CASE NO. 18-8003

IN THE UNITED STATES SUPREME COURT

ANTHONY J. DANNOLFO
Petitioner,

VS.

MARK INCH, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

****

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

****

PETITIONER'S REPLY BRIEF

ANTHONY J. DANNOLFO
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QUESTIONS

I.

DID DANNOLFO'S PROTESTATION OF INNOCENCE FORECLOSE HIS ABILITY OF PROVING *STRICKLAND* PREJUDICE UNDER *LAFLER V. COOPER*, OR DID THE COURTS FAIL TO GIVE MEANING TO *NORTH CAROLINA V. ALFORD'S* HOLDING THAT OTHER REASONS WOULD HAVE INDUCED DANNOLFO TO PLEAD, SUCH AS A CORRECT EVIDENTIARY PICTURE OF THE STATE'S CASE FROM COMPETENT COUNSEL?

II.

DOES DANNOLFO'S CASE, WHICH ALLIGNS WITH NUMEROUS CIRCUIT COURT DECISIONS, CONFLICT WITH *NORTH CAROLINA V. ALFORD* IN CONJUNCTION WITH *STRICKLAND V. WASHINGTON* AND *LAFLER V. COOPER*, WHERE HE PROTESTED HIS INNOCENCE, INVOLUNTARILY REJECTED A PLEA OFFER, AND LATER CLAIMED ACCEPTANCE OF THE LOST PLEA OFFER ABSENT COUNSEL'S MISADVICE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

FOR CASES FROM FEDERAL COURTS:

The United States Southern District Court of Florida decided Dannolfo's case on May 22, 2018 and is published at Dannolfo v. Julie Jones, 2018 U.S. Dist. Lexis 886704 (S.D.Fla.2018) and appears at Appendix B to the petition.

The opinion of the Eleventh Circuit of the United States Court of Appeals was decided on September 19, 2018 and appears at Appendix A to the petition and is unpublished. Additionally, the Eleventh Circuit denied Dannolfo"s Federal motion for Reconsideration on November 15, 2018, and appears at Appendix D to the petition.

JURISDICTION

The Jurisdiction of this court is invoked under 28 U.S.C § 1254(1)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment Right to the Effective Assistance of Counsel extends to the plea negotiation context. Const. Amend VI. See Lafler v. Cooper, 132 S.Ct.1376, 1384 (2012).

The State Courts adjudication of Dannolfo's claim involved a decision which was contrary to or an unreasonable application of clearly established Federal Law as determined by this Supreme Court of the United States under title 28 U.S.C. §2254(d)(1).

The Fifth Amendment guarantees an accused the right against self-incrimination, because Due Process guarantees an individual the right to maintain his innocence even when faced with evidence of overwhelming guilt. The law is clear that any judicially imposed penalty, which needlessly discourages assertion of the Fifth Amendment Right not to plead guilty and deter the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional. Const. Amend V. See United States v. Jackson, 390 U.S. 570 (1968).

LIST OF AUTHORITIES CITED

Statutes

STATEMENT OF THE CASE AND FACTS

Dannolfo adds the following for clarification in response to the Attorney General's "Brief in Opposition."

Dannolfo filed a Rule 3.850 postconviction motion through counsel. His ineffective assistance claim was based on three independent allegations of deficient performance by trial counsel, which are as follows: 1) Counsel advised Dannolfo that the state had weak case and that Dannolfo should reject the States plea offer; 2) Counsel misadvised Dannolfo regarding Sergeant Crane-Bakers anticipated trial testimony; and 3) Counsel misadvised Dannolfo on officer McCabe's anticipated trial testimony, and with proper advise, he would have accepted the state's plea offer. See generally Appendix F.

In describing the deficient performance, Dannolfo alleged verbatim:

> Attorney printz told the defendant that the state had a very weak case, and *he suggested* that the defendant reject the four and three year plea offers because they would beat the case at trial. Specifically, Attorney Printz misadvised him concerning pivotal material aspects of the case that he misunderstood, and at trial, counsel's misunderstanding and erroneous misadvice became painfully apparent (App. F. pg. 2)... Based on that erroneous information and misadvice, the defendant chose to reject the state's two plea offers of four and three years. Id. at 3...The defendant would have accepted the state's three year plea offer had counsel advised the defendant correctly about the strength of the state's case,

> and about material aspects of the case that counsel clearly misunderstood. Id. at 10. *Emphasis added*.

According to trial counsel, Crane-Baker was going to testify that Dannolfo was nowhere near the car when the confidential informant was in the car and given the Oxycodone. Counsel listed Crane-Baker as a defense witness and urged Dannolfo that his testimony would be favorable to the extent of contradicting officer McCabe's testimony. Counsel further testified at the evidentiary hearing that this was a mistake and he was surprised at trial when Crane-Baker testified that Dannolfo was right next to the car when the pills were passed to the C.I. (App. V, pgs. 11-12, 26).

Importantly, counsel testified that Dannolfo rejected the plea and immediately wanted to go to trial after being misadvised regarding Sergeant Crane-Bakers anticipated trial testimony.(App. v, pg. 12)

In reference to officer McCabe, trial counsel misadvised Dannolfo that McCabe did not hear the entire phone conversation, which occurred between Dannolfo and the confidential informant. At the evidentiary hearing, Dannolfo testified that counsel's specific misadvice was that officer McCabe "heard one side of the conversation. He did not hear the other side of the conversation, which was the caller, and that it was hearsay and it wasn't going to be allowed in the trial (App.v, pg.52).

Contrary to counsel, the contents of the phone call was admitted at trial, and the jury heard that Dannolfo set up the drug deal with the confidential informant. (App.u, pg. 293, 445-46).

In denying Dannolfo's claim, the State Court found that trial counsel denied telling Dannolfo to reject the state's plea offer based on the "anticipated impeachment of sergeant Crane-Baker" or because officer McCabe wouldn't be able to "testify to the content of the CI.'s phone call." (App. E, pg. 5).

The court further determined that Dannolfo "failed to meet his burden under Strickland v. Washington, of proving that his trial counsel misadvised him to reject the State's plea offer by telling him that the State had a weak case and that he would win at trial." (App. E, pg. 8)

The State Court never addressed the effect of counsel's misadvice concerning sergeant Crane-Baker's and officers McCabe's anticipated trial testimonies on Dannolfo's decision of whether to accept or reject the State's plea offer (App. E, pgs. 1-11); notwithstanding the fact that trial counsel testified at the evidentiary hearing that Dannolfo rejected the plea on the pretense of this misadvice. (App. v, pg. 12).

The Attorney General's office then states that this Supreme Court must give deference to the State Court's determination that trial counsel's performance was not deficient. (Brief in opposition, pg. 7). Dannolfo respectfully disagrees.

Dannolfo relies on all previous legal and factual assertions in his writ of certiorari. though respectfully adds the following in response to the Attorney General's Offices "Brief in Opposition."

REASONS FOR GRANTING THE PETITION

I. Dannolfo's protestations of innocence from the beginning of his case up till his trial, along with his willingness to help his defense during these times, don't foreclose the finding that he's shown a reasonable probability of accepting the State of Florida's plea offer absent trial counsels misadvice

II. The state court decision, including its precarious analysis, which the habeas courts adopted, conflict with North Carolina v. Alford in conjunction with Lafler v. Cooper and Strickland.

III. The United States Circuit Court of Appeals have expressed conflicting Views as to how a Lafler defendant's assertion of actual innocence impacts Strickland's prejudice prong in the context of rejecting a plea offer due to ineffective assistance of counsel

The language of Section 2254(d) expressly limits the provisions application to claims that were "adjudicated on the merits in state court proceedings." 28 U.S.C. § 2254(d). See Williams v. Taylor, 529 U.S. 362, 404 (2000) ("Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in the state court.")

However, a state court decision cannot be classified an "adjudication on the merits" if the state court's framing or analysis of the claim omitted one or more dimensions of the requisite federal constitutional analysis. See Porter v. McCollum, 130 S. Ct 447, 452(2009) ("Because the State Court did not decide

whether Porter's counsel was deficient, we review this element of Porter's Strickland claim *de novo*.")

> The state court never addressed trial counsel's objectively unreasonable performance, thus, it deference under 2254(d) and should be reviewed *de novo* by this Court

In the instant case, in its brief in opposition, Florida's Attorney General stated that trial counsel "[w]was not ineffective in this case because he advised Petitioner to take the plea offer." (Brief in opposition, pg. 9, n. 1). This reflects the state courts determination that Dannolfo didn't prove deficient performance under Strickland because trial counsel never told Dannolfo to reject the State's plea offer based on their case being weak. (App. E, pgs. 10-11).

However, trial counsel's testimony that he advised Dannolfo to accept the plea offer doesn't address or foreclose the question of whether counsel's misadvice concerning the anticipated trial testimonies of the two police officer's constituted deficient performance under Strickland v. Washington, Supra. See Lafler v. Cooper, 132 S. Ct. 1376, 1384(2012)(holding that during plea negotiations, defendant's are "entitled to the effective assistance of counsel" which includes competent advice).

In the instant case, the state court determined that trial counsel admitted error by his inability to impeach Sergeant Crane-Baker during the trial, and

concluded that made "a simple mistake" which "did not rise to the level of deficiency" required to demonstrate deficient performance under Strickland. (App. E, pg. 9)

Dannolfo submits that the state court erred in shifting the basis of his claim. The focus should have been on whether counsel's failure to become aware of Sergeant Crane-Bakers correct trial testimony and resulting misadvice to Dannolfo (which enticed the rejection of the state's plea and profession of innocence[1]) amounted to deficient performance; not on whether the "simple mistake" during the trial itself was ineffective assistance.[2]

The State Court never adjudicated the instance of whether counsel's misadvice to Dannolfo regarding the anticipated trial testimonies of Sergeant Crane-Baker and officer McCabe constituted deficient performance under Strickland v. Washington, Supra. Thus, Dannolfo respectfully submits that this Supreme Court can legally review this portion of his ineffective assistance claim *de novo*, irrespective of the Attorney General's claim stating otherwise. (Brief in Opposition, pg. 7). See Brown v. Maloney, 267 F. 3d 36, 40 (1st Cir. 2001), cert.

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[1] At the state evidentiary hearing, Dannolfo testified that his claims of innocence were in light of being misadvised by counsel and erroneously believing that the "evidence would prove that I was innocent." (App. v, pg. 64)

[2] Counsel's inability to impeach Sergeant Crane-Baker during the trial merely supported Dannolfo's assertion of misadvice during the plea negotiation process, which counsel admitted to. (App v, pgs. 11-12, 26).

denied, 535 U.S. 961(2002)("we can hardly defer to the state court on an issue that the state court did not address.").

Dannolfo respectfully adds that in this case, the record overwhelmingly demonstrates that he satisfied the deficiency prong under Strickland for his claim of ineffective assistance of counsel which went un-refuted either factually or legally. Strickland v. Washington , 466 U.S. 668, 690-91(1984)("No competent counsel would have taken the action that his counsel did take.") Moreover, trial counsel's performance in the instant case was objectively unreasonable.

The Attorney General urges this Court to deny Dannolfo's petition for Writ of certiorari because Dannolfo made an "insufficient showing" on Strickland's "performance prong" or otherwise never challenged counsel's deficient performance before this Supreme Court. (Brief in Opposition, pg.8)

Dannolfo replies that his main goal within his writ of certiorari was to outline his case and its significance to the constitutional questions of great national importance being presented. Furthermore, Dannolfo was of the understanding that in the event that this court accepts review, he will then have the opportunity to fully brief his claim of ineffective assistance of counsel in full. See Supreme Court Rule 16.2 ("whenever the court grants a petition for writ of certiorari... The case will then be scheduled for briefing and oral argument.")

> Contrary to Attorney General, the decisions of the instant case does conflict with Alford and demonstrated that Dannolfo was foreclosed from prying prejudice under Strickland

In the instant case, the Attorney General further argued incorrectly that "The Eleventh Circuit never stated petitioner could not legally establish prejudice under Strickland due to his prior claims of innocence." (Brief in Opposition, pg. 10)

Contrary to the Attorney General's argument to the this Court, the Eleventh Circuit Court of Appeals- in denying Dannolfo's application for Certifcate of Appealability- did exactly what the AG claimed it didn't; the Eleventh Circuit stated verbatim:

> **In light of his statement to the trial court that he would not accept any plea offer because he was not guilty, his assertion that he would have accepted the deal, had he been properly advised, is insufficient to establish prejudice**

(App. A: Decision of the 11th Circuit Court of Appeals, pg. 2).

Dannolfo submits that the Eleventh Circuits ruling in his case directly contradicts with this Courts holding in Alford which states that repeated declarations of innocence don't prove that a defendant wouldn't have accepted a plea, because "[r]easons other than the fact that he is guilty may induce a defendant so to plead... and he must be permitted to judge for himself in this respect." North Carolina v. Alford, 400 U.S. 25, 33(1970). See also, Griffin v. United States, 330

F.3d 733, 738(6th Cir. 2003)(Griffin's repeated declarations of innocence do not prove as the government claims, that he would not have accepted a guilty plea.") Thus, Dannolfo was foreclosed from proving Strickland prejudice due to his protestation of innocence.

Dannolfo asserts that the Florida's Attorney General's conclusions are internally inconsistent. For instance, the AG in the instant case urged the Fourth District Court of Appeals to deny Dannolfo Alford argument as follows:

> **The state maintains that the State would never have allowed Appellant, a twenty-two time convicted felon, to accept a plea while maintaining his innocence. Nothing in the record refutes the States assertion. Accordingly, Appellant's argument on this issue should be rejected.**

(App. K: States Answer brief, pg. 14).

The Attorney General's conclusion was directly against Dannolfo's argument on appeal in the state court that he could have accepted the state's plea offer in his best interests while maintaining his innocence under this Courts precedence in North Carolina v. Alford, Supra. (App. J, pg. 38) See Henderson v. Morton, 426 U.S. 637, 659 n. (6b)(1)(1976) ("Alford is based on the fact that the defendant could intelligently have concluded that whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the state's case against him was so strong that he would have been convicted anyway").

The state court's factual finding that he would not have accepted the three year plea offer absent counsel's misadvice-amounted to an unreasonable determination of the facts in light of the record before the state court

Under § 2254(d)(2)'s factual determination prong, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-el v. Cockrell, 537 U.S. 322, 340(2003).

A court can grant relief under section 2254(d)(2) if the state court misconstrued or misstated the record or overlooked or misconstrued evidence. See, e.g., Wiggins v. Smith, 539 U.S. 510, 528(2003) ("State court's assumption that the [social service] records documented instances of this [sexual] abuse" was "incorrect" and reflects an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding ; § 2254(d)(2)" and accordingly the "requirements of § 2254(d)...pose no bar to granting petitioner habeas relief"); Miller-El, 537 U.S. at 346 ("our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating ...")

A state court unreasonably determines the facts where the "process employed by the state court is defective" or is "unsupported by sufficient evidence," or "if no finding was made by the state court when it was required to

make a finding." Murray v. Schriro, 745 F.3d 984, 999(9th Cir. 2014) (quoting Taylor v. Maddox, 366 F.3d 992, 999(9th Cir. 2014).

In the instant case, Dannolfo testified that he would have accepted the state's plea offer of three years if counsel hadn't misadvised him on the anticipated trial testimonies of both Sergeant Crane-Baker and officer McCabe. (App. v, pg. 59). However, the state court factually determined that Dannolfo failed to present any credible evidence, other than his own self-serving assertions that demonstrates "but for his counsel's misadvice," he would have accepted the plea offer. (App. E, pg. 10).

In arriving to this factual determination, the lower court ignored trial counsel's testimony that Dannolfo immediately rejected the state's plea offer and wanted a trial once misadvised on Sergeant Crane-Bakers anticipated trial testimony. Moreover, according to counsel, Dannolfo specifically rejected the plea based on the erroneous information that he had which went overlooked by the state court. (App. v, pgs. 11-12). Furthermore, the state court short-changed counsel's testimony that "[w]e (Dannolfo and him) did have some discussions about the possibility of him taking a plea. So, it wasn't just I'm (Dannolfo) never going to accept a plea." (App. V pg. 42)

Thus, Dannolfo submits that the state court's assumption that Dannolfo failed to present any credible evidence besides his own assertions that he would

have accepted the plea, "but for his counsel's misadvice" - to be "incorrect" and reflects "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." As such, § 2254(d)(2), poses no bar to granting Dannolfo habeas relief.

Dannolfo respectfully adds that to the contrary of the state court, the record in his case demonstrates that his claim of ineffective assistance has been proven in accordance with controlling precedence of this Court and there exists no substantial evidence, which holds otherwise, including his protestations of innocence. Further, the state court's adjudication of Dannolfo's claim was contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court.

CONCLUSION

This Supreme Court has never specifically addressed the impact and application of Alford's holding to Strickland's prejudice analysis in the context of a lost plea offer premised on ineffective assistance of counsel.

The legal issue has constitutional and national significance and is sufficiently important to warrant the exercise of this Court's discretionary review; this is especially apparent where the lower courts and Attorney General Offices' are interpreting the issue in a way which conflicts with the relevant decisions of the this Court.

Based upon his writ of certiorari and foregoing arguments and authorities within this Reply Brief, Dannolfo respectfully submits that his writ of certiorari should be granted.

Respectfully submitted.

/s/ Anthony J. Dannolfo