

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   SHERRY L. BURT, WARDEN,                                 :

4           Petitioner   :   No. 12-414

5           v.   :

6   VONLEE NICOLE TITLOW                                     :

7   - - - - - x

8                         Washington, D.C.

9                         Tuesday, October 8, 2013

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11           The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:04 a.m.

14 APPEARANCES:

15 JOHN J. BURSCH, ESQ., Solicitor General, Lansing,  
16 Michigan; on behalf of Petitioner.

17 ANN O'CONNELL, ESQ., Assistant to the Solicitor General,  
18 Department of Justice, Washington, D.C.; for United  
19 States, as amicus curiae, supporting Petitioner.

20 VALERIE R. NEWMAN, ESQ., Assistant Defender, Detroit,  
21 Michigan; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 12-414, Burt v. Titlow.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 No court has ever held that AEDPA and  
11 Strickland can be satisfied by presumption based on a  
12 silent record. Yet that is precisely the approach the  
13 Sixth Circuit adopted in granting habeas relief here.

14 The record doesn't say how attorney Toca  
15 investigated or what advice attorney Toca gave, but  
16 based on that record silence, the Sixth Circuit assumed  
17 Toca was ineffective. And under AEDPA and Strickland,  
18 the presumptions run the opposite way.

19 Now, if there's one thing that the Court  
20 takes away from the oral argument this morning, I hope  
21 that it's -- it's this: How upside down the Sixth  
22 Circuit's analysis is when it says, on page 19A of the  
23 petition appendix, that Toca was deficient because the  
24 record contains no evidence that he advised Titlow about  
25 elements, evidence, or sentencing exposure.

1           The correct question is whether the record  
2     contains evidence that Toca did not do those things.  
3     And that record silence is dispositive in favor of the  
4     State on habeas review.

5           Now, if we could pull the curtain back and  
6     see what really happened here, it may be the case that  
7     Toca gave the proper advice, that he advised Titlow  
8     about all the perils of going to trial, and that Titlow  
9     continued to maintain her innocence.

10          Under Strickland, we're supposed to presume  
11     that Toca did exactly that, especially when it's  
12     Titlow's burden to satisfy the burden of proof, and she  
13     failed to do that.

14          So I'd like to begin with our first issue,  
15     which is AEDPA deference and the performance prong of  
16     Strickland.

17          JUSTICE GINSBURG:           May I just ask a question  
18     about what you just said? The record does show that  
19     Toca came into the case very late in the day, and he  
20     asked to have a postponement because he said, I have to  
21     get up to speed. I don't know anything about this case.

22          So Toca, himself, is saying, I'm not  
23     acquainted with the case -- with the case.

24          MR. BURSCH:           Well, I don't think he's --  
25     he's saying that, Justice Ginsburg. He's saying I'm not

1 prepared for trial yet, but he says, I've got a lot of  
2 materials here. He goes through a very sophisticated  
3 sentencing analysis with the -- the sentencing court in  
4 this plea withdrawal hearing.

5 If you understand Michigan sentencing, if  
6 you've got a manslaughter charge, there's a grid. And  
7 there's all kinds of different boxes that this could  
8 have fit into, and he would have had to have analyzed  
9 the evidence in order to determine that the two to five  
10 range was appropriate for a manslaughter conviction and  
11 to be able to then negotiate with the prosecutor about  
12 whether that was or was not appropriate.

13 And so we know that -- that Toca did a lot  
14 of work.

15 JUSTICE ALITO: Was -- was the sentence that  
16 was ultimately imposed after the trial for the  
17 second-degree murder conviction within the guidelines --  
18 within the Michigan guidelines?

19 MR. BURSCH: Yes, it was.

20 JUSTICE ALITO: What -- do you know what  
21 those guidelines were?

22 MR. BURSCH: I don't recall, but it's  
23 something on the range of 15 to 20 years. And when  
24 we're talking about guidelines, it's important for the  
25 Court to understand the difference between what the

1 guidelines called for, for manslaughter, and what was in  
2 the plea agreement because Michigan's got this  
3 indeterminate sentencing system, where you've got a  
4 range for the lower end.

5 And so the plea deal was 7 to 15 years on  
6 the lower end. And a manslaughter conviction -- that  
7 is, if they had gone to trial and lost for manslaughter,  
8 the lower end was 2 years to 5 years.

9 And so it was entirely reasonable, from an  
10 objective perspective, for an attorney, looking at this  
11 record, at the time the plea was withdrawn, to say, yes,  
12 if you want to maintain your innocence, the most likely  
13 bad result at trial is most likely better than the plea  
14 deal that you already have.

15 Sure, there's a risk that something worse  
16 could happen, but this Court has said in Strickland and  
17 Lafler and other places that bad predictions are not  
18 deficient performance.

19 And so, really, when you get down to it,  
20 it's really a problem with both the advice being  
21 reasonable, but also the failure to carry the burden of  
22 proof. It's just the case that Titlow has not come  
23 forward to demonstrate, as he was required to do -- she  
24 was required to do, on the record, what Titlow -- or  
25 what Toca did to investigate and what advice Toca

1 actually gave to Titlow.

2 JUSTICE KENNEDY: When we're asking whether  
3 the advice was reasonable, what force do we give to the  
4 proposition that a well-counselled defendant was now  
5 insisting that he wanted to change his plea? And there  
6 was only three days. How do we -- how do we factor that in? If --  
7 if we look just at what the counsel did --

8 MR. BURSCH: Right. I think that's an  
9 important factor.

10 JUSTICE KENNEDY: -- it may lead us to one  
11 answer. But if we know that a previously  
12 well-counselled defendant had now changed his mind and  
13 wanted to withdraw, how do we factor that in?

14 MR. BURSCH: I think that's a significant  
15 factor because, as you point out, before the ink was  
16 even dry on the plea agreement, Titlow was already in  
17 prison saying, I'm innocent, maybe I should be  
18 withdrawing this plea, setting in motion a chain of  
19 events that resulted in her firing the first attorney  
20 and then hiring a second attorney.

21 And I don't think that the court of  
22 appeals -- the Michigan Court of Appeals, articulated  
23 any kind of a -- a per se rule about that -- you know,  
24 certainly, we all understand that the ethical obligation  
25 of the lawyer is that, if your client insists that they

1 want to maintain their innocence, you have to allow them  
2 to do that.

3 But what the court of appeals did, at pages  
4 100 to 101A of the petition appendix, it looked at that,  
5 but it also looked at the other evidence. It looked at  
6 the Strickland presumption that Toca did his job. And  
7 then it says, at the very conclusion of that sentence,  
8 based on all the proofs and arguments presented, Titlow  
9 failed to satisfy her burden. This instance is one part  
10 of that.

11 JUSTICE ALITO: Could you -- could you  
12 explain the procedural situation before the Michigan  
13 Court of Appeals? There was a motion by the Respondent  
14 for a remand to the trial court to create a record; is  
15 that -- that correct --

16 MR. BURSCH: That's correct.

17 JUSTICE ALITO: -- on the issue of  
18 ineffective assistance of counsel?

19 And so the -- the question that the court of  
20 appeals had to decide was whether the materials that  
21 were submitted by the Respondent were sufficient to  
22 justify the hearing.

23 MR. BURSCH: That's correct.

24 JUSTICE ALITO: And the court of appeals, I  
25 gather, said they're not sufficient and cited, among



1 other things or principally, the fact that the  
2 Respondent had claimed innocence, and that was the  
3 reason for the -- the change of attorney.

4 So the issue really wasn't -- that was  
5 before them was really not entitlement to relief, but in  
6 the course of deciding whether there should be a remand,  
7 they necessarily got to the issue of whether there was  
8 an entitlement to relief.

9 Is that -- is that correct? Or do I not  
10 understand?

11 MR. BURSCH: Just to be clear about Michigan  
12 procedure, the defendant has an opportunity to ask for  
13 what's called a Ginther hearing in Michigan, and that's  
14 this evidentiary hearing to develop a record for an  
15 ineffective assistance claim.

16 Titlow did not ask for that hearing in the  
17 trial court. She did ask for it in the -- the Michigan  
18 Court of Appeals. But under the Michigan court rules --  
19 this is 7.211(C)(1)(a)(2) -- she was required to make a  
20 proffer to justify that hearing on this motion to  
21 remand.

22 And so the court of appeals, before it  
23 issued its merits opinion, issues a one-sentence order  
24 that says, that motion to remand is denied because you  
25 have not proffered enough evidence to demonstrate that a

1 hearing is warranted.

2 And that makes sense because the only  
3 proffer was the polygraph, the Lustig affidavit, and the  
4 Pierson affidavit. You know, it would be entirely  
5 appropriate -- this often happens -- that Titlow herself  
6 would have submitted an affidavit saying, this is what  
7 Titlow knew -- or I'm sorry, this is what Toca knew,  
8 this is what Toca advised, and I relied on that.

9 Or it sometimes is even the case, that the  
10 previous defense counsel is willing to submit the  
11 affidavit that says, this is what I knew, this is the  
12 advice that I gave. None of that was there. And so  
13 that's why you have this denial of the motion.

14 So now, in the context of that record and,  
15 Justice Kennedy, the claim of innocence and this whole  
16 thing being set in motion by that claim of innocence, it  
17 was quite easy for the Michigan Court of Appeals to say  
18 that, on the proofs presented and in light of the  
19 Strickland presumption, there was nothing objectively  
20 unreasonable about allowing Titlow to recall her plea.

21 JUSTICE KAGAN: In just thinking about that  
22 Michigan Court of Appeals decision, there is one sort of  
23 troubling line in it to me. It says, "When a defendant  
24 proclaims his innocence, it is not objectively  
25 unreasonable to recommend that the defendant refrain

1 from pleading guilty no matter how good the deal may  
2 appear."

3 And one way to read this is it's a kind of  
4 categorical rule, which says that, when the defendant  
5 says he is innocent, basically your obligations to  
6 properly advise him about a plea, go away. Now, I  
7 understand you not to read it that way.

8 MR. BURSCH: Correct.

9 JUSTICE KAGAN: So could you tell me a  
10 little bit about what you think of that question and why  
11 you read the sentence the way you read the sentence?

12 MR. BURSCH: Yes. I think it would be very  
13 difficult to defend the opinion if that was the only  
14 sentence of analysis because we do not agree that a  
15 simple claim of innocence by your client relieves the  
16 attorney of any responsibility to do anything. That's  
17 not what happened here.

18 Four sentences before the sentence you just  
19 read on page 101A, the court of appeals talks about the  
20 Strickland presumption that the attorney is doing his or  
21 her job. Two sentences after that sentence you just  
22 read, on page 102A, the Michigan Court of Appeals  
23 specifically says, "On the proofs and arguments offered  
24 by defendant, there is no ineffective assistance here."

25 And so that was part of a larger discussion

1 about attorneys who do their job when their clients are  
2 claiming innocence. And you have to put all that  
3 together.

4 And I think it's significant, also, that the  
5 Michigan Court of Appeals was giving Titlow the benefit  
6 of the doubt here because, on page 100A, just one page  
7 earlier, it assumes Titlow's position, that is that Toca  
8 actually gave the advice to withdraw the plea. We don't  
9 even know that because we don't have credible evidence  
10 in this record.

11 We don't have an affidavit from Titlow. We  
12 don't have an affidavit from Toca that indicates that  
13 Toca ever gave that advice. Again, if you could draw  
14 the curtain back, it may very well have been, as we  
15 assume under Strickland, that he totally and completely  
16 advised about all the risks of trial before the plea was  
17 withdrawn.

18 JUSTICE BREYER: Can you clarify something  
19 for me about habeas corpus law?

20 MR. BURSCH: Yes.

21 JUSTICE BREYER: I -- I have to imagine the  
22 facts, so let's take it as a hypothetical. That -- The U.S. --  
23 the district attorney says, this lawyer was adequate,  
24 and really, two factors make that obvious. The first  
25 factor is that the client said that she was innocent,

1 and taking that into account with the other things, that  
2 could have justified, adequately, his withdrawal of the  
3 plea and not convincing her not to.

4 Second, the sentence that the district  
5 attorney wanted to give was more than a year greater  
6 than the guidelines for manslaughter, and that could  
7 have justified it.

8 Now, it writes -- the court then writes in  
9 its opinion only the second reason and never mentions  
10 the first. Now, we go to habeas, and the habeas court  
11 thinks that second reason is pretty flimsy there. Gee,  
12 she was exposing herself to murder, et cetera, it's  
13 pretty flimsy. The first isn't so bad, but they didn't  
14 rely on it. Okay.

15 So now, what is the habeas court supposed to  
16 do? Is -- should the -- should the defendant have gone  
17 back to the State court first? Is the habeas court  
18 supposed to have its own independent hearing and make up  
19 its own mind?

20 How does this work?

21 MR. BURSCH: That's a delightful question.

22 JUSTICE BREYER: I'm glad. I would love to  
23 know the answer.

24 MR. BURSCH: And I want to start with a  
25 record response to distinguish our case from your

1   hypothetical and then address the habeas question. Your  
2   hypothetical assumed that the State court only mentioned  
3   one of the two reasons, and here, obviously, the court  
4   of appeals talked about innocence. We've discussed that  
5   at length.

6           But on page 100A of the opinion, the court  
7   of appeals also notes that the defendant moved to  
8   withdraw her plea because the agreed-upon sentence  
9   exceeded the sentencing guidelines range. So they are  
10   both here.

11           But assuming your hypothetical that we only  
12   had one and not two, the question is really easy under  
13   2254 because, so long as the decision was not a  
14   misapplication of this Court's clearly established  
15   precedent, there is no violation, even if their  
16   reasoning might not have been as strong as it could have  
17   been, had they mentioned the other reason.

18           So next habeas question, does the defendant  
19   get an opportunity to have a Federal habeas hearing to  
20   further develop the record about what happened? And the  
21   answer is no, because under 2254(e)(1) and (e)(2), there  
22   is a presumption of correctness about everything that  
23   was found in the State court system.

24           And there is no right to get a Federal  
25   evidentiary hearing if you have not adequately pursued

1 your ability to develop the record in the State court.

2 And as Justice Alito has already pointed  
3 out, it was Titlow's failure, not the State's failure,  
4 to properly proffer evidence to get the Ginther hearing.

5 JUSTICE ALITO: What do you make of the fact  
6 that -- what do you make of the fact that, at the change  
7 of plea hearing, the first attorney didn't mention the  
8 claim of innocence, only mentioned the fact that the  
9 sentence was above the guidelines?

10 MR. BURSCH: I don't think that's  
11 significant because those two things are not mutually  
12 exclusive. The defendant could believe, in her heart of  
13 hearts, that she's innocent, and at the same time, the  
14 attorney could acknowledge that there are facts in the  
15 record already admitted that a reasonable jury could  
16 conclude that you were guilty of manslaughter.

17 And so it would not be inconsistent for that  
18 attorney to argue for a lower guidelines range in the  
19 plea, and so there's really nothing inconsistent about  
20 that. But the important thing to understand here is  
21 just the failure of the burden of proof. The Sixth  
22 Circuit is upside-down when it reads into the record's  
23 silence ineffective assistance.

24 JUSTICE GINSBURG: When you say the record  
25 is silence -- silent, I am looking at the Joint

1 Appendix, page 295, and this is Titlow's statement. "I  
2 would have testified against my aunt...had I not been  
3 persuaded to withdraw my plea agreement because an  
4 attorney promised me he would represent me. He told me  
5 he could take my case to trial and win."

6 So that sounds like she was persuaded by  
7 Mr. Toca to go to trial because she could win. And he  
8 had, at that point, not made any appraisal of the case.

9 MR. BURSCH: Well, first, I have to disagree  
10 with the premise of your question, Justice Ginsburg,  
11 because there is no doubt that Toca made an appraisal.  
12 He had -- you know, the quote from the plea withdrawal  
13 hearing is "a lot of materials," and he made a very  
14 sophisticated argument about what the guidelines range  
15 should be, and that range was lower than the plea  
16 actually offered.

17 But what you need to understand about this  
18 testimony from Titlow right here, this was a plea for  
19 leniency at sentencing. This was not part of the  
20 proffer to the Michigan Court of Appeals as part of the  
21 motion for remand. What -- what Titlow could have done  
22 was submit her own affidavit or the affidavit from Toca  
23 establishing whether this was actually true or not.

24 In addition, you've got to take the context  
25 of this and juxtapose it against the other things that



1 Titlow was saying at this very same sentencing hearing.  
2 And it -- it's remarkable, really, that she says both of  
3 these things.

4 She says she feels sorry for her Aunt Billie  
5 for being this manipulating and evil person and thanks  
6 God that she did not do what Billie asked her to do.  
7 And she says it was only because of her, Titlow, that  
8 the truth came out. So somehow, it's -- it's still a  
9 claim of innocence, even after trial, even after there  
10 has been a conviction.

11 If there are no further questions, I will  
12 reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Ms. O'Connell.

15 ORAL ARGUMENT OF ANN O'CONNELL,  
16 FOR UNITED STATES, AS AMICUS CURIAE,  
17 SUPPORTING THE PETITIONER

18 MS. O'CONNELL: Mr. Chief Justice, and may  
19 it please the Court:

20 There are two primary points that the United  
21 States would like to make. First, when evaluating  
22 Strickland prejudice in the context of a rejected plea  
23 offer, the statement of a convicted defendant that she  
24 would have accepted the plea absent deficient advice  
25 should be viewed with skepticism, and to support a

1 finding of causation, the statement should be judged  
2 based on all the objective circumstances.

3 Second, when a Federal habeas court finds a  
4 Sixth Amendment violation in the rejected plea context,  
5 it should not categorically require the government to  
6 reoffer a rejected plea deal. That decision should be  
7 left to the sentencing court, and requiring the  
8 government to reoffer a rejected plea deal in a context  
9 like this case where the plea agreement required the  
10 defendant to do something other than plead guilty --  
11 give testimony against her aunt -- it doesn't make  
12 sense, and the government should not be required to make  
13 the reoffer.

14 Every defendant who rejects a plea offer and  
15 then is convicted after a trial will have an incentive  
16 and will want to revert back to a plea deal that she  
17 rejected beforehand. The statement of a convicted  
18 defendant that she would not have withdrawn her plea --

19 JUSTICE SOTOMAYOR: Counsel, years ago, one  
20 of my colleagues, not on this bench, but a different  
21 one, said to me -- you know, there's much to-do about  
22 judges basing credibility on demeanor. And he said, no  
23 one does that. What you base it on is the internal  
24 consistency and logic of the testimony and how it's  
25 corroborated by circumstances.

1           And he said, otherwise, you just rarely hear  
2   anybody say, story makes sense, nothing corrupt-- story doesn't  
3   make sense, the story's not corroborated, but the guy  
4   looks like he's telling the truth.

5           I'm reading all the decisions that you cited  
6   for me and not one, including in this circuit, relies  
7   simply on that kind of statement. Every one of them is  
8   based on comparing the testimony to other factors; to  
9   logic, to evidence, to objectives.

10          So I don't know what rule it is, what  
11   objective evidence means. Do you need corroboration the  
12   way you need to prove a murder? Is that what you want  
13   us to announce?

14          MS. O'CONNELL:           I don't -- we're not asking  
15   for any kind of a special rule that there has to  
16   be -- you know, a certain amount of corroborating  
17   evidence in addition to the defendant's statement. I do  
18   think it is just a general rule that you have to expand  
19   out to all the objective circumstances to evaluate the  
20   credibility of the defendant.

21          And what the Sixth Circuit said in this case  
22   is, unlike some circuits, this court does not require  
23   that a defendant must support his own assertion that he  
24   would have accepted the offer with additional objective  
25   evidence.

1 JUSTICE SOTOMAYOR: It said it, but it  
2 didn't do it.

3 MS. O'CONNELL: Well, to the extent that the  
4 court was saying that the defendant's statement should  
5 be credited or not credited alone, without necessarily  
6 looking at everything, that's wrong. And to the extent  
7 that it -- that it looked to other evidence in the  
8 record and to corroborating circumstances, the ones that  
9 it pointed to were too weak, and they were also very  
10 selective.

11 The court pointed to two things that the  
12 court --

13 JUSTICE SOTOMAYOR: Well, counselor, that's  
14 what juries do all the time, selectivity. That doesn't  
15 move me. What I want to know is, why do we announce a  
16 rule that, somehow, suggests a limitation that can't  
17 exist? Meaning what judges look to, to determine  
18 credibility relies on factors that you can't sum up in  
19 one word?

20 MS. O'CONNELL: All we're asking the Court  
21 to announce or to clarify on this question is that the  
22 subjective statement -- or the self-serving statement of  
23 a defendant in these circumstances should be viewed  
24 with skepticism and that the court should look --

25 JUSTICE SOTOMAYOR: Every court says that.

1           MS. O'CONNELL:           Well, to the -- there could  
2   be confusion on what the Sixth Circuit's rule is. I  
3   mean, there is -- the Sixth Circuit believed that it was  
4   announcing a rule or that it has a standard --

5           JUSTICE BREYER:           Well, are there rules in  
6   this area? I didn't think -- are there rules? I mean,  
7   doesn't every judge, whenever that judge is deciding a  
8   factual matter or the jury, take into account from every  
9   witness, whether that witness is making a pretty  
10   self-serving statement? I mean, that's a factor.

11           And I guess we could have some situations,  
12   sometime, in some place, where a witness got on the  
13   stand and said something that was totally in his favor,  
14   but when you heard it, hmm, and you knew the case, hmm,  
15   he's right. And then that could happen with this kind  
16   of witness, too. It could happen. I'm not saying it  
17   very often does, but it could.

18           So why should we have any special rule for  
19   these witnesses and not for any other?

20           MS. O'CONNELL:           We are not asking for any  
21   kind of a special rule. We are just asking that -- that  
22   the Court clarify, if it addresses the second question,  
23   that what the Sixth Circuit is saying, that you  
24   essentially -- if you interpret it to mean that you  
25   don't have to look out to all the -- the objective

1 circumstances to determine the credibility of the  
2 defendant, that that's wrong.

3 CHIEF JUSTICE ROBERTS: Well, you need to  
4 give us some examples of things that don't count. I  
5 thought it was in your brief that you had said, look,  
6 the fact that it turns out to have been a very bad  
7 deal -- you know, the bargain was one year, and the  
8 sentence after guilty was 20 years, that, I take it, you  
9 say is not a corroborating factor.

10 MS. O'CONNELL: Not in this case. The --  
11 the disparity between the sentence that a person  
12 receives after the plea deal and the sentence that they  
13 received after a trial is going to be present in every  
14 case.

15 CHIEF JUSTICE ROBERTS: Right.

16 MS. O'CONNELL: In fact, it has to be for  
17 prejudice. That could be a corroborating circumstance  
18 or something to support the defendant's statement in a  
19 case where, like some of the court of appeals' opinions,  
20 the defendant was misadvised on sentencing exposure.  
21 The lawyer said, well, you should reject this plea deal  
22 for 15 years because the maximum that you could get at  
23 trial is 20, and so it's worth the risk.

24 But this defendant understood completely and  
25 said multiple times, on the record, that she understood

1     that the -- the potential sentence for a murder  
2     conviction was a life sentence and that that was back on  
3     the table, if she withdrew the plea offer.

4             JUSTICE ALITO:             On the question of this --  
5     of this sentence, what do you think were the -- the  
6     range of reasonable sentences that could have been  
7     imposed in compliance with our recent decisions?

8             You have -- you have the sentence that was  
9     offered before the trial, but that was predicated on, A,  
10    testimony and, B, not having to go to trial. And then  
11    you have the sentence that was imposed after the trial,  
12    when there was no testimony and there was a trial.

13            So what was the -- what do you think a trial  
14    court could reasonably do in that situation, just split  
15    the difference?

16            MS. O'CONNELL:           Well, I think the trial  
17    court has a lot of discretion under the Court's opinion,  
18    but I think what -- what should have happened in this  
19    circumstance is to go back to the sentencing court, not  
20    require the government to reoffer this plea deal, which  
21    just simply can't be -- can't be offered and accepted  
22    anymore.

23            In fact, in the record, when you see it  
24    being reoffered, they're saying we're offering  
25    manslaughter in exchange for her testimony at a trial

1 that already happened. It doesn't make sense.

2 In this case, there -- there should be no  
3 reoffer. We should go based on the conviction after  
4 trial because of that, and perhaps there could be some  
5 kind of a reduction of the sentence within the district  
6 court's discretion to --

7 JUSTICE GINSBURG: Why -- why -- you made  
8 the point that this plea bargain could not be carried  
9 out once the number one condition, the prosecutor said,  
10 you testify against your aunt, and then we'll give you  
11 this deal. Once the aunt is tried and she doesn't  
12 testify, there's no -- there's no plea bargain.

13 So why isn't that enough to decide this  
14 case? If you can't tell a prosecutor to renew a bargain  
15 that can't be carried out, then it's become impossible.

16 MS. O'CONNELL: Well, I mean, we think  
17 that's right. I don't know that it makes sense to say  
18 that, because there is no remedy, that the Court  
19 shouldn't address the first or second questions.

20 I mean, maybe if the Court thinks that  
21 there's -- there's definitely no remedy and that this  
22 20- to 40-year sentence should remain in place, but --  
23 but, exactly, we don't think that the -- that the  
24 government should be required to reoffer the plea  
25 agreement in these circumstances.



1 JUSTICE KAGAN: But we're in a position now,  
2 aren't we, where the State court can do exactly that,  
3 can say the circumstances have changed and -- and so  
4 leave everything undisturbed.

5 MS. O'CONNELL: Yes. The problem -- one of  
6 the problems here is that the Sixth Circuit sort of  
7 took, as a given, that in circumstances like this, that  
8 the -- the original plea offer has to be reoffered. And  
9 what we think the court was saying in Lafler is that  
10 that's one thing that's on the table.

11 It's not necessarily required in every case.  
12 There could be other creative remedies, like there could  
13 be a defendant who can no longer -- who missed the  
14 opportunity to give the testimony she was supposed to  
15 give, but perhaps she has information on somebody else,  
16 and so maybe we could do a renegotiation of the plea.

17 The Sixth Circuit, we do not think, should  
18 be just requiring after it finds a Sixth Amendment  
19 violation that the government reoffer a plea agreement  
20 in circumstances that are different from those in  
21 Lafler.

22 JUSTICE SOTOMAYOR: But isn't that -- I  
23 mean, the court didn't say that the court -- that the  
24 court below -- the Sixth Circuit didn't say that the  
25 court below had to accept the reoffered plea agreement.

1           It seemed inherent in Lafler and Frye that  
2   what the Court was saying is that the court below has to  
3   use its judgment on whether offer -- accepting the plea  
4   is -- is right or giving another remedy is right. All  
5   of these arguments should be before that court, not  
6   before us, as an absolute rule.

7           MS. O'CONNELL:           That's right. And -- and we  
8   simply think that the decision whether to require the  
9   government to reoffer it in the first place should also  
10  be something that's left up to the sentencing court --

11          JUSTICE SOTOMAYOR:       So that's your only  
12  point, which is that that should be an issue for the  
13  court below?

14          MS. O'CONNELL:           Yes. That this should all be  
15  left to the discretion -- discretion of the sentencing  
16  court to come up with an adequate remedy.

17          JUSTICE SOTOMAYOR:       But some remedy has to  
18  be offered --

19          MS. O'CONNELL:           Well --

20          JUSTICE SOTOMAYOR:       -- if there is a  
21  violation.

22          MS. O'CONNELL:           The -- the Court's opinion  
23  in Lafler, I think, leaves that question open. It says  
24  that it could be the circumstances that the sentencing  
25  judge determines that the most fair result is to leave

1 the conviction and the sentence in place, but the  
2 sentencing court has that discretion.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Newman?

6 ORAL ARGUMENT OF VALERIE R. NEWMAN

7 ON BEHALF OF THE RESPONDENT

8 MS. NEWMAN: Mr. Chief Justice, and may it  
9 please the Court:

10 There is no question that the Michigan Court  
11 of Appeals erred and created an end-run around  
12 Strickland in finding the professed -- that if a  
13 defendant professes innocence, that there's no need to  
14 look any further to say that defense counsel provided  
15 effective assistance.

16 There is also --

17 JUSTICE SOTOMAYOR: I agree with you -- I  
18 agree with you and so does your adversary, but he says  
19 there is nothing in this record to show what research  
20 was done or not done.

21 The fact that the prior counsel's record  
22 wasn't reviewed doesn't say that he didn't talk to the  
23 prosecutor, doesn't say that he didn't look into other  
24 record evidence, any of the discovery that had been  
25 filed with the court, or any of the other circumstances

1     that could have informed him adequately.

2             MS. NEWMAN:             That is partially true, Justice  
3     Sotomayor. The record does show that, at every turn,  
4     when Mr. Toca stepped into the courtroom, he asked for  
5     more time and indicated he wasn't ready. The record  
6     does show that, as soon as the plea was withdrawn,  
7     Mr. Toca said, I need more time. I'm not ready to go to  
8     trial. And in all fairness, my -- my client deserves to  
9     have a fair trial. I'm not ready.

10            He's not ready to go to trial.            He doesn't  
11     have a good handle on what the record is. My brother  
12     counsel makes an argument that Mr. Toca made a very  
13     sophisticated sentencing analysis and, therefore, had a  
14     grasp of the record. I would disagree with that  
15     interpretation of the record.

16            Mr. Toca came in and said that the  
17     guidelines were two to five on the minimum sentence.  
18     The prosecutor said, I don't know what the guidelines  
19     are, and I don't care. There's -- we don't even know if  
20     his recitation of what the guidelines range was, was  
21     accurate, so there is nothing on this record to show  
22     that Mr. Toca even knew anything about the --

23            JUSTICE SOTOMAYOR:            Well, that's --

24            JUSTICE ALITO:            Are you arguing that he --  
25     he needed to be -- he needed to have enough material and

1 to have familiarized himself enough with everything  
2 that's relevant to the case to be able to go to trial  
3 before he could move to have the -- the previous plea  
4 withdrawn?

5 MS. NEWMAN: No, my argument does not go  
6 that far. What I'm arguing --

7 JUSTICE ALITO: All right. Well, then I  
8 don't understand what the argument was.

9 MS. NEWMAN: The argument is that defense  
10 counsel has a duty to investigate, that the defense  
11 attorney has a duty to be able to inform the client of  
12 the risks of either accepting a plea, withdrawing a  
13 plea, whatever the case. In this case, it's withdrawing  
14 a plea that has already been accepted by the court.  
15 This is a very significant step in this matter.

16 JUSTICE SCALIA: Well, that's true, but --  
17 but you -- you have the duty, or -- or counsel for the  
18 defendant has the duty to show that counsel did not do  
19 that. It's -- it seems to me you are putting the burden  
20 on the other side to -- to prove that the -- that  
21 counsel knew all this. And that's not the way -- that's  
22 not the way the game is played.

23 MS. NEWMAN: I agree with that,  
24 Justice Scalia, and we are not putting the burden on the  
25 other side. There is -- I will refer the Court to the

1 Pierson affidavit, which is in the Joint Appendix at  
2 page 298. That affidavit, in particular, paragraphs 6,  
3 7, and 8, indicate that, at an arbitration hearing,  
4 when Ms. Titlow testified and Mr. Ott or deputy --  
5 Sheriff's Deputy Ott testified -- in arbitration  
6 hearings, witnesses are put under oath, and the  
7 affidavit is a sworn affidavit from an attorney.

8 So it is a notarized affidavit from -- about  
9 testimony that was taken under oath, that indicates that  
10 Mr. Toca approached Ms. Titlow while she was in jail,  
11 while she was represented by counsel, that the approach  
12 was, you should reject the plea and not testify against  
13 your aunt. That's the evidence that we have in the  
14 record, and that is not just Ms. Titlow.

15 JUSTICE KENNEDY: But just -- just to be  
16 clear, isn't that after Titlow had asked for an attorney  
17 because Titlow had talked with the jailer, who  
18 encouraged Titlow to plead innocent? So -- so you have  
19 to include that preface to this statement, or it's quite  
20 incomplete.

21 MS. NEWMAN: Justice Kennedy --

22 JUSTICE KENNEDY: Or correct me if that's  
23 wrong.

24 MS. NEWMAN: I would say that's wrong, and  
25 that's where the court of appeals was wrong again and why

1 the State court's findings are entitled to no deference  
2 because the state court took that affidavit from William  
3 Pierson and turned the words on its head.

4 The affidavit does not state that Vonlee  
5 Titlow approached the sheriff's deputy and asked for a  
6 new attorney. The affidavit states that the sheriff's  
7 deputy approached her. He told her she should consult  
8 with his attorney because his attorney was really good  
9 and his attorney would be able to help her.

10 And so it's the sheriff's deputy,  
11 unequivocally, from this affidavit, because it's the  
12 only place that this evidence comes from, it's the  
13 sheriff's deputy -- I'm sorry. Were you looking -- it's  
14 on page 298 of the Joint Appendix in William Pierson's  
15 affidavit.

16 It's the sheriff's deputy that sets  
17 everything in motion about innocence. And why does he  
18 do that? Because he's in the courtroom when the plea is  
19 entered. And what is part of the plea? Part of the  
20 plea is that Vonlee Titlow passed a polygraph. Well, to  
21 a layperson what does that mean? You pass a polygraph,  
22 you are innocent, you didn't do the crime.

23 Well, in this case, that's not the situation  
24 at all. The passing of the polygraph cemented her guilt  
25 in participating in this crime. But what the -- what

1 she passed in the polygraph was that she was an aider  
2 and abettor, so it was her aunt who took the pillow and  
3 smothered her uncle, not Ms. Titlow, but she was  
4 present. She participated. She accepted money after  
5 the crime.

6 So everything that happened in the Michigan  
7 Court of Appeals took the actual facts and turned them  
8 on its head, which is why the factual findings are not  
9 entitled to deference.

10 JUSTICE ALITO: Isn't it -- is it  
11 unreasonable to read the Pierson affidavit -- and -- and  
12 you submitted that; isn't that correct?

13 MS. NEWMAN: Correct.

14 JUSTICE ALITO: All right. To read it to  
15 mean that there were discussions between Deputy Ott and  
16 Titlow, and Titlow said she wasn't guilty? Ott said,  
17 well, if you are not guilty, you shouldn't plead guilty.  
18 I will refer you to an attorney. If you want me to, I  
19 could ask somebody to come and talk to me.

20 That seems to be a direct quote from -- from  
21 Titlow. Isn't that -- so isn't it reasonable to read it  
22 that way?

23 MS. NEWMAN: Justice Alito, that's one --  
24 part of what you said, I would agree with, that the --  
25 it does state in the affidavit, certainly, that he had



1 an attorney that was really good and could ask somebody  
2 to come talk to me. But the rest of the statements, I  
3 would argue, are -- are inferences and not facts, and we  
4 have facts in the affidavit.

5 JUSTICE BREYER: So the point is that there  
6 has to be some evidence. You -- you are saying that the  
7 court was wrong when they said your client said she  
8 wasn't guilty.

9 Now, this affidavit doesn't show that. I  
10 mean, paragraph 6 doesn't say who spoke first, but  
11 common sense suggests that the deputy sheriff wouldn't  
12 have made that statement, unless she spoke first. I  
13 mean, does he go around saying to everybody, just  
14 generally, oh -- you know, if you are not guilty, you  
15 shouldn't plead guilty.

16 I mean, it says they had discussions, and  
17 during the discussions, he told her she shouldn't plead  
18 guilty if she wasn't guilty.

19 MS. NEWMAN: It also -- it also says, with  
20 all due respect, that --

21 JUSTICE BREYER: Where?

22 MS. NEWMAN: -- the deputy approached her.

23 JUSTICE BREYER: Where -- approached her --

24 MS. NEWMAN: Right.

25 JUSTICE BREYER: -- and had discussions with

1 her. It doesn't say why he approached her. I mean, I  
2 just don't think people normally do that, they go to  
3 every person in jail and say, you know, if you are not  
4 guilty, you shouldn't plead guilty.

5 I mean, somebody might, but something  
6 triggered that advice, and the affidavit doesn't tell me  
7 what triggered that advice. So I could infer that what  
8 triggered the advice was her statement she was not  
9 guilty, or I could infer this is an unusual situation  
10 where, for some reason unknown, he brought it up. I  
11 don't know, from reading paragraph 6.

12 MS. NEWMAN: And Justice Breyer --

13 JUSTICE BREYER: So whose burden is it?

14 MS. NEWMAN: Justice Breyer, I would argue  
15 that it's -- it's an inference that doesn't matter.  
16 It's an --

17 JUSTICE BREYER: Okay.

18 MS. NEWMAN: -- in this case.

19 JUSTICE BREYER: It doesn't matter. Why  
20 doesn't it matter? Because if she went, he -- she  
21 said -- you know, I'm not really guilty, he said, well,  
22 you shouldn't plead guilty, she said -- but I have a  
23 lawyer that will get rid of your guilty plea. If it  
24 went something like that, and then we assume the lawyer  
25 was told about this -- it doesn't say, but that's a

1 reasonable assumption.

2 And then the court opinion of Michigan seems  
3 to make sense that that was a reason -- that was one of  
4 the reasons that made his conduct in -- in withdrawing  
5 the plea or -- you know, not strongly advising her  
6 against it. That was one reason why that wasn't an  
7 inadequate assistance of counsel.

8 Now, where have I made my mistake in this  
9 chain?

10 MS. NEWMAN: Well, in paragraph 8 of William  
11 Pierson's affidavit on page 298, it indicates that it  
12 was Frederick Toca who encouraged her to reject a plea  
13 agreement to testify against the aunt. So, again, we  
14 have the attorney, who is not Ms. Titlow, who is saying,  
15 I want to withdraw my plea. It's the attorney who is  
16 saying to her and encouraging her to reject the plea.

17 JUSTICE SOTOMAYOR: Ms. Newman -- you know,  
18 I -- I'm -- this may be the first case that I have been  
19 involved in as a judge -- and there might be others, but  
20 myself, personally -- where, in a situation like this,  
21 the defendant has not put in an affidavit to explain  
22 what happened.

23 There is some force to your adversary's  
24 argument that there's a really sparse record here, and  
25 AEDPA deference requires the burden on you. You can't

1 deny that. I guess -- I don't know if you were  
2 responsible, but what other circumstances that would  
3 occasion a defendant not saying, this is what I was  
4 told?

5 MS. NEWMAN: I was not the attorney. I came  
6 into the case at this level, so I did not do any of the  
7 litigation below. However, there are -- there is record  
8 evidence to support, not -- there is record evidence  
9 that supports the claim and maybe was a strategic  
10 decision by the attorney not to submit other affidavits  
11 because the attorney was simply looking for a hearing to  
12 expand the record. So we have --

13 JUSTICE SOTOMAYOR: But they didn't ask for  
14 the hearing in the court below. They only asked for it  
15 at the court of appeals.

16 MS. NEWMAN: They -- Michigan -- Michigan --  
17 the way Michigan works is, within 56 days of getting the  
18 transcripts, you can file in the trial court. If you --  
19 if you fail to make that 56-day deadline, then your  
20 alternative is to go to the court of appeals and ask for  
21 a remand.

22 So we don't know when the case got to the  
23 attorney. So I don't think that there's any inference  
24 that can be drawn from the fact that, within that very  
25 short time period, there was no motion filed in the

1 trial court.

2 JUSTICE ALITO: Who was the attorney at that  
3 stage? I take it, it wasn't the trial attorney because  
4 the -- a big part of the claim before the Michigan Court  
5 of Appeals was that the trial attorney was also  
6 ineffective.

7 MS. NEWMAN: Right. It was --

8 JUSTICE ALITO: Who was it?

9 MS. NEWMAN: It was an appellate attorney,  
10 Liz Jacobs, was the attorney at that stage.

11 JUSTICE ALITO: And she's -- is she with  
12 your office or she's --

13 MS. NEWMAN: She's not with my office, no.

14 JUSTICE ALITO: But she was appointed.

15 MS. NEWMAN: She was -- I don't know if she  
16 was appointed or retained, but she's not with my office.

17 JUSTICE GINSBURG: May I ask you,  
18 Ms. Newman, if you would agree that the Sixth Circuit  
19 was wrong, at least to this extent, is there -- what is  
20 the argument for directing a prosecutor to make a plea  
21 offer that was never previously made? The offer that  
22 was made is impossible to carry out now. The offer was  
23 conditioned on her testimony at her aunt's trial. That  
24 didn't happen.

25 So there is no -- there is no plea bargain

1 offered. And yet, the court instructs a renewal,  
2 instructs the prosecutor to renew an offer that doesn't  
3 exist.

4 MS. NEWMAN: Well, Justice Ginsburg --  
5 Ginsburg, as the Court decided last term in  
6 *Lafler v. Cooper*, the point of the remedy is to put the  
7 defendant as closely as possible back in the position he  
8 or she would have been in, but for the ineffective  
9 assistance.

10 In *Lafler v. Cooper*, the Court recognized  
11 that there's going to be situations where circumstances  
12 have changed, and there's going to be circumstances  
13 where that is not possible to -- to do that exactly.

14 In this case, of course, she cannot testify  
15 against her aunt because her aunt was acquitted and is  
16 deceased; however --

17 JUSTICE GINSBURG: Then how could -- how  
18 could the Court order the prosecutor to renew an offer  
19 that can't be made?

20 MS. NEWMAN: Well, it is an offer that can  
21 be made if you remove the condition precedent. So the  
22 offer -- the -- the premise of the offer is a charge  
23 reduction. From first-degree --

24 JUSTICE GINSBURG: But the whole -- what  
25 drove the prosecutor to make this bargain was he wanted

1 the testimony, so how -- how can that -- that's -- I've  
2 never seen anything like this, where a court orders a  
3 prosecutor to make a plea offer that was never made.

4 MS. NEWMAN: Well, again, referring to  
5 *Lafler v. Cooper*, the remedy goes -- the Sixth Amendment  
6 right attaches to the defendant, not to the prosecution,  
7 so the goal here is to remedy, if the Court finds and  
8 agrees that there's a Sixth Amendment violation, to  
9 remedy that Sixth Amendment violation. If there is an  
10 unequal burden to be borne by one -- one side or the  
11 other, it has to be borne by the government.

12 And so, therefore, the way to remedy the  
13 Sixth Amendment violation, it was a charge reduction, is  
14 to reoffer the manslaughter plea, which has already been  
15 done in this case, by the way. My client has already  
16 accepted that plea.

17 And then it's up to the trial court now  
18 whether or not to accept the plea, reject the plea, or  
19 do some sort of modification, which is exactly what the  
20 Sixth Circuit ordered and is exactly what this Court  
21 ordered in -- in *Lafler v. Cooper*, to allow the trial  
22 court to have the discretion in fashioning a remedy that  
23 both will take care of the Sixth Amendment violation and  
24 can balance the concerns of the prosecution in what's  
25 been lost in that process, but still be able to craft a

1 remedy.

2 JUSTICE SCALIA: I don't know that it's so  
3 strange to make the prosecutor -- to make the  
4 prosecution submit an offer that can no longer be  
5 accepted. I mean, it doesn't seem to me any more  
6 strange than to make the prosecution submit an offer  
7 where the situation was at the beginning. You do this,  
8 and I will -- you know, I will prosecute. The quid pro  
9 quo was you avoid the possibility of conviction.

10 But here, she's already been convicted. She  
11 had a trial -- you know, by 12 fair, impartial jurors,  
12 and she was guilty. That's -- that's what the jury  
13 found. So it seems to me just as strange to make the  
14 prosecution, now that we know she's guilty, submit --  
15 submit that prior offer.

16 So, I mean, it seems to me quite weird, in  
17 any event. So one -- one incremental weirdness is -- is  
18 not so bad.

19 MS. NEWMAN: Justice Scalia, though, I think  
20 you hit the point on the head. She -- she was always  
21 guilty. And as my brother counsel stated, this case, in  
22 some ways, is very, very similar to Cooper. You have  
23 comments on the record by Frederick Toca that the  
24 prosecution is -- has made comments and -- and they  
25 reference this in the appendix, they reference a



1 newspaper article, the prosecutor talks about the fact  
2 that this is nothing more than a manslaughter case.

3 This is -- we're charging first-degree  
4 murder, but really, it's sort of a -- in sheep's  
5 clothing, it's really just manslaughter. And Frederick  
6 Toca is saying on the record, this is just a  
7 manslaughter case.

8 Why should my client accept an  
9 above-guideline sentence of a seven-year minimum and  
10 have to testify against a codefendant. She's going to  
11 go to trial, and the prosecutor's already admitted this  
12 is nothing more than a manslaughter case, so she'll be  
13 convicted of manslaughter, and she's going to be in a  
14 better position following trial and conviction, just  
15 like in Cooper.

16 There was no question Mr. Cooper was going  
17 to be convicted. There was no question at all. Defense  
18 counsel gave the same advice. You can't be convicted of  
19 the charged offense. You're going to be convicted of a  
20 lesser sentence, and following that conviction, you will  
21 be in a better position for sentencing than you will be  
22 with this plea.

23 JUSTICE ALITO: If that's the case --

24 MS. NEWMAN: The facts are in all force.

25 JUSTICE ALITO: Your arguments seemed to

1 be -- have had a head-on collision. If this is nothing  
2 but a manslaughter case, then why was -- what argument  
3 do you have that Toca was ineffective in saying, let's  
4 go to trial. So if you're convicted of manslaughter  
5 without the plea, you'll get your guidelines sentence on  
6 the manslaughter case?

7 MS. NEWMAN: Because it's for the same  
8 reason in Cooper. He was absolutely wrong, and he was  
9 not aware of the evidence that had been marshalled  
10 against Ms. Titlow, including their own confessions.

11 JUSTICE ALITO: Well, that's not a  
12 manslaughter case. I thought you were just saying it's  
13 a manslaughter case.

14 MS. NEWMAN: I'm saying that his  
15 representations on the record are similar to the  
16 representations made by Mr. Cooper's attorney on the  
17 record. That you would -- in response to Justice --

18 JUSTICE GINSBURG: But the charge was --  
19 that she was convicted of second-degree murder, right?

20 MS. NEWMAN: She was convicted of  
21 second-degree murder. And in this case -- in Cooper,  
22 the defense attorney never filed a motion to quash. So  
23 he never challenged the efficient -- the legal  
24 sufficiency of the evidence.

25 In this case, attorney number one,

1 Mr. Lustig, did file a motion to quash. He tested the  
2 sufficiency, the legal sufficiency of the prosecution's  
3 case for first-degree murder.

4 JUSTICE ALITO: You have my head --

5 MS. NEWMAN: So there's no question --

6 JUSTICE ALITO: You have my head spinning.  
7 I thought you were making the argument that there's  
8 nothing unfair about requiring acceptance of -- about  
9 the imposition of a manslaughter sentence because this  
10 was a manslaughter case. I thought you were making that  
11 argument.

12 MS. NEWMAN: I'm not making that --

13 JUSTICE ALITO: Did I misunderstand that?

14 MS. NEWMAN: I'm not making that argument.

15 JUSTICE BREYER: I thought your argument was this -- there  
16 is a reason that they spoke about, which was, well, she  
17 said she was innocent. Now, as to that one, what they  
18 wrote is the record discloses that the second attorney's  
19 advice was set in motion by defendant's statement to the  
20 sheriff's deputy that he did not commit the offense.

21 Now, you say that's just contrary to fact as  
22 you point to the affidavit. And the affidavit I read, I  
23 think it's a little -- rather ambiguous in that respect,  
24 and I can overturn that, or a Federal court can, only if  
25 this factual statement I just read you is clearly wrong,

1 clearly. So I have a tough time saying it's clearly.

2 And I know they overstated because they said  
3 automatically, and that's good -- well, that may be an  
4 overstatement. You have to read it in light of that  
5 sentence. But then you're making a second argument, I  
6 take it, if this is right. Your second argument is,  
7 anyway, he was incompetent for a completely different  
8 reason.

9 He didn't read the record. And if he'd read  
10 it, he never would have made the statement that this is  
11 just a manslaughter case. He would have seen that, if  
12 she withdrew her guilty plea, she'd be tried for murder,  
13 and then she'd get a really long sentence.

14 So that's an ineffective assistance of  
15 counsel. Now, what does the court in Michigan say about  
16 that? Nothing. Nothing. So now, I wonder. Maybe  
17 nobody made that argument to them, or maybe they made  
18 it, and they rejected it sub silentio. That's why I  
19 asked my first question. Okay? So -- and you heard the  
20 response.

21 Even if they had heard that argument and  
22 they said nothing about it, they don't have to -- they  
23 don't have to mention every argument made. If they just  
24 deny, we assume they deny it, and what we do is see  
25 whether they were within their rights to deny it.

1 That's how we are supposed to look at it, does it  
2 clearly violate Supreme Court law to deny it?

3 And there is going to be a factual part of  
4 that and a legal part. All right. How do we deal with  
5 that?

6 MS. NEWMAN: Well, 2254 gives -- has  
7 separate provisions for the legal aspect of that.

8 JUSTICE BREYER: First of all, did anybody  
9 make the argument as clearly as you have made it? I saw  
10 what it was, I think. So that's -- did anybody make  
11 that argument to the Michigan court?

12 MS. NEWMAN: Not that I'm aware of.

13 JUSTICE BREYER: No. Okay. Well, that's  
14 the end of that, isn't it? What you are coming for is  
15 you have to proceed by asking for reopening in the  
16 Michigan court and see if they say it's too late. And  
17 then -- you know, et cetera, they're all spelled out in  
18 this opinion, which I can't remember, Cullen or  
19 Pinholster or something, and this isn't an argument for  
20 us now.

21 MS. NEWMAN: It's just a factual argument  
22 trying to respond to the Court's questions about what  
23 happened in this case and about what is contained in the  
24 record and what Mr. Toca did say on the record.

25 CHIEF JUSTICE ROBERTS: If I could move

1 beyond the particular facts to some of the broader  
2 points that the Solicitor General has raised? If you  
3 don't have the requirement of at least some  
4 corroboration, then all you have in every case is a  
5 completely self-serving assertion, I wouldn't have pled  
6 guilty - if you know, if I had known this or I had known  
7 that.

8 And everybody will raise that argument.  
9 Everybody raises ineffective assistance of counsel  
10 anyway, and they will just add onto it this plea  
11 assertion. I mean, shouldn't it be -- the Sixth Circuit  
12 really went out of its way saying there is no  
13 requirement of corroboration at all.

14 MS. NEWMAN: Mr. Chief Justice, there is no  
15 question the Sixth Circuit, in dicta, said that we don't  
16 require it, but it exists in this case. And the reality  
17 is, as we discussed in our brief, that every circuit  
18 looks -- it's a Strickland analysis.

19 Just like every other Strickland analysis,  
20 the court looks at the entire record and makes a  
21 determination based on the record. And this Court has  
22 always eschewed hard, fast, bright-line rules in terms  
23 of telling courts what has to exist in order to make a  
24 specific finding.

25 CHIEF JUSTICE ROBERTS: So you think the

1 Sixth Circuit was wrong in what you are characterizing  
2 as dicta? You think it was wrong to say that and that  
3 the other circuits which require something in addition,  
4 that that's the rule that we should adopt?

5 MS. NEWMAN: I don't think -- no, I don't  
6 think that any particular rule should be adopted. I  
7 think the rules that exist under Strickland are fine for  
8 the circuits. The rules have existed for decades, and  
9 the circuits have no trouble figuring out when the  
10 threshold is met and when it's not.

11 CHIEF JUSTICE ROBERTS: Well, I thought --  
12 maybe I'm misremembering, but the Sixth Circuit  
13 distanced it itself from the other circuits, didn't it?

14 MS. NEWMAN: Yes, it did distance itself by  
15 stating --

16 CHIEF JUSTICE ROBERTS: Now, you are telling  
17 me the circuits have always done this. So the  
18 Sixth Circuit at least thinks it's doing something  
19 different?

20 MS. NEWMAN: It may think it is doing  
21 something different, but in this particular case, there  
22 was objective evidence that they pointed to, and as the  
23 Solicitor General mentioned, there's always going to be  
24 sentencing disparity because you're going to have to  
25 have a sentencing disparity in order to show prejudice.

1 So, in effect, there will always be objective evidence  
2 that will support any subjective statement of a criminal  
3 defendant, or you're never going to see a --

4 CHIEF JUSTICE ROBERTS: Well, if there is  
5 always going to be objective evidence, that's like  
6 saying you don't have to have corroboration.

7 MS. NEWMAN: Right, but for this Court -- my  
8 point is, obviously, the Court can -- can set forth a  
9 rule, but in doing so, I think we are going to run into  
10 what Justice Sotomayor said earlier, in terms of judges  
11 do this all the time, they -- they figure out who's  
12 credible. I mean, it's never just like here's these  
13 things, but this guy's credible, so I'm going to believe  
14 him.

15 It's the totality of the circumstances, and  
16 it's always going to have to be a totality of the  
17 circumstances. So to say, here's the line, there has to  
18 be objective evidence, then what is the objective  
19 evidence? How are we going to define objective  
20 evidence.

21 CHIEF JUSTICE ROBERTS: So the Sixth Circuit  
22 was wrong when it said, we are doing something different  
23 than the other circuits?

24 MS. NEWMAN: They certainly did not do  
25 anything different in this case. In the other cases



1     that I have reviewed from the Sixth Circuit, I have not  
2     seen a case that relied only on subjective testimony, so  
3     I can't point to a case where the Sixth Circuit is doing  
4     something different than any other case, and I don't  
5     believe anyone else has pointed to a particular case.

6             So they might think they are doing something  
7     different, but in reality, they are doing the same thing  
8     as everybody else.

9             JUSTICE ALITO:             Can I ask you about Mr. --  
10    Mr. Toca's ethical lapses? Are they -- do they have a  
11    legal significance in this case?

12            MS. NEWMAN:            They certainly speak to his  
13    credibility. In United States v. Soto-Lopez is a very  
14    similar case out of the Ninth Circuit, where the Court  
15    did rely on the fact that the attorney had significant  
16    problems, ethical problems. And in this case,  
17    Mr. Toca's actions and his ethical problems go  
18    hand-in-hand.

19            I mean, he approached a represented  
20    defendant who was in jail and encouraged her to reject a  
21    plea. He did this on a very short timeline,  
22    admitting that -- well, not admitting, but we know, from  
23    prior counsel, that he had not even picked up the phone  
24    to speak with prior counsel, who had spent almost a year  
25    litigating this case. He had not retrieved prior

1 counsel's file. It appears from the record -- those are  
2 facts.

3 In terms of inferences, it appears from the  
4 record that he got his information from the media. This  
5 was a highly, highly publicized case. He signed a  
6 retainer agreement with a client who had no money, who  
7 gave him some jewelry and the right to promote her  
8 story.

9 So he had every -- he violated multiple  
10 ethical rules, and those violations lead to the  
11 conclusion -- a reasonable conclusion that the reason  
12 for withdrawing the plea was to make the deal more  
13 lucrative. It is not lucrative if she pleads.

14 She had already pled, so she had already  
15 entered a plea, and all that was left was sentencing.  
16 That's not a very exciting story, if your entire  
17 retainer agreement relies on the fact that you have the  
18 media rights to sell this story.

19 So, yes, I would argue that the ethical  
20 lapses are very significant in this case and lend  
21 credibility to --

22 JUSTICE ALITO: In what sense is his  
23 credibility -- did his credibility figure in the  
24 decision of the Michigan Court of Appeals?

25 MS. NEWMAN: Well, it didn't. There were

1 separate issues raised on ethical violations, and they  
2 were denied by the Michigan Court of Appeals, and they  
3 were denied by the Federal court.

4 JUSTICE KAGAN: Do you know whether the Michigan  
5 Court of Appeals was ever presented with this argument  
6 that, in fact, he gave the advice that he did because of  
7 the peculiar fee arrangement that he had?

8 MS. NEWMAN: They were specifically  
9 presented with the conflict argument, and off the top of  
10 my head, I apologize, I don't recall if that is  
11 specifically contained in there, but I think it was. I  
12 mean, it was definitely briefed and argued, the ethical  
13 violations.

14 JUSTICE KAGAN: And Mr. Toca is now, remind  
15 me, disbarred for?

16 MS. NEWMAN: Disbarred.

17 JUSTICE KAGAN: Forever?

18 MS. NEWMAN: Yes. He committed multiple  
19 misdemeanors and a felony and, in part, was disbarred  
20 based on this conduct in this case, so he is no longer  
21 practicing law. Last I checked, he is no longer  
22 practicing law anywhere in the United States.

23 JUSTICE ALITO: What was submitted to the  
24 Michigan Court of Appeals? Not the -- I am not talking  
25 about the exhibits that were attached, but there was a

1 motion, a brief? What was it?

2 MS. NEWMAN: Yes, in Michigan, it's called a  
3 motion to remand. You are required under the court  
4 rules to submit a brief in support of that motion to  
5 remand, and you are required to submit a proffer. So  
6 the proffer --

7 JUSTICE ALITO: It's not in the habeas  
8 record, it's not in the record of the Federal Court.  
9 And we've been unable to get it from the State court,  
10 but it does exist?

11 MS. NEWMAN: Yes.

12 JUSTICE ALITO: This motion?

13 MS. NEWMAN: Absolutely, yes. You have to  
14 file a motion to remand, and the court of appeals  
15 specifically references that motion to remand and the  
16 proffer by the affidavit in stating that normally they  
17 wouldn't consider those, that proffer as substantive of  
18 evidence, but in this case, inexplicably, they did,  
19 which leads to another reason why the Michigan Court of  
20 Appeals decision is unreasonable because it is the Michigan  
21 Court of Appeals that failed to engage in further fact  
22 finding.

23 So we take the record, as we get it from  
24 them and under Williams and other decisions, if the  
25 Court is the one that's responsible for an inadequate record,

1 I mean we have what we have, and I would argue to  
2 this Court that the record that we had supports that the  
3 Michigan Court of Appeals erred both legally and  
4 factually in its findings, and therefore, neither are  
5 entitled to any deference. And the Sixth Circuit's habeas grant  
6 should be affirmed in this matter. If there are no further questions -

7 Thank you, your honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Bursch, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF JOHN J. BURSCH

11 ON BEHALF OF THE PETITIONER

12 MR. BURSCH: Thank you, Mr. Chief Justice.

13 A few clean-up points, starting with this  
14 idea that the actual predicate was wrong. As we  
15 explained in our briefing in the habeas pleadings in  
16 this very case, Titlow already conceded that the factual  
17 predicate was correct.

18 And, Justice Breyer, you asked about the  
19 quantum of proof necessary to overcome that assumption  
20 that the Court of Appeals made based on the record  
21 before it, and actually, the legal standard under AEDPA  
22 is not clearly wrong. Under 2254(e)(1), which is  
23 reprinted in our blue brief, it is presumed correct, and  
24 that presumption can only be overcome by clear and  
25 convincing evidence, and we don't have that here.

1           Second, with respect to the advice, my  
2 friend on the other side points to Paragraph 8 of the  
3 Pierson affidavit. And it's a little ironic that they  
4 put all their eggs in that basket now because, in their  
5 briefing, they disclaim it as triple hearsay and say  
6 this Court should not rely on it, and she said some  
7 things characterizing that paragraph that aren't in  
8 there. There is nothing in paragraph 8 or the rest of  
9 the affidavit that says Toca approached Titlow. I don't  
10 know where that comes from.

11           But assume that everything that she says is  
12 correct and that Toca did give the advice to withdraw  
13 the plea, that still doesn't mean that it's bad advice  
14 when you apply the AEDPA and Strickland rubrics because,  
15 as Justice Alito pointed out, the differentiation in the  
16 manslaughter guidelines and what was actually in the  
17 plea actually makes this objectively reasonable advice.

18           And, in fact, it's more than that because,  
19 at the time the plea was withdrawn, consider all the  
20 facts that were known from talking to the prosecutor,  
21 looking in the police file and everything else that --  
22 that Toca presumably did. At that time, no one knew  
23 about this critical Chahine testimony, which only came  
24 out at trial, that it was actually Titlow who held Uncle  
25 Don down while he was being smothered.

1           I mean, that completely changes the  
2   complexion of this case. And so to say that Titlow was  
3   always guilty when all of her testimony up to the point  
4   of the plea withdrawal had been, I told my Aunt Billie  
5   to stop, and then I left the scene, that's just not  
6   credible.

7           Point on the second issue, the prejudice  
8   prong. Chief Justice Roberts and Justice Sotomayor, you  
9   note that the other circuits all look at objective  
10  evidence, and we think that's the right way to approach  
11  this. And you're exactly right, Chief Justice, that the  
12  Sixth Circuit takes a different approach.

13          The Sixth Circuit says, although some  
14  circuits have held that a defendant must support his own  
15  assertion that he would have accepted the offer with  
16  additional objective evidence, we, in this circuit, have  
17  declined to adopt such a requirement.

18          And you can see how that difference played  
19  out in this very case because the Sixth Circuit didn't  
20  look at all the other evidence that was in the record  
21  that was contrary to this self-serving statement that  
22  Titlow made; that Titlow had the plea in hand and,  
23  before the ink was even dry, was already professing  
24  innocence and talking to other lawyers; that she fired  
25  Lustig and there was no reason to do that, unless she

1 wanted to -- to withdraw the plea; that she did not have  
2 a propensity for truthfulness.

3 At trial, she lied about the fact that she  
4 was drunk, when she was not, the night of the murder.  
5 The evidence came out that she asked Chahine to lie  
6 about the alibi, and she hid the murder weapon. And  
7 then you've got all these statements at the sentencing  
8 hearing and post remand, where she's continually  
9 asserting her innocence. It's happening all the time.

10 When you consider all that objectively,  
11 under the other circuit standards, clearly, that would  
12 not be sufficient to establish prejudice here.

13 JUSTICE SOTOMAYOR: I -- I --

14 MR. BURSCH: That's the objective evidence.

15 JUSTICE SOTOMAYOR: I -- I don't understand  
16 what you're saying. The other side says -- and I think  
17 it's the standard -- that you look at the totality of  
18 the circumstances.

19 MR. BURSCH: Correct.

20 JUSTICE SOTOMAYOR: And what you're saying  
21 is they didn't do that here. It's not that -- they use  
22 some objective evidence, you're saying they didn't use  
23 other objective evidence. I am --

24 MR. BURSCH: Here's -- yeah. Here's the  
25 connector, Justice Sotomayor. The reason they didn't



1 look at the other evidence is because they have a  
2 different rule. They don't think they have to look at  
3 it. They did look at things like sentencing  
4 disparities.

5 As the Solicitor General's office explained,  
6 that shouldn't come into play here because that was a  
7 well-known disparity; it wasn't something that was  
8 hidden by client's ineffective assistance. And they --  
9 the Sixth Circuit talks about the fact that she accepted  
10 the plea once and then withdrew it. Obviously, that  
11 cuts both ways.

12 So all you are left with is the subjective  
13 testimony. And when you look at all the other objective  
14 evidence, the evidence that other circuits would look  
15 at, there's really only one possible outcome here.

16 So in sum, Your Honors -- oh, I guess I do  
17 want to mention one other quick point since my light  
18 hasn't gone yet. The book deal, there was no book deal.  
19 Look at page Joint Appendix 60, and I've seen copyright  
20 assignments. That wasn't the case here. They were  
21 trying to raise money for the trial.

22 And -- and this case had nothing to do with  
23 the reason why Toca was disbarred. That's at Joint  
24 Appendix 302 to 317. It was because he falsely put  
25 someone else's license tabs on his license plate, and

1     that was a misdemeanor, and then he lied about it.

2             In sum, record silence under AEDPA and  
3     Strickland means the State wins, not the convicted  
4     murderer.

5             Thank you.

6             CHIEF JUSTICE ROBERTS:             Thank you, counsel.

7             The case is submitted.

8             (Whereupon, at 12:04 p.m., the case in the  
9     above-entitled matter was submitted.)

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