

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas Mackenzie — PETITIONER
(Your Name)

VS.

Sec'y, Florida Dept. of Corrections — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s): Florida trial and appellate court

[] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Thomas W. Mackenzie, Jr.
(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Thomas Mackenzie, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>0</u>	\$ <u>N/A</u>	\$ <u>0</u>	\$ <u>N/A</u>
Self-employment	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Income from real property (such as rental income)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Interest and dividends	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Gifts	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Alimony	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Child Support	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Unemployment payments	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Public-assistance (such as welfare)	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Other (specify): _____	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____
Total monthly income:	\$ <u>0</u>	\$ _____	\$ <u>0</u>	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		\$	\$
		\$	\$
		\$	\$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	\$ _____	\$ _____
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 0	\$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ 0	\$ _____
Home maintenance (repairs and upkeep)	\$ 0	\$ _____
Food	\$ 0	\$ _____
Clothing	\$ 0	\$ _____
Laundry and dry-cleaning	\$ 0	\$ _____
Medical and dental expenses	\$ 0	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 0	\$
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	\$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 0	\$
Life	\$ 0	\$
Health	\$ 0	\$
Motor Vehicle	\$ 0	\$
Other: _____	\$ 0	\$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ 0	\$
Installment payments		
Motor Vehicle	\$ 0	\$
Credit card(s)	\$ 0	\$
Department store(s)	\$ 0	\$
Other: _____	\$ 0	\$
Alimony, maintenance, and support paid to others	\$ 0	\$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0	\$
Other (specify): _____	\$ 0	\$
Total monthly expenses:	\$ 0	\$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been incarcerated since 2010 and have no income or resources.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 13, 2018


(Signature)

No. _____

**In The
Supreme Court of the United States**

____—◆—_____
THOMAS MACKENZIE,

Petitioner,

v.

SECRETARY, FLORIDA
DEPARTMENT OF
CORRECTIONS,

Respondent.

____—◆—_____
**On Petition For Writ Of Certiorari
United States Court of Appeals,
Eleventh Circuit**

____—◆—_____
PETITION FOR WRIT OF CERTIORARI

____—◆—_____
GRAY R. PROCTOR
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QUESTION PRESENTED

1. Whether *Strickland's* test for deficient performance applies where trial counsel failed to investigate and discover the strength of the government's case before a plea expired and more serious charges were filed, and the defendant was subsequently convicted at trial?

LIST OF PARTIES

All parties appear in the caption.

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OPINIONS BELOW

The order denying a certificate of appealability is unpublished, and reproduced at pages 1-14 of the appendix. The order adopting the report and recommendation is unpublished, and reproduced at pages 15-16 of the appendix. The report and recommendation is unpublished and not included in the appendix, but available on Lexis at *Mackenzie v. Jones*, No. 16-14169, 2017 U.S. Dist. LEXIS 130726, at *1 (S.D. Fla. Aug. 15, 2017). The state court's order affirming the denial of Mr. Mackenzie's postconviction motion is unpublished and not reproduced here, but is available at *Mackenzie v. State*, 190 So.3d 645 (Fla. Ct. App. April 28, 2016). The state court's order denying Mr. Mackenzie's postconviction motion is reproduced at pages 17-21 of the appendix.

JURISDICTION

Mr. Mackenzie seeks review of the decision of the United States Court of Appeals for the Eleventh Judicial Circuit, denying a motion for a certificate of appealability. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2253(c) provides in relevant part that:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254 provides in relevant part that:

(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 the State court proceeding.

The Sixth Amendment provides in relevant part that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

STATEMENT OF THE CASE

Mr. Mackenzie was connected to a burglary by two items of evidence. The first was a weak identification by the victim, who initially described a man five inches shorter, with different colored hair and tee-shirt. (App. 3-4). The second: two bottles of Heineken beer, each bearing lot numbers identical to the remainder of a six-pack in the victim's refrigerator. (App. 2-3, 10-11, 18). The state promptly offered Mr. Mackenzie a fifteen-year plea deal. (App. 2). Subsequently the state revoked the plea deal and charged Mr. Mackenzie with home invasion robbery, a first-degree felony punishable by thirty years in prison. The state's new offer was twenty-five years in prison. (App. 2).

Counsel later learned that the lot numbers identified the exact minute that the bottles left the Heineken production line in Holland on March 10, 2009, one year before the alleged robbery. (App. 11, 24). Moreover, Heineken beers expire six months after production, and are promptly removed from stores at that time. (App. 23-25).

At trial, Mr. Mackenzie was convicted and sentenced to twenty years in prison. Through luck, and no action or strategy of trial counsel, the jurors learned only that the lot numbers matched. They did not learn the precision with which the lot numbers placed Mr. Mackenzie in the victim's home. (App. 18).¹

¹ Mr. Mackenzie notes that the state court committed a clear error of fact when it wrote that "no evidence of the numbers on any beer bottle were admitted at trial," (App. 18). The Eleventh Circuit appears to have perpetuated that error in describing Mr. Mackenzie's claims as relating to the fact that the numbers matched,

Mr. Mackenzie has argued that if he had known the truth about the matching lot numbers on the bottles of Heineken, he would have accepted the state's fifteen-year plea offer. The state court "misconstrued Mr. Mackenzie's claim" as relating to ineffectiveness at trial, holding that no prejudice could occur where the jury never learned what the lot numbers meant. (App. 11). The Eleventh Circuit nevertheless denied a certificate of appealability, reasoning that deficiency could not exist because "defense counsel did not learn the significance of the numbers until after the first plea offer had been revoked." (App. 11).

REASONS FOR GRANTING PETITION

Although "this Court is not equipped to correct every perceived error coming from the lower federal courts," the Court's attention is warranted here to correct the "clear misapprehension" of the Court's precedents and give guidance on a question the Court has left open. *Tolan v. Cotton*, 572 U.S. 650, 659-60, 134 S. Ct. 1861, 1867-68 (2014) (citations omitted).

The Sixth Amendment requires trial counsel "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984). The Court has explained that the Sixth Amendment's guarantee of assistance of counsel extends to the plea-bargaining process. However, in the only case to address a defendant who rejected a plea offer, counsel's

rather than the information contained in the lot numbers. (App. 5, 7, 11; see App. 27 (claim from pro se § 2254 petition)).

deficiency was stipulated. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). The Court has never taken a case in which counsel's deficiency was at issue.

Mr. Mackenzie's case demonstrates that the Court must explain that counsel has a duty to make reasonable investigations into any plea offer, and that duty must be interpreted against the time-sensitive nature of lenient offers. Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye*, 53 AM. CRIM. L. REV. 377, 391-392 (Spring 2016) (explaining the importance of evaluating any plea offer quickly before "the prosecutor revokes it or makes a worse deal due to the added charge or enhancement"). In fact, throughout this case Mr. Mackenzie's claims have been evaluated unrealistically, as though no one could predict that the prosecutor would have filed enhanced charges. *Compare* (App. 19 (statement by postconviction court that no one "could have predicted that the state would amend the information to reflect a charge of home invasion robbery)) *with* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 402 (observing that prosecutors regularly "threaten to add charges, to add enhancements, or to seek more time, as part of the plea-bargaining process"). The Court can use this case as a vehicle to articulate counsel's duty to investigate and advise during the plea negotiation stage, instead of limiting "[it]s focus to a single phase of plea bargaining: The client counseling phase." Alkon, 53 AM. CRIM. L. REV. at 407.

The legal issue is also in a posture amendable to full consideration by federal courts. The state court did not address Mr. Mackenzie's claim. Because the claim

was misconstrued, it was not “adjudicated on the merits,” 28 U.S.C. § 2254(d), and therefore can be considered *de novo*.

CONCLUSION

This case cleanly presents an unanswered question of pure law. Mr. Mackenzie has argued that trial counsel should have investigated and discovered how strongly the matching lot numbers on bottles of Heineken beer linked him to the victim’s home. The Eleventh Circuit has held that counsel did not even arguably have any duty to investigate, only to convey information. Thus, counsel’s actual ignorance of the lot numbers’ meaning is enough to resolve the case. The Court should take this case to resolve whether courts must apply *Strickland*’s test for deficient performance to investigation of plea offers.

Respectfully Submitted,
/s/ Gray Proctor
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Dated: December 10, 2018