Cooper was actually denied his right to plea guilty by Mr. McClain – either formulation of the actions of Mr. McClain creates a constitutional violation and prejudice to the outcome. *R 10, 5/28/04 GHT 31, 35.*

Defense counsel never informed him that rejecting the plea exposed him to substantial risk. *R 10, 5/28/04 GHT 32-33.* Mr. McClain never asked for additional time to discuss the consequences or alternate scenarios with his client before rejecting the government's offer. *R 10, 5/28/04 GHT 8.* This denied Mr. Cooper an opportunity to make an intelligent decision whether to accept a favorable plea or proceed to trial with damaging facts and significant sentencing exposure. The lack of competent advice from his attorney either denied Mr. Cooper the ability to make the decision or else rendered Mr. Cooper's decision improperly informed and unintelligent.

Had Mr. McClain fully counseled his client on the appropriate law and relevant facts, Mr. Cooper would have been able to accept the government's initial plea offer.[11] *R 10, 5/28/04 GHT 33*. This fact finds additional support in the large disparity between the plea offer and his full sentencing exposure. *See U.S. v. Griffin*, 330 F.3d 733, 737-38 (6th Cir. 2003) ("a substantial disparity between the penalty offered by the prosecution and the punishment called for by the indictment is sufficient to establish a reasonable probability that a properly informed and advised defendant would have accepted the prosecution's offer."). As in *Magana,*

[11] The Sixth Circuit has declined to require habeas petitioners to support such a conclusion with additional objective evidence. *Smith v. U.S.*, 348 F.3d 545, 551 (2003) ("Although some circuits have held that a defendant must support his own assertion that he would have accepted the offer with additional objective evidence, we in this circuit have declined to adopt such a requirement.").

supra and *Griffin*, *supra* it is reasonable to believe Mr. Cooper would have chosen a minimum sentence in the range of 4-7 years rather than risking life imprisonment or the 15 year minimum sentence imposed.

Had Mr. Cooper been properly advised of his sentence exposure before rejecting the offer, there is a reasonable probability that he would have accepted the plea. *See Smith supra* at 553-54 (vacating denial of habeas petition where record did not show attorney informed defendant how unlikely he was to prevail at trial or that defendant could receive dramatically higher sentence as compared to plea offer. The court concluded, "[defense counsel's] failure … to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance. . . . Whether the petitioner had this information before he rejected the plea offer is also an important factor in the consideration of the reasonable likelihood that a properly counseled defendant would have accepted the government's guilty plea offer.").

As a result of Mr. McClain's unprofessional errors, there is a near certain probability that that outcome was prejudiced. Mr. Cooper would have accepted the original plea offer, in accordance with his original intent from the beginning. The fact that Mr. Cooper subsequently received a fair trial, as repeatedly noted by the state in its briefing, cannot ameliorate the fact that Mr. Cooper was denied the

effective assistance of counsel during a critical stage in the proceedings which affected his substantial rights and caused him prejudice.

Further, the state relies upon *State v. Grueber*, 165 P.3d 1185 (Utah 2007), for the proposition that prejudice under *Strickland* is impossible when the defendant goes on to receive a fair trial. Again, the state neglects one of the foundational premises of the Supreme Court of Utah: "If a defendant has been convicted at a fair trial after rejecting, *with the assistance of counsel*, the plea opportunity, there is nothing "'unreliable'" or "'fundamentally unfair'" about imposing a sentence based on the conviction." *Grueber* at 1190 (citations omitted). Unlike the facts of *Grueber*, Mr. Cooper was denied the assistance of effective counsel when the plea opportunity was available and eventually rejected, thereby rendering the resultant trial fundamentally unfair.

2. The District Court properly determined that specific performance of the original plea bargain is the appropriate remedy for violations of the Sixth Amendment.

Mr. Cooper is entitled to specific performance of the plea agreement for a minimum sentence in the range of 51-85 months, the plea he would have accepted if he had competent counsel. Remedies to violations of constitutional rights can take many shapes, but "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered

from the constitutional violation . . ." *U.S. v. Morrison*, 449 U.S. 361, 364 (1981). The approach of the U.S. Supreme Court has been to "identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel." *Id.* at 365.

Several federal courts have granted specific performance where ineffective assistance of counsel deprived a defendant of an opportunity to accept a plea offer. *See e.g., U.S. v. Blaylock*, 20 F.3d 1458, 1468-69 (9th Cir. 1994) (requiring reinstatement of plea offer as the remedy to restore defendant to his original position before the Sixth Amendment violation occurred); *Lewandowski v. Makel*, 949 F.2d 884, 887, 889 (6th Cir.1991) (upholding district court's decision to grant specific performance of plea agreement and upholding original sentence imposed pursuant to plea bargain); *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562, 569 (E.D. Mich. 2005) (allowing specific performance where counsel was ineffective for failing to communicate government's offer to defendant).

The state makes a variety of arguments against specific performance of the original plea as an effective remedy based on an apparent misunderstanding of the District Court opinion. In pertinent part, the District Court found that "the most appropriate remedy is to grant a writ of habeas corpus ordering specific performance of . . . [the] original plea agreement, for a minimum sentence in the range of fifty-one to eighty-five months, the plea . . . [Mr. Cooper] would have

accepted if counsel had been competent." *DC at 16*. This remedy implicates no concerns of separation of powers or federalism because the District Court is not directing a new plea agreement to be offered, but is simply implementing specific performance, the appropriate remedy in this situation.

Conclusion

Mr. Cooper, despite his desire to plead guilty from the beginning, was never allowed to accept the proffered plea bargain, in light of the proofs which the prosecution had at its disposal at the time, based on incompetent advice from his lawyer. His reliance on counsel's unreasonable recommendations rendered his plea decision unintelligent and unknowing, if this court holds that he was given an opportunity to make a decision. The District Court was correct to grant the writ of habeas corpus in light of the state court's unreasonable application of the *Strickland* and *Lockhart* standards when it found that counsel provided effective assistance. The District Court was also correct in remedying the violation of Mr. Cooper's Sixth Amendment right by ordering re-sentencing under the terms of the original plea offer, which called for a minimum sentence in the range of 51-85 months, the plea he would have accepted if he had competent counsel.

The District Court's opinion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Petitioner-Appellant hereby certifies that his brief complies with the maximum-word-count provision of FRAP 32(7)(B) in that the word-processing system used to prepare the brief shows that it contains 6511 words.

ADDENDUM

In lieu of a separate designation of District Court documents, the Petitioner-Appellee designates the entire District Court docket entry report.

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2009, this document was served on all parties or their counsel of record through the CM/ECF system.

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