No. 19-_____

IN THE
Supreme Court of the United States

STEPHEN KRELL,
PETITIONER,
v.
STATE OF LOUISIANA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Manasseh, Gill, Knipe & Bélanger, P.L.C.
André R. Bélanger
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Andre@manassehandgill.com

QUESTION PRESENTED

Whether the Sixth Amendment's right to the effective assistance to counsel during the plea bargaining stages of the proceeding is implicated when trial counsel has a substantial misapprehension of the defendant's case, including knowledge of controlling legal principles, which would render their advice concerning the merits of an offer of a plea bargain before trial deficient?

PARTIES TO THE PROCEEDING

Stephen Krell is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below. To date, the State of Louisiana has been represented by the District Attorney's Office for the 22nd Judicial District Court.

TABLE OF CONTENTS

APPENDICES

APPENDIX A: Decision of the State Trial Court Ruling on PCR Application

APPENDIX B: Decision of the Louisiana First Circuit Court of Appeals, re: PCR

APPENDIX C: Decision of the Louisiana Supreme Court, re: PCR

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Constitutional Provisions

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal is an unpublished opinion reported as *State v. Krell*, No. 2016-kw-1319, (La. App. 1 Cir.12/01/16). After receiving an adverse ruling, this petitioner sought a writ of certiorari from the Louisiana Supreme Court which was denied in an opinion published as *State v. Krell*, 260 So.3d 583, 2017-kp-0013, 2019 WL 126006 (La. 1/08/19).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on December 1, 2016. The Louisiana Supreme Court denied review of the decision on January 8, 2019. This Court's jurisdiction is pursuant to 28 U.S.C. 1257(a).

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Stephen Krell, respectfully requests a writ of certiorari to the Louisiana Supreme Court in *State v. Krell*, 260 So.3d 583, 2017-0013, 2019 WL 126006 (La. 1/08/19). This petition raises the issue of the effective assistance of counsel during the plea bargaining process when the trial attorney deficiently misapprehends the strength of its defense when rendering their advice on whether to accept a pre-trial plea offer to a specified sentence by the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution vests the accused in all criminal prosecutions with the right to "the assistance of counsel for his defense." U.S. Const. Amend VI. This Amendment was made applicable to the individual states through the due process clause of the Constitution's Fourteenth Amendment. U.S. Const. Amend XIV.

In *Strickland v. Washington*, this Court held that an accused's Sixth Amendment right to counsel requires that said counsel be reasonably competent. *Strickland v. Washington*, 104 S.Ct. 2052, 466 U.S. 688 (1984). More recently, in *Missouri v. Frye* and *Lafler v. Cooper*, this Court held that the right to the effective assistance of counsel applies to the critical stages of the plea bargaining process. *Missouri v. Frye*, 132 S.Ct. 1399, 566 U.S. 184 (2012); *Lafler v. Cooper*, 132 S.Ct. 1376, 566 U.S. 156 (2012). Lastly, in *Hinton v. Alabama*, this Court held that an attorney's lack of knowledge concerning the law regarding fundamental aspects of a case to be constitutionally deficient which is precisely what has happened here. *Hinton v. Alabama*, 134 S.Ct. 1081, __ U.S. ____ (2014).

This petition seeks to address whether trial counsel's deficient assessment of the merits of the defense rendered her ineffective in offering advice during the plea bargaining process by the court should he accept responsibility before trial. In this case, prior to trial, the defendant was offered a guilty plea to 30 years, by the court, which he rejected and went to trial. At trial, the defense tried to establish that the accused was suicidal and that the his gun jammed when he attempted to use it on

himself. However, the defense was barred from offering the contents of the petitioner's 4 suicide notes for which she based her defense at trial and, based upon the transcript provided, clearly was not prepared to examine the state's ballistic expert, much less provide one for the accused. The cumulative effect at trial was the decimation of the petitioner's anticipated defense- not by the savviness of the prosecution's tactics- rather, simply due to fundamental errors made by the defendant's trial counsel concerning applicable state law. Were basic decisions made by trial counsel prior to trial, better advice could have been given to the accused and a more reasoned and reliable evaluation of the court's pre-trial sentencing plea offer could have been made by Mr. Krell. We simply seek to vacate his conviction and sentence so that he can now properly make that assessment or, alternatively, remand the case for an evidentiary hearing to probe into the basis for this flawed defense and the advice rendered regarding the petitioner's decision to reject the offer and go to trial.

STATEMENT OF CASE

Stephen Krell was charged with two counts of Attempted First Degree Murder alleging he tried to kill Stephanie Stein and Don Stein. Krell was convicted as charged regarding Mrs. Stein and responsively for Aggravated Battery regarding Mr. Stein. He was received a 45 year sentence and a consecutive 10 year sentence on the respective counts. His appeal was denied by this court on July 30, 2014 and the Louisiana Supreme Court denied the petitioner's writ application. Krell

obtained new counsel who filed a post-conviction application citing the ineffective assistance of his trial counsel. That application was denied on August 8, 2016. The First Circuit denied the writ without reason on December 1, 2016, and the Louisiana Supreme Court denied the writ of certiorari presented to it on January 8, 2019. This petition now follows.

STATEMENT OF THE FACTS

The facts elicited in this section are only those germane to the petitioner's claims for the ineffective assistance of counsel and are not meant to serve as either a timeline or a "blow by blow" of the evidence presented at trial.

As noted above, Mr. Krell was convicted of attempted murder and aggravated battery pertaining to his ex-girlfriend and her father. The crime alleged was a shooting incident at the ex-girlfriend's residence. The defense wasn't mistaken identity or even a justifiable act on Mr. Krell's part- rather, it focused solely upon his state of mind. In other words, the defense attorney's theory was simply that Mr. Krell lacked the specific intent to commit these crimes. This defense relied upon the premise that Mr. Krell was suicidal at the time of the incident. In order to support this claim, the defense sought to introduce evidence of the contents of 4 suicide notes written by the defendant 2 weeks prior to this event and to suggest that he tried to take his life during the hostilities. This strategy is loaded with deficiencies and evidences an ineffective trial counsel.

First, evidence of Mr. Krell's suicidal tendencies is not a cognizable defense in and of itself. Louisiana is not a "diminished capacity" state that lessens the severity of the crime based upon the accused's mental condition. In essence, Louisiana law asks whether the defendant intended to do the act and whether he knew his course of conduct was wrong. The later prong is only germane when the accused pleads "not guilty and not guilty by reason of insanity" which was not done here. La. C.Cr.P. Art. 651; *State v. Pire*, 902 So.2d 1018 (La. 2005).So, from the outset, Mr. Krell's defense was predicated upon a legal theory not supported by controlling legal precedent.

As such, the defense attorney's attempt to introduce the content of the petitioner's suicide notes is irrelevant to the case and the trial court's ruling as such is correct as a matter of Louisiana law. The problem here is that the defense attorney lamented during trial that this was the crux of the defendant's case. Competent counsel, at a bare minimum, would have addressed this issue in a pre-trial hearing in order to see if the defendant's due process rights to a fair trial trumps the anticipated evidentiary ruling by the court that such testimony is irrelevant to the issue of specific intent. See *Chambers v. Mississippi*, 93 S.Ct. 1038, 410 U.S. 284 (1973). Since this was not done, Mr. Krell went to trial thinking he had a viable defense for the jury's consideration. He was wrong.

Compounding matters, trial counsel's efforts to evidence the defendant's lack of intent by showing he tried to kill himself during the incident failed as well. The presumed trial theory rested upon a discharged bullet and casing found at the scene. Counsel wanted to argue that the gun jammed when Mr. Krell tried to kill himself.

The problem, as evidence by counsel's comments at trial, is that she wasn't the least bit prepared for this line of questioning. The trial transcript will show that she admitted the state's ballistics expert without knowing his qualifications which implies that she never bothered to interview him and review her theory concerning the bullet. Also, the defendant presented a case- but omitted from the testimony was a ballistics expert to support the defense theory. Simply put, he didn't have one.

The defendant is serving a 55 year sentence. He was offered a plea to 30 years by the court if he accepted responsibility before trial. Based on the advice of his lawyer, he rejected that plea and opted for a trial. If given the chance, Mr. Krell would further advise being told by her that "he had a good case". Regrettably, his defense rested on an unfounded legal theory not recognized in Louisiana and presented by an unprepared trial lawyer. Under these circumstances, how can we say that Mr. Krell was competently represented during plea negotiations or that his decision to go to trial was intelligently made?

REASONS FOR GRANTING A WRIT OF CERTIORARI

This Court requires trial counsel to competently represent and advise the accused during plea negotiations. In this case, the defendant is serving a sentence that is 25 years longer-nearly double- an offer extended to him by the court and rejected prior to proceeding with trial. In this case, the defendant proceeded to trial, based on the advice of counsel, with a flawed defense that is not recognized as a cognizable defense under Louisiana law. Under these circumstances, Mr. Krell

proceeded to trial under the false belief that he actually had a viable defense to present to the jury. He was wrong. And, a competent lawyer would have known better. As a result, Mr. Krell will now die in prison.

This Court's *Frye* and *Lafler* decisions require defense counsel to properly advise and communicate the consequences of plea offers to the defendant. This writ seeks to extend those holdings to include the context of the reasonableness of the anticipated trial strategy has upon such advice. In *Teague v. Scott*, the Fifth Circuit Court of Appeals noted that a defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial. *Teague v. Scott*, 60 F.3d 1167 (5th Cir. 1995). In this case, Mr. Krell could not intelligently assess the court's proposed pre-trial sentencing offer because counsel mistakenly led him to believe he could defend on the issue of *mens rea* by presenting the contents of his suicide notes even though such a defense is forbidden under applicable state law. Competent counsel would have advised Mr. Krell that he had no viable defense on the merits of his case and that he should accept the court's plea offer or risk a substantially higher sentence. Unfortunately for Mr. Krell, this is precisely what happened.

In *Handley v. United States*, the district court for the Northern District of Illinois ruled that trial counsel is deficient if the petitioner can prove that his attorney did not make a good faith effort to discover the facts relevant to his sentencing, analyze those facts in terms of applicable legal principles and to discuss the analysis with him. *Handley v United States*, 47 F.Supp. 3d 712 (N.D. IL. 2014). At issue in

Handley is whether trial counsel properly advised the defendant of the proper statutory penalties. The district court's opinion left open the possibility of an evidentiary hearing moving forward. That said, the outcome of *Handly* is not germane to this case, rather, it's simply the recognition by a federal court on the importance of defense counsel's knowledge of legal principles and analysis has upon the accused's decision to plead guilty or go to trial that is important. In this case, trial counsel was deficient in failing to grasp the well settled legal principle that Louisiana law does not recognize the concept of "diminished capacity" and, as such the contents of the accused's suicide notes would be deemed irrelevant at trial. As would the "concept" of his suicidal tendencies. This would make any reliance upon those notes or his attempted suicide as a viable defense to the charge ill founded. And, any advice to reject a plea offer based on this defense both unwise and legally deficient.

This position is supported by the Tenth Circuit Court of Appeals decision in *Heard v. Addison*, in which the circuit court of appeals held that a criminal defense lawyer has a duty to conduct reasonable investigations into their client's case which extended to both principles of law as well as the underlying facts of the case. *Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013). In *Heard*, the circuit court of appeals cited its own precedent that counsel is obligated to research relevant law in order to make an informed decision as to whether certain avenues will prove fruitful. The circuit court of appeals also noted applicable ABA Standards suggesting an appropriate investigation of controlling law and likely admissible evidence is required before

making plea recommendations. Here, as stated before and will be stated afterwards, trial counsel failed to abide by these standards when she failed to recognized that controlling legal principles would have rendered evidence critical to Mr. Krell's defense inadmissible. Despite these legal principles, trial counsel "ran with" an unviable defense at trial.

During trial, the defense attorney promised the jury that the evidence presented would show that Mr. Krell lacked the specific intent to kill because he was suicidal-suggesting the only person he intended to harm was himself and not the two victims whose causes were brought before them. The problem, as noted above, is that Louisiana is not a "diminished capacity" state so evidence of Mr. Krell's suicidal tendencies is not a defense to whether he had the specific intent to kill unless he lacked the capacity to discern the wrongfulness of his conduct. La. C.Cr.P. Art. 651; *State v. Pire*, 902 So.2d 1018 (La. 2005).However, the defendant's ability to discern right from wrong must be specifically pled and was not done so here. So, in essence, the defense promised the jury a presentation of evidence that is not supported by, and contrary to, governing state law. Not surprisingly, this promise was broken when the court followed its duty to apply controlling precedent regarding the presentation and admissibility of the evidence at trial by excluding crucial aspects of the anticipated defense.

Federal courts have found that "broken promises" made during opening statements can constitute ineffective assistance of counsel. In *McLaughlin v. Steele*, the federal court in the Eastern District of Missouri found inadequate performance

by counsel who arbitrarily broke their promise to the jury as to what the evidence would show, causing the jury to lose confidence in the credibility of the advocate's cause. *McLaughlin v. Steele*, 173 F.Supp.3d 855 (E.D. MO. 2016). Specifically, in a death penalty phase, counsel advised the jury that they would hear testimony from a certain mental health professional who was not called to testify at trial based on counsel's last minute discovery of significant impeaching information. What was significant for the district court is that trial counsel became aware of the impeaching information prior to its penalty phase's opening statement.

This case involves a similar broken promise. Trial counsel should never have promised the jury that evidence would be presented regarding Mr. Krell's suicidal tendencies. Indeed, the transcript reflects that the 4 suicide notes contents constituted the "entire defense". As a fundamental principle of Louisiana law, trial counsel should have known that the contents of the notes were irrelevant. Even if she thought it might be excluded from trial, she could have litigated a pre-trial motion in limine to be certain she could present the desired evidence and, assuming an adverse ruling, could properly advise Mr. Krell on the merits of any plea discussions within the context of weighing the admissible trial evidence. Instead, she made promises to the jury that she could not keep; provided the court, as done here, followed controlling jurisprudence.

As stated above, trial counsel also attempted to prove the defendant was suicidal by suggesting he tried to kill himself during the incident. This position would rely upon scientific evidence concerning an intact bullet found in the driveway.

Counsel suggested that this shows that Krell's gun jammed when he tried to kill himself. Again, this evidentiary conclusion is irrelevant to the issue of specific intent. However, this point is noted here simply for this Court to further conclude that trial counsel was not prepared properly since she stipulated to the state witnesses' expertise without knowing a single thing about his background and without every discussing her theory of the case with him

Lastly, we ask this Court to not only consider *Frye* and *Lafler,* but to also apply *Hinton v. Alabama* to the case at hand. In *Hinton,* this Court held that an attorney's ignorance on a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.* The record before the Court suggests this is precisely what happened here. As such, we ask this Court to consider one of two options. First, we ask the Court to vacate the defendant's conviction and sentence with a remand to the trial court so that the defendant can assess the prior plea offer with an informed understanding of the admissible evidence. This approach is consistent with the remedy provided by this Court in *Lafler*. Second, this Court could remand the case for an evidentiary hearing in which trial counsel could be questioned about the basis for the "suicide defense", her understanding of the applicable law, and both counsel and the petitioner could be questioned about the specifics of the plea negotiations and the advice on whether to accept the plea or go to trial.

CONCLUSION

Anyone accused of a crime is afforded the constitutional right to have a competent attorney represent him at all critical stages of the proceeding. The applicability of this right extends beyond the trial itself and includes the quality of representation afforded the accused before trial and even includes the plea bargaining process. As such, it seems intuitive that the quality of counsel's "bargaining efforts' is dependent upon their ability to recognize controlling legal principles, the nature of the evidence against the accused and the likely viability of any defense to the charges the defendant may be able to present.

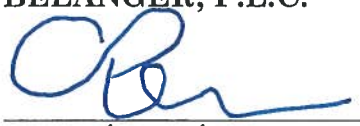
In this case, trial counsel was incompetent on advising Mr. Krell on the merits of accepting the trial court's willingness to sentence Mr. Krell to 30 years if he accepted responsibility before trial. Counsel led Mr. Krell to believe he had a good case. Unfortunately, trial counsel's defense is not recognized by controlling Louisiana law and, frankly, probably more appropriate for sentencing mitigation. As such, Mr. Krell was lulled into a real misapprehension of the strength of his defense which prevented him from making an intelligent decision to reject the court's sentencing offer.

Under these circumstances, it is not surprising that Mr. Krell lost at trial. He received a 55 year cumulative sentence which is 5 year short of the combined statutory maximum. This is a harsh penalty for a first offender convicted of a two crimes arising out of the same set of operative facts.

In this petition, we suggest two possible remedies. Both attempt to restore Mr. Krell to the position he was in before he rejected the court's plea.

Respectfully Submitted,

MANASSEH, GILL, KNIPE & BÉLANGER, P.L.C.



ANDRÉ R. BÉLANGER
Louisiana State Bar No. 26797
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Andre@manassehandgill.com

Dated: 4/4/19

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the ____ day of _____ 2019, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Attorney for Plaintiff-Appellee
Mr. Warren Montgomery
Office of the District Attorney
22nd JDC, St. Tammany Parish
701 N. Columbia Street
Covington, LA 70433

ANDRÉ R. BÉLANGER