No. 09-948 FEB 9 - 2010

In The

Supreme Court of the United States

JUSTIN JONES, Director,
Oklahoma Department of Corrections,

Petitioner,

v.

MICHAEL JOE WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent was convicted of first-degree murder following a fair trial and received a sentence of life without the possibility of parole. The Oklahoma Court of Criminal Appeals held, however, that his Sixth Amendment right to counsel was violated because his counsel improperly rejected a pre-trial plea offer for a 10-year sentence in exchange for a guilty plea to second-degree murder. To remedy that Sixth Amendment violation, the Oklahoma Court modified his sentence to life *with* the possibility of parole – the lowest sentence for first-degree murder under Oklahoma law. The Tenth Circuit granted habeas relief on the ground that that remedy was constitutionally inadequate. The question presented is:

Did the Tenth Circuit contravene the limits Congress imposed in 28 U.S.C. § 2254(d)(1) when it granted habeas relief on the ground that the remedy the Oklahoma Court of Criminal Appeals gave was constitutionally inadequate, even though this Court has not clearly established what remedy, if any, is appropriate for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Justin Jones, Director of the Oklahoma Department of Corrections, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1-55), appears in the Federal Reporter as *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009), and the opinion denying rehearing and rehearing *en banc* (Pet. App. 122-138) appears in the Federal Reporter as *Williams v. Jones*, 583 F.3d 1254 (10th Cir. 2009). The judgment and order of the District Court (Pet. App. 87-89) and the magistrate's report and recommendation (Pet. App. 57-86) are unreported. The decision of the Oklahoma Court of Criminal Appeals (Pet. App. 90-121) is unreported.

JURISDICTION

The Tenth Circuit entered its *per curiam* opinion on July 14, 2009 (Pet. App. 1-55), reversing the United States District Court for the Eastern District of Oklahoma's denial of federal habeas corpus relief. The Tenth Circuit entered its opinion denying the petition for rehearing and rehearing *en banc* on October 14, 2009. (Pet. App. 122-138). On January 5,

2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 11, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, U.S. CONST. art. VI, provides in relevant part:

> In all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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 State court proceedings.

STATEMENT OF THE CASE

A. The Facts of the Murder

The facts at trial revealed that in 1997, Respondent entered the home of Larry and Dolores Durrett with a gun. The gunman shot Mr. Durrett three times in his sleep, and twice more when the victim tried to pursue him. Mr. Durrett later died of his wounds. During a routine traffic stop the next day, police discovered Respondent and his girlfriend, Debra Smith, with packed suitcases and a rifle matching the shell casings left at the Durrett's home. At trial, several witnesses reported hearing Respondent threaten to kill Mr. Durrett over a botched drug deal. Evidence also revealed that Respondent's friend and eventual co-defendant, Stacy Pearce, drove Respondent to the Durrett's home the day of the murder and watched Respondent exit the car with a gun in hand. Mr. Pearce testified that when Respondent returned to the car he confessed to shooting Mr. Durrett. Ms. Smith also testified that Respondent confessed to her that he killed Mr. Durrett. (Pet. App. 129 n.2).

B. State Court Proceedings

Respondent was tried in state District Court before a jury, which found him guilty of first-degree murder and sentenced him to life without the possibility of parole. He appealed to the Oklahoma Court of Criminal Appeals, which rejected his various challenges to the underlying murder conviction. (Pet. App. 90-121). The Court, however, remanded to the District Court for an evidentiary hearing on the Respondent's contention that his counsel's performance during the pre-trial plea bargain was deficient. (Pet. App. 106).

The evidentiary hearing revealed that prior to his trial for first-degree murder, an assistant district attorney offered Respondent a 10-year sentence in exchange for a guilty plea to second-degree murder. Respondent wanted to accept the offer, but his attorney, believing that his client was innocent and that acceptance of the plea would amount to perjury, threatened to withdraw from the case if the offer was accepted. (Pet. App. 110-113). After that hearing, the trial court found that trial counsel had rendered deficient performance, but that Respondent suffered no prejudice. (Pet. App. 113-114).

The Oklahoma Court of Criminal Appeals agreed that trial counsel's performance was deficient, but reversed with respect to prejudice. (Pet. App. 117-119). The Court stated that "[t]he lost opportunity to pursue that plea offer with his retained counsel leads us to conclude [Respondent] has indeed suffered

prejudice by his trial counsel's action, for we have no way of reinstating that plea offer, even by reversing this case and remanding for a new trial". (Pet. App. 119). As a remedy, the Court modified Respondent's sentence to life imprisonment with the possibility of parole, the lowest punishment for first-degree murder. *See* Okla. Stat. tit. 21, § 701.9 (Pet. App. 119).

C. Federal Court Proceedings

1. Respondent filed a habeas corpus petition with the United States District Court for the Eastern District of Oklahoma. As relevant here, he claimed that the Oklahoma Court of Criminal Appeals imposed an inadequate remedy for the Sixth Amendment violation that occurred pre-trial. The District Court denied relief. With regard to the challenge to the remedy imposed by the Court of Criminal Appeals, the District Court held that "[s]entencing is a matter of state law . . . and petitioner's modified sentence is within the statutory sentencing range for his crime, see Okla. Stat. tit. 21, § 701.9." (Pet. App. 84).

2. The Tenth Circuit granted a certificate of appealability on the issue of "whether the OCCA's modification of Mr. Williams' sentence from life imprisonment without parole to life imprisonment with parole was a constitutionally adequate remedy for the ineffective assistance of counsel Mr. Williams received during plea negotiations." (Pet. App. 3). By a 2-1 vote, the Court of Appeals held (in a *per curiam*

opinion) that the remedy provided by the Oklahoma Court of Criminal Appeals – modifying his sentence to life with the possibility of parole – was "objectively unreasonable," and that the habeas petition should therefore be granted. (Pet. App. 1-17).

The Court of Appeals first ruled that Respondent's Sixth Amendment rights were violated. "The fact that [Respondent] subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation." (Pet. App. 10). Turning to remedy, the Court of Appeals acknowledged "that there are numerous circuit, district, and state court decisions employing various remedies in this context," including decisions holding that no remedy is appropriate because "a subsequent fair trial vitiates any Sixth Amendment violation." (Pet. App. 12-13 (citing *State v. Greuber*, 165 P.3d 1185 (Utah 2007))). The Court nonetheless concluded that "the OCCA was required to adopt the [remedy] that comes closest" to "restor[ing] the parties' original positions," "without being restrained by state law." (Pet. App. 13). In support of that conclusion, the Court relied on *United States v. Morrison*, 449 U.S. 361, 364 (1981), in which this Court held "that remedies should be tailored to the injury." (Pet. App. 13-14). The Court of Appeals remanded to the District Court to "impose a remedy that comes as close to possible to remedying the constitutional violation, and is not limited by state law." (Pet. App. 14). The Court acknowledged, however, that the only remedies that may be available to the Respondent

would be specific performance or a new trial. (Pet. App. 17).

Judge Gorsuch dissented. He explained that the loss of a plea cannot form the prejudice necessary for ineffective assistance of counsel when there is a lawful jury conviction that follows it. He reasoned that the purpose of the right to effective assistance of counsel is to ensure that a defendant receives a reliable and fair trial, and Respondent had such a trial. (Pet. App. 28-29, 35, 47). The loss of the plea did not affect the quality of the adversarial proceeding; thus, counsel's deficiency did not make the outcome of Respondent's trial any less reliable. (Pet. App. 32-39). Nor, Justice Gorsuch explained, was Respondent's loss of the plea unfair to him because a plea bargain is a matter of prosecutorial discretion and not a legal entitlement. (Pet. App. 35, 37-45).

Justice Gorsuch also considered the potential remedies available to courts in this situation and pointed out that each remedy either fails to restore a defendant to his original position or interferes with the prerogatives of the executive branch. He explained that specific performance of the plea bargain would put Respondent in a better position than he was in originally because it would give him a legal entitlement to a plea, which he did not have before. It would also interfere with the right of the executive to alter or withdraw plea offers. (Pet. App. 53-54). And, he added, it would be odd to provide Respondent with a new trial, given that his first fair trial led to a

higher sentence than the one from which he sought habeas relief. (Pet. App. 55).

3. Four judges dissented from the denial of rehearing *en banc* through another opinion by Judge Gorsuch. Judge Gorsuch stated that the two remedies left available on remand, a new trial or specific performance of a foregone plea bargain, represented a significant new federal intrusion into state judicial functions and a revamping of the separation of powers, one that unsurprisingly conflicts with the decisions of a number of other courts. (Pet. App. 130-131). He noted that no decision from this Court has ever held (or even hinted) that a lawyer's bad advice to reject a plea offer gives rise to a violation of the Sixth Amendment, or any other provision of federal law. (Pet. App. 132). He concluded that "there's no authority anywhere suggesting that [Respondent] suffered a Sixth Amendment violation," and that the remedy given by the Oklahoma Court of Criminal Appeals was therefore more generous than federal law required. (Pet. App. 136).

REASONS FOR GRANTING THE PETITION

In the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress placed strict limits on when federal courts can grant habeas relief. In particular, 28 U.S.C. § 2254(d)(1), forbids federal courts from granting habeas relief based on a state court merits decision unless that decision conflicts with "clearly

established Federal law, as determined by the Supreme Court of the United States." This Court has not hesitated to grant certiorari when a federal court fails to comply with that dictate. *See, e.g.*, *Knowles v. Mirayance*, 129 S. Ct. 1411 (2009); *Wright v. Van Patten*, 552 U.S. 120 (2008); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Rice v. Collins*, 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2005); *Holland v. Jackson*, 542 U.S. 649 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Woodford v. Viciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002); *Bell v. Cone*, 535 U.S. 685 (2002). The Tenth Circuit did precisely that in this case.

1. This Court has not clearly established that a defendant is prejudiced and that the Sixth Amendment is therefore violated when the defendant rejects a plea offer because of deficient assistance of counsel but then is convicted at a fair trial. As Judge Gorsuch's two dissents demonstrate, a powerful argument can be made that a defendant is not prejudiced in that situation, because he ultimately received precisely the process that the Constitution mandates – a fair trial. (Pet. App. 17, 20, 28-29, 133-136). Although most lower courts have held that a defendant can state a Sixth Amendment claim in that situation, several courts have reached the contrary conclusion.[1] Until this Court resolves the question, a

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[1] *See, e.g., State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo.

(Continued on following page)

state court cannot be said to have violated "clearly established Federal law, as determined by the Supreme Court of the United States" when it declines to provide *any* remedy.

In this case, the Oklahoma Court of Criminal Appeals did provide a remedy to Respondent for his trial counsel's deficient performance in rejecting a pre-trial plea, which was followed by conviction after a fair trial. The Tenth Circuit nonetheless held that the state court's remedy was not only constitutionally inadequate, but that it violated "clearly established Federal law, as determined by [this] Court." It is difficult to see how that is possible. Given that this Court has not clearly established that the Sixth Amendment is even violated in this context, it inexorably follows that this Court has not clearly established what the remedy would be if there were a violation.

Indeed, in *Arave v. Hoffman*, 552 U.S. 1008 (2007), the Court granted certiorari, in part, to address this precise issue. The Court specifically ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and

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Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000).

sentenced pursuant to a fair trial?" *Id.* at 1008.[2] The Court dismissed the case, however, under Rule 46 and never reached the merits. *Arave v. Hoffman*, 552 U.S. 117 (2008). Accordingly, the issue of the appropriate remedy, if any, remains open. This Court did not clearly establish an answer in *Arave* and has not done so in any subsequent case.

2. The Tenth Circuit nonetheless relied on this Court's decision in *United States v. Morrison*, 449 U.S. 361 (1981), for its conclusion that the Oklahoma Court of Criminal Appeals' decision unreasonably applied clearly established law. (Pet. App. 8). In that case, the Court developed a general test for courts to apply when crafting remedies for Sixth Amendment violations that occur at a post-indictment stage: "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." 449 U.S. at 364. That very general rule, while helpful in some situations, does not clearly establish the appropriate remedy "for ineffective assistance of counsel during

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[2] The two questions presented in the *Arave* petition itself asked whether the Ninth Circuit erred in finding deficient performance and prejudice on the facts of the case. Petition for Certiorari at *i, ii, Arave*, 552 U.S. 1008 (No. 07-110), 2007 WL 2238120. The question relating to prejudice did not ask whether prejudice may ever be found where the defendant was convicted following a fair trial. Rather, it asked merely whether prejudice was shown in that case, given that the defendant "failed to allege he would have accepted the state's plea offer but for [his counsel's] advice." *Id.* at *ii*.

plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?"

In holding that *Morrison* clearly established the applicable law in the case, the Tenth Circuit committed the exact same mistake as the courts this Court reversed in *Carey v. Musladin*, 549 U.S. 70 (2006), and *Wright v. Van Patten*, 552 U.S. 120 (2008). In *Musladin*, the Ninth Circuit held that a California state court unreasonably applied clearly established law when it rejected a defendant's due process claim based on members of the murder victim's family wearing buttons bearing the victim's photo. 549 U.S. at 73-74. This Court disagreed, holding that the Ninth Circuit erred when it took a line of cases in which this Court addressed government-sponsored courtroom practices (*e.g.*, "compell[ing] the defendant to stand trial in prison clothes,") *id.* at 75, and held that it clearly established the law with respect to spectators' courtroom conduct. Because of "the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here," and because "[n]o holding of this Court required" applying the Court's test for government-sponsored courtroom practices to courtroom spectators' conduct, this Court held that the Ninth Circuit violated AEDPA when it declared that the state court's rejection of Musladin's challenge to the spectators' courtroom conduct "was contrary to clearly established federal law and constituted an unreasonable application of that law." *Id.* at 77.

Likewise, in *Van Patten*, the Seventh Circuit granted habeas relief on the ground that Van Patten's counsel was presumptively ineffective within the meaning of *United States v. Cronic*, 466 U.S. 648 (1984), because he participated in the plea hearing by speaker phone. 552 U.S. at 122. This Court reversed. The Court agreed that *Cronic* established the general rule that "'when . . . the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small[,] a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *Id.* at 124 (quoting *Cronic*, 466 U.S. at 659-60). But, held this Court, "[n]o decision of this Court . . . squarely addresses the issue in this case, . . . or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Id.* at 125. Thus, although *Cronic* established a general rule as to when prejudice will be presumed, that was not enough to constitute "clearly established law" that prejudice will be presumed in a particular context.

So, too, here. *Morrison* established a general rule regarding the appropriate remedy for a Sixth Amendment violation. But it did not clearly establish what remedy is appropriate in this particular category of cases: where counsel provided ineffective assistance during plea bargain negotiations, and the defendant was later convicted and sentenced pursuant to a fair trial. Indeed, this Court would have had no reason to grant certiorari in *Arave* on the question of the appropriate remedy, if any, in that situation had it already clearly established the applicable rule.

3. The divergent remedies the lower courts have imposed in this situation provide further evidence that there is no clearly established law from this Court controlling the lower courts' choice of remedy. Some courts have granted the defendant a new trial. *See, e.g.*, *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998); *People v. Curry*, 687 N.E.2d 877, 890 (Ill. 1997); *State v. Lentowski*, 569 N.W.2d 758, 761-62 (Wis. 1997); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Taccetta*, 797 A.2d 884, 888 (N.J. Sup. Ct. App. Div. 2002); *Commonwealth v. Copeland*, 554 A.2d 54, 61 (Pa. Super. Ct. 1988); *Ex Parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C. App. 1983).

Other courts have specifically enforced the forgone plea offer. *See, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *Satterlee v. Wolfenberger*, 453 F.3d 362, 368-69 (6th Cir. 2006); *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001) (requiring specific enforcement of the original plea unless the prosecution shows non-vindictive reasons for changing or withdrawing it); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986) (requiring specific enforcement unless defendant does not accept the plea); *De Jesus Garcia Jiminez v. State*, 114 P.3d 903, 907 (Okla. Crim. App. 2006).

And still other courts have crafted remedies that are hybrids of the new-trial and reinstatement-of-plea approaches or that are entirely different. *See, e.g.*, *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996)

(ordering defendant's sentence to be reduced to the time he had already served and him discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262, 267 n.7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial); *In re Alvernez*, 830 P.2d 747, 760 (Cal. 1992) (permitting prosecutor to choose between resubmission of the original plea within thirty days or a new trial); *Tucker v. Holland*, 327 S.E.2d 388, 396 (W.Va. 1985) (refusing to reinstate the original plea but directing trial court to consider that plea for approval (or rejection)); *Harris v. State*, 437 N.E.2d 44, 45 (Ind. 1982) (permitting defendant to choose between reinstatement of the original plea or a new trial); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. App. 1978) (directing trial court to consider original plea for approval unless state withdraws plea, in which case defendant gets a new trial); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. 1978) (granting defendant the opportunity to engage in a new plea bargain with the advice of counsel, and if discussion breaks down, a new trial).

Lastly, some courts believe no remedy is appropriate because there is no prejudice in the first place. *See, e.g.*, *State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007); *Bryan v. State of Missouri*, 134 S.W.3d 795, 802-04 (Mo. Ct. App. 2004); *Louisiana v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000). This Court recognized that this is one of the possible remedial options through the phrasing of its question in *Arave*:

"What, *if any*, remedy should be provided . . . " 552 U.S. 1008 (emphasis added).

In *Musladin*, this Court stated, "Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment" of the issue. 549 U.S. at 76. The lower courts' divergent approaches to the appropriate remedy, if any, for deficient performance during plea negotiations that precede a fair trial "[r]eflect[ ] the lack of guidance from this Court" on this issue as well. Because this Court has not clearly established the appropriate remedy, if any, for deficient performance in this context, habeas relief under § 2254(d)(1) is foreclosed.

4. In addition to being all over the map, the remedies imposed by the lower courts are all problematic, either failing to restore defendants to their original positions or interfering with the prerogatives of the executive branch. As the Utah Supreme Court has held, and Judge Gorsuch observed, the absence of a remedy that both leaves our system of separation of powers intact and puts the habeas petitioner back in the position he would have been in had there been no constitutional violation suggests that there is no constitutional violation to remedy in the first place. *See Greuber*, 165 P.3d at 1190-91; Pet. App. 52. At the very least, it becomes still harder to fault the Oklahoma Court of Criminal Appeals for not adopting one of those remedies.

First, granting the defendant a new trial does not truly remedy his counsel's error because the

prosecution may choose not to re-offer him the original plea. At that point, we are back where we started: the defendant will be tried. Yet the defendant has already been tried, fairly. Requiring a "do over" of a fair trial, to remedy a pre-trial problem that did not affect the trial one whit, is an odd remedy indeed. As Judge Gorsuch noted, "If a fair trial is the right remedy, then in a real sense he's already received it." (Pet. App. 55).

A new trial also presents practical problems as there is no guarantee that the witnesses and evidence available at the first trial will still be available. A defendant who was already convicted at a fair trial might therefore be acquitted for insufficiency of evidence. On the other hand, the defendant may receive a higher sentence at the new trial than he did the first time around. *See* Pet. App. 55; *Greuber*, 165 P.3d at 1190; *Commonwealth v. Mahar*, 809 N.E.2d 989, 1002-03 (Mass. 2004) (Sosman, J., concurring).

By contrast, specifically enforcing the original plea offer places the defendant in a better position than he was in originally because that gives him a legal entitlement to the plea, which he did not have before. Prior to his trial, the defendant only had a *chance* at the plea offer because the prosecution could have altered or withdrawn the plea, and the state trial judge could have rejected it. Thus, specifically enforcing the original plea interferes with the right of the executive branch to alter or withdraw pleas as it sees fit, implicating serious separation of powers

concerns. *See* Pet. App. 54; *Mahar*, 809 N.E.2d at 1001 (Sosman, J., concurring).

Specifically enforcing the plea offer was one of two remedies that the Tenth Circuit had in mind when it remanded this case to the District Court. (Pet. App. 52-53). This remedy would represent an even more extreme imposition on the executive in this case because the prosecution would be forced to offer a plea to a lesser offense than the one the defendant was ultimately convicted of as the result of a fair trial. *See Mahar*, 809 N.E.2d at 1001, 1001 n.18 (Sosman, J., concurring) ("requiring the prosecution to dismiss a valid charge (as is often necessary to make the lower sentence lawful, . . .) runs afoul of the doctrine of separation of powers").

Hybrid remedies that pair a new trial and a requirement that the prosecution re-offer the original plea, but that permit the prosecution subsequently to alter or withdraw the plea offer, suffer from the same infirmities. The mere judicial act of forcing the prosecution to offer the plea again encroaches on the prerogatives of the executive branch. It is also unfair to the state because the state may have made its original offer only to avoid the expense and risk of trial, which ultimately it was not able to do. *See Greuber*, 165 P.3d at 1190; *Mahar*, 809 N.E.2d at 1001-02 (Sosman, J., concurring).

Admittedly, the remedy adopted by the Oklahoma Court of Criminal Appeals is also an imperfect one. Preserving the defendant's conviction but re-sentencing

him to a lower sentence within the lawful range falls short of restoring the defendant to his original pre-trial position. The issue before the Tenth Circuit, however, was not whether the remedy imposed by the Oklahoma Court of Criminal Appeals was perfect or even proper. It was whether that remedy conflicted with "clearly established Federal law, as determined by [this] Court." This Court has not clearly established the appropriate remedy in this situation – as confirmed not only by the divergent approaches taken by the lower courts, but also by the problematic nature of all of those approaches.

It is not clear from this Court's precedents that there even is a constitutional violation to remedy in this case, let alone what the remedy would be in the event there were a violation. In *Van Patten*, this Court reiterated that the term "clearly established federal law" in 28 U.S.C. § 2254(d)(1) is a narrow one and that only decisions that "squarely address[ ]" the issue in a case fit the bill. 552 U.S. at 125. Because there was no such decision that could form the basis for the Tenth Circuit's decision in this case, the Court should grant the petition and consider summarily reversing the Tenth Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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