18-8003

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ANTHONY J. DANNOLFO—Petitioner

VS.

MARK INCH, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERALS OFFICE—Respondent(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRITE OF CERTIORARI

ANTHONY J. DANNOLFO
AVON PARK CORRECTIONAL INSTITUTION
8100 HIGHWAY 64 EAST
AVON PARK, FLORIDA 33825

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

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FOR CASES FROM FEDERAL COURTS:

The Unite 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the United States Court of Appeals was decided on September 19, 2018 and appears at Appendix A to the petition and is unpublished.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)

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

Cases

STATEMENT OF THE CASE

I. Procedural History

On December 29, 2010, Dannolfo was convicted of Trafficking in Oxycodone and sentenced to twenty years in prison following a jury trial (App.U,Pgs.485-86). Dannolfo appealed the judgment and sentence which was per curium affirmed by the Fourth District Court of Appeal. See Dannolfo v. State, 103So.3d170 (Fla. 4th DCA 2012). On February 20, 2015, Dannolfo, through counsel, filed an amended motion for post conviction relief alleging in pertinent part, that trial counsel misadvised him concerning material aspects of the state's case and in the absence thereof, Dannolfo would have accepted the state's three year plea offer. (App. F, Pgs. 1-10) The state post conviction court granted an evidentiary hearing on this ground. (App.G,Pgs.3-5) The hearing was held on April 18, 2016 and on December 5, 2016, the post conviction court issued its final order denying post conviction relief. (App. E, pg. 1) Dannolfo filed a motion for rehearing, (App. H) which was then denied. (App. I) Dannolfo appealed the post conviction court's denial and filed his Initial Brief with the Fourth District Court of Appeal (App. J).

Florida's Attorney General filed its answer brief on July 31, 2017. (App. K). Dannolfo filed his reply brief on August 23, 2017. (App. L) On November 22, 2017, the Appellate Court affirmed the post conviction court's order denying relief. See Dannolfo v. State, 2017 WL 5629544 (Fla.4thDCA2017). Dannolfo filed a motion for rehearing on December 6, 2017, (App. M) which was denied on January 3, 2018. (App. N)

On February 23, 2018, Dannolfo filed a petition under 28 U.S.C § 2254 for Writ of Habeas Corpus with the Southern District Court of Florida. (App. O) The Habeas Court ordered the State

of Florida to file a response pursuant to a Show Cause Order. (App. P) On April 23, 2018, the Attorney General filed its response. (App. Q) Dannolfo then filed a reply to the response. (App. R) On May 22, 2018, the Southern District Court denied Dannolfo's petition for Writ of Habeas Corpus (App. B) Dannolfo filed an Application for Certificate of Appealability with the Eleventh Circuit Court of Appeals. (App. S) The Eleventh Circuit denied Dannolfo's application for C.O.A (App. A). Dannolfo then filed a Motion for Reconsideration (App. T) which was denied. (App. D)

STATEMENT OF THE FACTS

I. Substance of facts at trial which includes Officer's McCabe's testimony

On February 19, 2009, Delray police officers conducted a buy/bust operation that took place at the Dunken Donut's parking lot at 37 West Atlantic Avenue. (App.U,pg.336) A confidential informant made a phone call arranging for a transaction of 120 Oxycodone pills for $500 dollars. Officer McCabe was present when the C.I. made the phone call to arrange the drug deal. (App.U,pgs.299-300) Officer McCabe told the jury that he heard Dannolfo on the other end of the phone agree to deliver the pills to the C.I. at the Dunken Donuts. (App.U, pg.305) Dannolfo arrived at the parking lot in a car which contained four people and was located in the backseat behind the driver. (App.U,pg.303) Dannolfo exited the vehicle, approached Officer McCabe and the C.I. and asked McCabe if he was a cop, an informer, or working with the cops. (App.U,pg.304) Dannolfo and the C.I. walked to the rear of the car that Dannolfo exited, and Dannolfo stood outside the car when the C.I. got into the rear seat where he had sat. (App.U, pgs.304-05) According to Officer McCabe, Dannolfo then stated "Give it to him." The driver of the vehicle, a female[1], reached back and handed the C.I. a pill bottle, McCabe walked toward the car and tried to hand the money to Dannolfo, who refused to accept it. McCabe then tossed the money into the backseat of the car and walked away. Officer McCabe then gave the "take down signal" and the police task force moved in to make the arrests. (App.U,pgs.305-07) The pill bottle contained 92 Oxycodone pills. (App.U,pg.308)

II. Substance of Sergeant Crane-Baker's trial testimony

Sergeant Crane-Baker had an unobstructed view of the drug transaction and heard Dannolfo ask Officer McCabe whether "He was a cop, worked for the police department or was an

[1] The driver was Dannolfo's co-defendant, identified as Jody Karasik. (App. U, pg. 188)

informant," through an open cell phone line.[2] Sergeant Crane-Baker then heard Dannolfo direct the C.I. into the vacant seat in the car. Something was exchanged from the front of the car, at which point the C.I. exited the car and handed Officer McCabe a pill bottle. (App.U,pgs.337-38)

III. Substance and evidence of Dannolfo's claim of Ineffective Assistance of Counsel.

In Ground One of his amended Motion for Post Conviction Relief, Dannolfo alleged that trial counsel misadvised him regarding the strength of the state's case against him. Specifically, counsel misinformed him on what the two police officer's would testify to at trial, and based on this, Dannolfo rejected the state's 3 year plea offer and received 20 years instead. (App.F, pgs.1-8)

A. Counsel's misadvice relating to Sergeant Crane-Baker

Counsel mistakenly advised Dannolfo that Sergeant Crane-Baker would testify at trial that Dannolfo and officer McCabe was nowhere near the car when the C.I. was given the pill bottle containing the Oxycodone. (App. F, pg. 2; App. V, pg. 50) A significant point, as this would have contradicted Officer McCabe's anticipated trial testimony. (App. U, pgs, 305-07).

B. Substance of counsel's evidentiary hearing testimony

Counsel testified at the evidentiary hearing that he mistakenly thought Sergeant Crane-Baker would provide favorable testimony for the defense and listed him as a defense witness before the trial. (App.V, pg.11). He further testified that he advised Dannolfo prior to trial that Crane-Baker's testimony "would be favorable to the extent that it would be used to contradict [Officer McCabe]." (App.V,pg.12) He admitted that had he known Crane-Baker would testify that Dannolfo was at the car when the C.I. was given the pill bottle, it would have affected his advice to Dannolfo about whether to accept or reject the plea offer. (App.V,pg.26) Importantly, he

[2] Sergeant Crane-Baker called McCabe, who placed his cell phone in his pocket. (App. U. pg. 337)

testified that Dannolfo rejected the plea directly after being misadvised concerning Crane-Baker's anticipated trial testimony. (App.V,pg.12)

As counsel mistakenly believed during the trial that Sergeant Crane-Baker's testimony was inconsistent with his deposition testimony, he asked the trial court for a recess to comb through Crane-Baker's deposition. However, he was unable to prove any inconsistency. (App.U,pgs.343-45) He further admitted to being surprised by this turn of events at the evidentiary hearing. (App.V,pg.13)

C. The post conviction court's findings

The post conviction court found that counsel erred when he was unable to impeach Crane-Baker during the trial. However, the court further ruled that "[a] simple mistake does not automatically rise to the level of efficiency to support a claim of efficient performance under Strickland v. Washington, Supra." (App.E,pg.9)[3] (Contrarily, Dannolfo argued at the evidentiary hearing, through post conviction counsel—that trial counsel's misadvice (which was the deficient performance) was verified through counsel's own admittance and the failed instance of impeaching Sergeant Crane-Baker during trial) (App V,pgs.78-79)

D. Dannolfo's evidentiary hearing testimony concerning counsel's misadvice relating to officer McCabe

Counsel misadvised Dannolfo that Officer McCabe only heard one side of the phone call which set up the drug deal. Dannolfo testified that according to counsel, McCabe "[D]id not hear the other side of the conversation, which was the other caller, and that it was hearsay and it was not going to be allowed in the trial." (App.V, pg.52) Dannolfo further testified that counsel based McCabe's trial testimony off of his deposition. Id.

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[3] This mischaracterized Dannolfo's Lafler/Frye plea claim. Contrary to the post conviction court's findings, counsel's deficient performance stemmed from his mistaken advice to Dannolfo concerning Crane-Baker's anticipated trial testimony. (App. F, pg.2; App. V, pg. 658)

E. Counsel's evidentiary hearing testimony relating to officer McCabe

At the evidentiary hearing, counsel testified that he read Officer McCabe's deposition prior to the trial and that according to McCabe, only the C.I's end of the phone call was overheard. (App.V, pgs.14-15) As such, it was counsel's understanding that Officer McCabe had not heard the other end of the call which set up the drug deal. Id. Counsel testified that he did "not know" if he told Dannolfo that McCabe did not hear both sides of the C.I.'s phone call, though added that Dannolfo was provided with a copy of McCabe's deposition. (App.V., pg.15)

F. Trial counsel's Motion in Limine which sought to exclude the phone call in Officer McCabe's trial testimony

During the trial, counsel argued that "[T]here's no proof to anybody that the C.I. is on the phone with Mr. Dannolfo." (App.U, pg.178) The trial court specifically asks, "The cop doesn't hear what the defendant says, does he?" "Agreed," the state attorney says.[4] Id. The court adds that the C.I. could be speaking with Jody Karask, Dannolfo's co-defendant, to which the state agrees. (App.U., pgs.188-89, 205)

During counsel's opening arguments, he mentions a phone call which occurred between Dannolfo and the C.I. (App.U., pgs.223-24) Consequently, the trial court re-opens its ruling on the Motion in Limine, finding that this changed the landscape of what is admissible from the phone call that officer McCabe overheard. (App.U., pg.227) Counsel replied that the phone call he alluded to during opening arguments was made earlier in the day (and not at the police station in the presence of Officer McCabe). Id. The State of Florida then argues that it wants to proffer McCabe's testimony in regards to the phone call:

> [McCabe] heard the other person on the line that was a male, and there was an agreement for the sale of pills, which Mr. Printz has called into question by saying specifically the defendant had no intent, in any way to show up at that gas station

[4] At this point in the proceedings, it's apparent that all parties were unaware of Officer McCabe's supplemental report which states that the C.I. was talking to Dannolfo. (App. U, pg. 248)

> or Dunkin Donuts to do a sale. And that's going to be directly contradicted by the conversation. (App. U., pg. 232)

The trial court asks whether counsel's on notice to Officer McCabe hearing Dannolfo on the phone call. In response, counsel states that McCabe is saying something now which contradicts his testimony during his deposition. (App. U., pgs.232-33)

G. Officer McCabe's proffered testimony

Officer McCabe testified that he was a foot away from the C.I. during the phone call which arranged the purchase of 120 Oxycodone pills for 500 dollars. (App.U., pgs.240-41) The C.I. pulled his ear away from the phone so that McCabe could hear. (App.U, pgs.245) McCabe further testified that he heard both sides of the phone call and could specifically "hear the defendant" agree to deliver the pills to the Dunkin Donuts. (App.U., pg.247), Counsel asked McCabe if this was the first time that he told anybody that he could hear the other end of the phone all. (App. U, pg.248). McCabe stated, "I don't believe so," and proceeded to read from his supplemental report:

> While monitoring the conservation, Anthony D. stated he will meet the C.I. and [me] at the Dunkin Donuts located at 37 West Atlantic Avenue to make the transaction.[5] Id. At 248.

H. The Trial Court Allowed Officer McCabe to Testify to the Entire Contents of the Phone Call.

The trial court ultimately ruled that it was "Admissible that the defendant was the caller, that it was circumstantially established," and that the evidence of an agreement to sell drugs "is an

[5] Counsel's misadvice concerning Officer McCabe stemmed from his inability to familiarize himself with McCabe's supplemental report. Dannolfo adds that this instance of counsel's newfound understanding during the trial was brought up in his Motion for Post Conviction Relief (App. F., pgs. 3-4) and constitutes "objective evidence" in the Alfer/Frye prejudice analysis.

adoptive admission that is not subject to the confrontation clause." (App.U, pg.293). Officer McCabe testified as such and the State of Florida argued as followed in its closing arguments:

> Well, how do we know that the defendant was involved? And the first way that we know is the conversation that [the C.I.] has with the defendant. Got a guy, hundred and twenty oxy pills for five hundred dollars, that's what Officer McCabe heard in the conversation and what was going on. We'll meet you at Dunkin Donuts. (App. U., pgs. 445-46)

IV. The Post Conviction Court's Factual Findings and Conclusions of Law

The post conviction court found that Dannolfo sufficiently alleged prejudice according to this Court's decision in Lafler v. Cooper, 132 S.CT.1376,1385 (2012) and Florida's adopted version in Alcorn v. State, 121So.3d 419,430-32 (Fla. 2013). However, in denying Dannolfo's ground the lower court stated in pertinent part:

> The judge's "plea" colloquy at the commencement of trial demonstrates that the state had not withdrawn its offer and the trial court would have accepted the plea if defendant chose to accept it. The record demonstrates that had defendant entered into the plea agreement, his punishment would be less severe that the ("20") year sentence that was imposed after the jury convicted him. Therefore prongs 2, 3 and 4 of the Alcorn Analysis have been satisfied by defendant. However, the evidence demonstrates that defendant has failed to meet the first Alcorn prong, which requires him to prove that he would have accepted the plea, but for the misadvice of counsel. Defendant has failed to present any credible evidence other than his own self-serving assertions that demonstrates "but for counsel's misadvice," he would have accepted the plea offer. To the contrary, competent and credible evidence was presented at the evidentiary hearing that refutes this allegation. (App.E, pg.10)

A. Evidence in light of post conviction court's ruling

Trial counsel discussed the plea deal with Dannolfo and advised that he would only have 260 days left to serve if he accepted the state's plea offer. (App.V, pg.8) Counsel thought the offer was a good one and advised Dannolfo that he should accept it. Id. at 9. However, Dannolfo

wouldn't accept the offer and wanted a trial because he thought he wasn't guilty and could "beat the case." Id. At 9, 30-31, 35[6]

B. Dannolfo's testimony in light of his protestation of innocence

Dannolfo testified that he was an active participant in his defense and maintained his innocence throughout the case. When the prosecutor asked him about these claims of innocence, he replied that "I was always told by my first attorney to always maintain your innocence until the state proves you otherwise." (App. V, pg. 60) Dannolfo further added that his claims of innocence were in light of being misadvised by counsel and thinking the "evidence would prove that I was innocent." Id. at 64.

The post conviction court referred to Dannolfo's profession of innocence in denying relief: "Defendant advised the judge that he wanted to testify to prove that he was innocent." (App.E,pg. 6) On the morning of trial, Dannolfo stated as follows:

> You know, I would---whatever I've committed and done in my life, I've took the time for and pleaded guilty to...I know I face thirty years, but I didn't do nothing...Every conviction I've ever made...I've took it because I did the crime, you know what I'm saying...These are my pills, I'm a drug addict...But I can't for the life of me take a trafficking charge and I have to take it to trial.[7](App. U, pgs. 4-5)

On appeal, the State of Florida vehemently argued that Dannolfo claimed "[h]e was innocent immediately before trial and rejected the state's plea offer yet again" and that "the credible evidence presented below showed that appellant was hell bent on having his day in court because he thought he could beat the charge, and the trial court's denial of appellant's argument should be affirmed." (App.K,pg. 12)

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[6] When trial counsel was asked whether Dannolfo rejected the state's plea offer based on the misadvice he provided, he said "I imagine so." (App.V,pg. 26) Thus, even counsel's testimony supports Dannolfo's assertion of accepting the plea absent the misadvice. Id. At 50

[7] The post conviction court refers to the trial transcripts in adjudicating Dannolfo's claim. (App.E,pg. 9)

Dannolfo argued in his initial brief on appeal that he could have accepted the state's plea offer in his best interests while maintaining his innocence according to this Court's precedent in North Carolina v. Alford, supra.[8] (App.J,pg. 38) In response, the Attorney General's Office argued that "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 State's assertion. Accordingly, appellants argument on this issued should be rejected." (App.K,pg. 14)

In his reply brief, Dannolfo argued that the post conviction court "[f]ailed to consider the circumstances as viewed at the time of the offer and whether there was a 'reasonable probability' that Dannolfo would have chosen to accept the plea had he been correctly advised." (App.L,pg.3). "The Lower Court's heightened standard of Dannolfo failing to prove was erroneous" as "the probability that the defendant would have taken the plea need only be sufficient to undermine confidence that he would have rejected the plea regardless." Id. at 3. Dannolfo then pointed out that he "[s]houldn't have been required to present additional evidence that he would have accepted the plea offer. Such a stringent and additional requirement contradicts Strickland's holding that Dannolfo need only establish a reasonable probability that the result would have been different." Id. at 3.

[8] North Carolina v. Alford, 400 U.S. 25 (1970)

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

This Supreme Court of the United States had long ago held that a criminal defendant "[a]ccused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 32 (1970) As such, this Court found 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." Id at 33. Moreover, this Court pointed out that it could not "perceive any material difference between a plea that refused to admit commission of the criminal act and a plea containing a protestation of innocence when...the record before the judge contains strong evidence of guilt." Id at 32. Importantly, "[A]lford 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." Henderson v. Morton, 426 U.S. 637,659 n.(6b)(1)(1976).

In the instant case following an evidentiary hearing, the post conviction court ruled that Dannolfo failed to prove a reasonable probability that he would have accepted the state's plea offer but for the alleged misadvice of counsel. (App.E,pg. 10) In support thereof, it found that Dannolfo "[a]cknowledged that when he rejected the state's plea offer in open court, he told the judge that he had entered pleas many times in the past, but he would not this time because he did

not sell or deliver drugs." Id at 6. According to the court, Dannolfo also "advised the judge that he wanted to testify to prove that he was innocent." Id at 6. Additionally, it stated the following:

> Other evidence at the evidentiary hearing refuted defendant's allegations that it was his counsel's misadvice that caused him to reject the state's plea offer. Documents from trial counsel's file demonstrated that defendant was actively involved in his defense from the beginning and that he felt that he could beat the case at trial. These notes are corroborated by the defendant's letter to the public defender wherein he listed items he wanted done in his case and provided case law. Also in a letter to the presiding judge, defendant discussed the story of his life and asked pointed legal questions related to his defense. (App.E,pg. 9)

In putting the protestations of innocence comments into context, Dannolfo testified at the evidentiary hearing that "I was always told by my first attorney to always maintain your innocence until the state proves you otherwise."[9] (App.V,pg. 60) He further added that his claims of innocence were in light of being misadvised by trial counsel and erroneously believing that the "evidence would prove that I was innocent." Id at 64. Thus, Dannolfo's claims of innocence, his interests in helping his defense and thoughts that he could "beat the case" (App.V,pgs. 30-31,35) were the product of an uninformed Dannolfo and directly enticed through counsel's faulty advice concerning the anticipated trial testimonies of both Sergeant Crane-Baker and Officer McCabe. (App.V,pgs.12,26;14-15, respectively). Moreover, at the evidentiary hearing, counsel testified that Dannolfo rejected the state's plea offer on the pretense of the misadvice (App.V,pg. 26), which further reinforced Dannolfo's testimony on this point:

> I would have gladly accepted the state's plea of three years if it wasn't for the mistakes that my lawyer made with regard to the testimonies of both Sergeant Crane-Baker and Officer McCabe. (App. V, pg. 59)

As a result, he is serving a twenty-year sentence over the state's rejected three-year plea offer. Id at 59.

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[9] See Griffin v. United States, 330 F.3d 733,738 (6th Cir. 2003) ("Defendant's must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government.")

II. The State Court's decision, including its precarious analysis, which the Habeas Courts adopted, conflict with North Carolina v. Alford in conjunction with Lafler v. Cooper and Strickland

In ruling as it did, the post conviction court's decision ignored Alford's holding that protestations of innocence don't foreclose a finding that Dannolfo would have pled because "reasons other than the fact that he is guilty" may have induced him to plead, such as a correct evidentiary picture from competent counsel. See Alford, 400 U.S. at 33. This is especially apparent when the state and Habeas Court's did not question what Dannolfo would have done with proper and adequate advice. See Alcorn v. State,121So.3d 419,432 (Fla. 2013) (adopting Lafler v. Cooper, 132S.Ct. 1376 (2012) (a "determination of a 'reasonable probability' that the [defendant] would have accepted the plea requires consideration of the 'totality of evidence' and "based upon a consideration of the circumstances as viewed at the time of the offer and what would have been done with proper and adequate advice.") Of course, this analysis stems from Strickland itself. See Strickland v. Washington,466U.S.668,695 (1984) (To find prejudice for purposes of a ineffective assistance claim, a court "must consider the totality of the evidence before the judge or jury.")

In reference to Alcorn's "consideration of the circumstances as viewed at the time of the offer" Alcorn, 121 So. 3d at 432, Dannolfo points out that on the morning of trial and before the lengthy discussion of the Motion of Limine, he asked trial counsel a question right before he rejected the state's plea offer:

> After I asked for a moment from the judge to speak with my attorney over the rejection of the plea, the first thing I asked him was, "Are we positively sure about Sergeant Crane-Baker's testimony?" And he told me he was. And the second thing he said, "He's listed as a defense witness for you..." So, I turned around to the judge and I said, "Your Honor, we're going to trial on that information and it wasn't there." (App.V. pg. 57)

Importantly, trial counsel referred to this same conversation with Dannolfo at the evidentiary hearing. Counsel testified that "I thought that [Crane-Baker] testimony would be favorable to the extent that it would be used to contradict Officer McCabe," and that once Dannolfo heard this, "He wanted to go to trial at that point." (App.V. pgs. 11-12)

Had the lower court, in its determination of prejudice in Dannolfo's Lafler plea claim, considered this Supreme Court's holding in Strickland, 466 U.S. at 695 (which was incorporated in Florida's adopted version of Lafler, see Alcorn, 121 So. 3d. at 432) in conjunction with North Carolina v. Alford, 400 U.S. at 32, it would have gauged the following reasons why Dannolfo would have pled guilty despite his claims of innocence along with his interests in helping is defense and thoughts that he could "beat the case."[10] For instance, Dannolfo would not have erroneously believed that Crane-Baker was going to testify favorably for the defense; i.e., that Dannolfo was not near the car when the drugs were given to the confidential informant from his co-defendant, which would have directly contradicted Officer McCabe's testimony, (App.V,pg. 12). Nor would Dannolfo have been under the false impression that Office McCabe never heard him on the other end of the phone call with the C.I., which allowed McCabe to testify that Dannolfo set up the drug deal with the C.I.—a consequence which was completely shortchanged against Dannolfo's understanding when he rejected the states plea offer. (App.V,pg. 52; App.U,pgs. 445-46)

A correct evidentiary picture of the state's case from competent counsel would have overwhelmingly encouraged Dannolfo to accept the state's three-year plea offer. See Lafler, 132 S.Ct at 1384 (holding that during plea negotiations, defendants are "entitled to the effective assistance of counsel.")

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[10] According to the state court, trial counsels' file demonstrated that Dannolfo was actively involved in his defense and felt that he could beat the case at trial. (App.E,pg. 9) See also Appendix W: Trial Counsel Notes, and Dannolfo's letters to counsel and presiding judge, respectively.

Essentially, the state and Habeas Courts concluded that counsel's misinformation had no impact on Dannolfo's decision-making process and undercuts this Supreme Court's reasoning that the Sixth Amendment Right to Counsel includes competent and correct advice. See Lafler v. Cooper,132 S.Ct. at 1384.

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

In a case from the Sixth Circuit, the court determined that the defendant's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. See Griffin v. United States, 330 F.3d 733, 738 (6th Cir. 2003) (citing North Carolina v. Alford,400 U.S. 25,33 (1979) ("reasons other than the fact that he is guilty may induce a defendant to so plead...and he must be permitted to judge for himself in this respect.")

The Sixth Circuit in Griffin reasoned that a "[d]efendant must claim innocence right up to the point of accepting a guilty plea or they would lose their ability to make a deal with the government," and that "[i]t does not make sense to say that a defendant's protestations belie his later claim that he would have accepted a guilty plea." Griffin,330 F.3d at 738. A "[d]efendant must be entitled to maintain his innocence throughout the trial under the Fifth Amendment," and the defendant in Griffin could have "entered an Alford plea even while protesting his innocence."[11] Id. Finally, "these declarations of innocence are therefore not dispositive on the question of whether Griffin would have accepted the government's plea offer." Id.

[11] The Attorney General of Florida stated that it never would have allowed Dannolfo to plead guilty while maintaining his innocence. (App K.,pg. 14.) However, the prosecutor during the trial did not object when the trial court persisted in plea discussions after Dannolfo's profession of innocence. (App. U, pg. 4-8)

The Sixth Circuits decision in Griffin is similar to the Eleventh Circuits decision in Lalani, where the court determined that the defendant's protestations of innocence do not prevent him from showing Strickland prejudice in the context of accepting a lost plea offer. See Lalani v. United States,315 Fed.App'x. 858, 861 (11th Cir. 2009) ("We find the Sixth Circuits opinion in Griffin persuasive with respect to the prejudice prong of Strickland.")

Importantly, the Eleventh and Sixth Circuits have issued contradictory decisions to that of Lalani and Griffin in respects to Lafler plea claim defendant's proving Strickland prejudice in light of their previous and/or ongoing claims of innocence. For instance, the Eleventh Circuit has repeatedly stated that a defendant's claim that he would have accepted a plea if properly informed is undermined by claims of innocence. See Osley v. United States,751 F.3d 1214, 1224-25 (11th Cir. 2014) Likewise, the Sixth Circuit has reasoned that "[p]rotestations of innocence throughout trial are a proper factor" in determining whether a defendant would have accepted a lost plea offer. Smith v. United States,348 F.3d 545, 552 (6th Cir. 2003); Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (same).

Simply put, there exists unabashed instability on this area of law in sore need of this Supreme Court's guidance. For instance, contrary to Griffin, 330 F.3d at 738, the Sixth Circuit has demonstrated through its other decisions that declarations of innocence are...dispostive [to Strickland prejudice] on the question of whether [a defendant] would have accepted the governments plea offer. See Humprees v. United States, 398 F.3d 855, 859 (6th Cir. 2005) (finding defendant did not establish reasonable probability that he would have pleaded guilty because of his assertions of innocence during trial.); Comrie v. United States,455 Fed. App,x. 637, 640 (6th Cir. 2005) (holding that defendant did not establish prejudice because "at all points [defendant] was quite adamant that he was innocent [and] wanted to go to trial.")

In the instant case, the Eleventh Circuit Summarized Dannolfo's plea claim as follows:

> 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, pg. 2)

The Eleventh Circuit's position on the issue is that Dannolfo couldn't legally establish that he would have accepted the plea offer due to his previous protestation of innocence, irrespective to this Supreme Court's precedence in North Carolina v. Alford and the misadvice itself. See North Carolina v. Alford, 400 U.S. at 33.

To be sure, there exist cases where a defendant's protestations of innocence will surmount their notion of accepting a lost plea offer in the absence of trivial deficient performances on part of defense lawyers. However, Dannolfo submits that in all cases involving Lafler defendant's protesting their innocence, however strong, the overseeing judges should logically consider, when appropriate, that "reasons other than the fact that he is guilty may induce a defendant so to plead" while analyzing whether the defendant met his burden under Strickland. North Carolina v. Alford,400 U.S. 25,33 (1979)

In making a case worthy of this Supreme Court's attention, Dannolfo strongly notes that in practice, amongst American post conviction litigation, the rationale within Griffin and Lalani in conjunction with Alford is seldom the undertaken course. Instead, a Lafler defendant's prior protestation of innocence will virtually foreclose any possibility of their proving Strickland prejudice, regardless of the circumstances. For this reason, Dannolfo humbly requests this Court's guidance on this important point of law of national importance.

IV. There is one informative case known to Dannolfo in which a Lafler plea claim defendant demonstrated Strickland prejudice following a full evidentiary hearing

In Sawaf v. United States, the defendant was a doctor who vehemently denied being a drug dealer at all pretrial and post trial proceedings, including his evidentiary hearing. See Sawaf v. United States,570 Fed. App'x. 544, 545 (6th Cir. 2014). In Sawaf, trial counsel failed to advise the defendant that he would likely receive a prison sentence of at least 235 months if convicted at trial after rejecting the government's plea offer of 41 months. Id at 545-46. The defendant claimed he would have accepted the 41 month plea offer had he known what he faced at trial, despite his continued insistence that he was innocent. Id at 546. The District Court found this not credible, given his ongoing claims of innocence. Id at 548

The Sixth Circuit in Sawaf began its analysis with the presumption that there was a "reasonable probability" that the defendant would have pleaded guilty had he known about the heightened penalties from a trial conviction; and then determined whether there was evidence to rebut this presumption.[12] Id at 548. Its reasoning behind this logic went as followed:

> Under this burden-shifting framework, the relevant inquiry is whether the evidence conclusively supports the finding that even if Sawaf had known that proceeding to trial would expose him to a 20 year prison sentence—there is no reasonable possibility that Sawaf would have pleaded guilty. Id at 548

Dannolfo submits that the Sixth Circuit's rebuttable "presumption of prejudice can be used objectively in cases such as his, where there exists a wide discrepancy between the anticipated trial testimonies proclaimed by trial counsel and the actual evidence brought forth by the

[12] The Sixth Circuit employs a rebuttable presumption as follows: "If counsel failed to provide the defendant with an estimated range of the penalties that could result from a trial conviction, the prejudice prong is presumptively satisfied if the difference between the length of the sentence imposed in the government's plea offer and the sentence imposed after trial was substantial" and "when this presumption applies, the defendant is not required to submit additional objective evidence to 'support his assertion that he would have accepted the offer' if provided with the benefit of effective assistance." Sawaf, 570 Fed. App'x. at 548

government at trial - where this misadvice enticed an involuntary rejection of a favorable plea and otherwise denied the Lafler defendant of his Sixth Amendment right to the effective assistance of counsel during plea negotiations, namely, his ability to make an informed, conscious decision on whether to accept the government's plea offer or not.

Had the post conviction court in Dannolfo's case applied the Sixth Circuits "presumption of prejudice," the relevant inquiry would have been whether the evidence conclusively supported the finding that even if Dannolfo wasn't misadvised concerning the anticipated testimonies of Sergeant Crane-Baker and Officer McCabe, there wouldn't have been no reasonable possibility that Dannolfo would have pleaded guilty and accepted the state's three year plea offer. See Sawaf, 570,Fed.,Appx. at 548. At this juncture, Dannolfo submits that his vocal claims of innocence, interest in helping his defense (with letters) and thoughts that he could "beat the case" (which in themselves are expressions of innocence) would not rebut the presumption that he would have accepted the plea offer absent counsel's misadvice. (App.E,pg. 9) See also Appendix W, which are Dannolfo's letters to the presiding judge, trial counsel, and attorney notes.

V. The Fifth Circuits decision in Banks v. Vonnoy observed that foreclosure of Strickland prejudice, premised on claims of innocence, conflict with this Supreme Court's analysis in North Carolina v. Alford

The State Court's adjudication of Dannolfo's claim involved a decision which was an unreasonable application of Strickland in light of Lafler v. Cooper, 132 S.Ct. 1376 in conjunction with North Carolina v. Alford, 400 U.S.25 (1970). Specifically, the lower court should not have assumed that Dannolfo would not have accepted the state's three-year plea offer based on his vocal claims of innocence, interests in helping his defense (letters to presiding judge and public

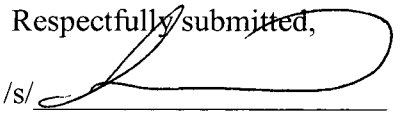
defender) and thoughts that he could "beat the case." (App.E,pg. 9) See also Appendix W, (letters and P.D notes).

Dannolfo respectively points out that his letters to his judge and public defender, in addition to his thoughts that he could "beat the case" at trial—are nonetheless different versions of him protesting his innocence. As such, the state courts reasons for denying post conviction relief, i.e., his continued claims of innocence, even when viewed through the "doubly deferential" lens afforded under Strickland and AEDPA, are in conflict with this Supreme Courts analysis in North Carolina v. Alford which stated that "[r]easons other than the fact that he is guilty may induce a defendant to so plead." Alford, 400 U.S. at 33. See also Banks v. Vannoy, 2017,U.S. App. Lexis 17135 (5th Cir. 2017) ("[T]he lower courts proffered reasons for denying Habeas relief, i.e., Banks continued claims of innocence, even when viewed through the "doubly deferential" lens afforded under Strickland and AEDPA appear to be in conflict with the Supreme Courts analysis in Alford, 400 U.S. at 33 (noting the "[r]easons other than the fact that he is guilty may invoke a defendant to so plead.")

CONCLUSION

Dannolfo respectfully requests this Supreme Court to grant this Writ of Certiorari in any feasible manner deemed appropriate, which could range from a mere reversal in light of North Carolina v. Alford or a more pronounced opinion in which guidance can be offered on a point of law in disarray amongst American post conviction law. As it stands, the Alford decision stands for a one-directional approach only. The petition for Writ of Certiorari should be granted

Respectfully submitted,

/s/ 

Anthony J. Dannolfo

Date: 2/4/15