No. 18-9511

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER STEPP
Petitioner

v.

STATE OF FLORIDA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a federal habeas petitioner is entitled to § 2254 habeas relief where the district court failed to "look through" to the state court's determination of his constitutional claims under *Wilson v. Sellers,* 584 US ___, 138 S. Ct. 1188, 200 L Ed 2d 530 (2018), and the state court failed to acknowledge, much less apply, the Supreme Court's holdings in *Lafler v. Cooper*, 566 US 156, 132 S Ct 1376, 182 L Ed 2d 398 (2012), and *Missouri v. Frye*, 566 US 134, 132 S Ct 1399, 182 L Ed 2d 379 (2012), to the petitioner's claim of ineffective assistance of counsel?

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

Christopher Stepp, *pro* se, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his request for a certificate of appealability (COA) filed in the Eleventh Circuit Court of Appeals in Atlanta, Georgia. The Eleventh Circuit's denial of his application for COA was rendered on December 26, 2018, and the Eleventh Circuit's denial of his motion for reconsideration was rendered on February 14, 2019.

OPINIONS BELOW

The Eleventh Circuit's denial of Stepp's application for COA is provided in Appendix A-1. The Eleventh Circuit's denial of Stepp's motion for reconsideration is provided in Appendix A-2. The Southern District's denial of Stepp's § 2254 federal

habeas petition is provided in Appendix A-3.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Part III of the Rules of the Supreme Court of the United States. The latest decision of the Eleventh Circuit Court of Appeals was rendered on February 14, 2019. This petition is therefore timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Stepp's question involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

STATEMENT OF THE CASE

In May 2010, Stepp was charged by information in Miami-Dade County, Florida, with second-degree murder (count 1) and attempted armed robbery (count 2), in violation of §§ 782.04(2) and 812.13(2)(a), Fla. Stat. (2010). Almost a year later, he was charged through a superseding indictment by the Grand Jury with first-degree murder (count 1) and attempted armed robbery (count 2), in violation of §§ 782.04(1) and 812.13(2), Fla. Stat. (2010). Stepp entered a plea of not guilty to both charges and proceeded to jury trial, which was held in October 2011.

Following the trial, Stepp was found guilty as charged of first-degree murder (count 1) and attempted armed robbery (count 2). The jury also found that he discharged a firearm and caused death or great bodily harm. The state trial court

sentenced him to life imprisonment without the possibility of parole for the first-degree murder charge and to a mandatory minimum term of twenty-five years' imprisonment for the attempted armed robbery charge.

Stepp appealed his convictions and sentences to the /third District Court of Appeal. In his appeal, Stepp contended that the trial court erred in not allowing his trial counsel to argue in closing that a detective had failed to subpoena phone records which would have impeached the state's key witness's testimony. In March 2013, the Third District Court of Appeal *per curiam* affirmed Stepp's convictions and sentences in a written opinion. *See Stepp v. State*, 109 So. 3d 839 (Fla. 3d DCA 2013). Stepp sought discretionary review from the Florida Supreme Court, which the Court denied in June 2013. *See Stepp v. State*, 118 So. 3d 222 (Fla. 2013).

On January 8, 2014, Stepp filed a motion for post-conviction relief in the state trial court pursuant to Fla. R. Crim. P. 3.850. In his motion, Stepp argued, *inter alia*, that his trial counsel was ineffective for providing him with inaccurate information, which caused him to reject the state's initial 10-year plea offer. In March 2016, the trial court denied Stepp's motion without a hearing. Stepp appealed to the Third District Court of Appeal. On May 6, 2015, the Third District *per curiam* affirmed the denial of Stepp's motion. *See Stepp v. State*, 166 So. 3d 794 (Fla. 3d DCA 2015). Stepp moved for rehearing, which the Third District ultimately denied.

On December 6, 2016, Stepp filed a petition for writ of habeas corpus in the federal district court, Southern District of Florida, pursuant to 28 U.S.C. § 2254,

arguing, *inter alia*, that his trial counsel was ineffective for providing him with inaccurate information, which caused him to reject the state's initial 10-year plea offer [Appendix A-4]. On August 28, 2018, the federal district court denied Stepp's petition in its entirety [Appendix A-3].

Stepp next moved for a certificate of appealability ("COA") in the Eleventh Circuit Court of Appeal. On December 26, 2018, the Eleventh Circuit denied Stepp's request for COA [Appendix A-1], and then denied Stepp's motion for reconsideration on February 14, 2019 [Appendix A-3].

This petition follows.

REASONS FOR GRANTING THE WRIT

I. Because the Federal District Court Failed to Apply the "Look Through" Presumption Enunciated in *Wilson v. Sellers*, and Because the Eleventh Circuit Court of Appeals Sanctioned the District Court's Failure By Denying Stepp a Certificate of Appealability, Certiorari Relief Is Warranted Since the Application of the Look Through Presumption Would Have Warranted The Granting of Ground Six of Stepp's Federal Habeas Petition.

A. Background

In ground six of his federal habeas petition, Stepp asserted that his trial counsel was ineffective for providing him with inaccurate information and misadvice which caused him to reject the state's initial plea offer of 10 years imprisonment [Appendix A-4 at 10]. Facts of the case reveal that the state offered Stepp 10 years imprisonment in exchange for a guilty plea, but that trial counsel advised Stepp not to accept the offer [*Id.* at 10]. Counsel assured Stepp that the state's case was weak and that acquittal was likely [*Id.*]. Specifically, counsel told Stepp that the state's witnesses were unreliable because of their past criminal histories and because of deals made with the state in exchange for their testimonies [*Id.*]. Moreover, counsel assured Stepp that he was going to investigate the case more thoroughly and explore potential witnesses and defenses.

In his federal habeas petition, Stepp contended that he refused the state's 10-year offer based solely on his counsel's advice [Appendix A-4 at 11]. And because Stepp rejected the 10-year plea offer, the state empanelled a grand jury, which ultimately indicted Stepp with first degree murder and attempted armed robbery [*Id.*]. Stepp was later convicted of both charges in the indictment and sentenced to

life imprisonment for the murder charge and to a mandatory minim term of twenty-five years imprisonment for the attempted armed robbery charge [*Id.*].

Stepp also explained in his federal habeas petition that the state trial court, in adjudicating this claim on the merits, failed to acknowledge, much less apply, the correct legal standard to his claim—*i.e.*, that enunciated by this Court in *Lafler v. Cooper*, 566 US 156, 132 S Ct 1376, 182 L Ed 2d 398 (2012), and *Missouri v. Frye*, 566 US 134, 132 S Ct 1399, 182 L Ed 2d 379 (2012) [Appendix A-4 at 11].

In adjudicating ground six on the merits, the federal district court did not evaluate the state trial court's application of this Court's precedent, *i.e.*, *Lafler* and Frye, but rather created its own basis for denying Stepp relief. The district court ultimately adopted the Magistrate Judge's report and recommendation and rejected Stepp's claim, finding that Stepp "fail[ed] to show that a reasonable attorney would not advise a criminal defendant to reject such a plea offer, especially where the State's primary evidence came from [two witnesses] whom had criminal histories and may have had credibility issues" [Appendix A-3 at 21]. The district court also agreed with the Magistrate that Stepp did not "provide any support, other than his own self-serving statement, to suggest he would have accepted the plea offer had it not been for counsel's advice" [*Id.*]. The district court concluded:

> The Court thus rejects [Stepp's] objection the state court applied the wrong standard by not referencing *Frye* or *Lafler*. *See, e.g., Fisher v. Sec'y, Fla. Dep't of Corr.*, 616 Fed. Appx. 916, 921 (11th Cir. 2015) ("While the Florida court did not cite to... *Lafler*, it determined that Petitioner had to show prejudice in order to prevail on his claim, as required by *Strickland* [*v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]...

> Accordingly, the court correctly identified the governing legal principles, and thus, its decision was not contrary to federal law." (alterations added)). [Stepp's] sixth habeas claim is denied.

[Appendix A-3 at 23] (citations and quotations in original).

B. Analysis

In *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018), this Court held that where a state appellate court issues an unexplained (or *per curiam*) decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."

Here, the federal district court did not employ the "look through" presumption when it adjudicated Stepp's ineffective assistance of counsel claim in ground six; and this is true even though *Wilson v. Sellers* was rendered on April 17, 2018, some four and a half months before the district court denied Stepp's habeas petition on August 28, 2018. Had the district court properly applied the "look though" presumption, the district court would have been inclined to grant Stepp's federal habeas claim of ineffective assistance of counsel in ground six, because Stepp satisfied both *Lafler* and *Frye* in pleading his claim.

In 2012, in companion decisions in *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), this Court clarified that the Sixth Amendment right to the effective assistance of counsel extends specifically "to the negotiation and

consideration of plea offers that lapse or are rejected." *In re Perez*, 682 F.3d 930, 932 (11th Cir. 2012) (per curiam) (footnote omitted). In *Lafler*, the parties agreed that counsel's performance was deficient when he advised the defendant to reject the plea offer on the grounds that he could not be convicted at trial. *See* 566 U.S. at 163. And, in *Lafler*, this Court articulated a three-part test to prove prejudice in the context of a foregone guilty plea:

> Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability [1] that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 163-64; *see Frye*, 566 U.S. at 147.

In this case, Stepp satisfied *Lafler* and *Frye's* pleading requirements. Under oath, he alleged that, absent counsel's misadvice, (1) the 10-year plea offer would have been presented to the state trial court (meaning that he would have accepted its terms and the prosecution would not have withdrawn it); (2) the court would have accepted its terms; and (3) both the conviction and sentence under the offer's terms would have been less severe than under the judgment and sentence that were ultimately imposed [Appendix A-4 at 10-11]. Nonetheless, the state trial court disregarded the fact that Stepp sufficiently alleged each prong of *Lafler* and *Frye*, and instead held Stepp to the *Strickland* standard. Although *Lafler* and *Frye* are

rooted in the *Strickland* analysis, the standards are quite different; otherwise, this Court never would have felt the need to address the questions posed in both *Lafler* and *Frye*.

Following the denial of his state post-conviction motion, Stepp appealed the state trial court's denial of his claim of ineffective assistance of trial counsel concerning the rejection of the 10-year plea offer. In his brief, he explained to the state appellate court that the trial court failed to apply the correct legal standard to the claim, *i.e.*, that enunciated in *Lafler* and *Frye* and, of course, their Florida progeny, *Alcorn v. State*, 121 So. 3d 419, 425 (Fla. 2013). But the state appellate court rejected Stepp's claim and, in so doing, issued an unexplained (or *per curiam*) decision.

Thus, under *Wilson v. Sellers*, the federal district court was obligated to "look through" the state appellate court's unexplained decision to the state trial court's decision and then determine whether the state trial court misapplied Supreme Court precedent when adjudicating the claim. 28 U.S.C. § 2254(d)(1) demands no less. Had the federal district court done so, the district court would have been inclined to grant ground six of Stepp's federal habeas petition, since Stepp satisfied the pleading requirements of *Lafler* and *Frye*. And Stepp tried to explain this to the Eleventh Circuit Court of Appeals in his motion for reconsideration following the denial of his application for a COA, but to no avail. With a one-sentence order, the Eleventh Circuit rejected Stepp's argument without regard to this Court's holding in *Wilson v. Sellers* [Appendix A-3].

As a final point, Stepp submits that the exception to the *Wilson v. Sellers* "look through" presumption does not apply here, so the actions of both the federal district court and the Eleventh Circuit cannot, in any way, be excused. The exception recognized by this Court in *Wilson v. Sellers* comes into play, and the state may rebut the presumption, where "the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*, 200 L. Ed 2d 535.

But here, the state did not even brief the issue in Stepp's appeal from the denial of his claim. Under Fla. R. App. P. 9.141(b)(2)(C)(i), the state "need not file an answer brief unless directed by the court." The state, in Stepp's postconviction appeal, elected not to file an answer brief, and the state appellate court never ordered the state to do so. Thus there was no "alternative" argument put forth by the state which would activate the exception to the "look through" presumption.

Moreover, it was not "obvious in the record" that Stepp's claim was meritless. Rather, his claim was actually supported by the record. Significantly, nobody, not even the state, disputed the existence of the state's initial 10-year plea offer. And Stepp's assertions concerning trial counsel's advice—instructing him to reject the 10-year offer due to the supposed insufficient evidence—remains uncontroverted since there was never an evidentiary hearing on the claim.

Ultimately, Stepp made a legally sufficient claim of ineffective assistance of counsel that was not refuted by the record. While the federal district court went

well beyond the state trial court's reasoning and essentially concluded that Stepp's claim was distinguishable from *Lafler* and insufficiently pled, Stepp's claim was almost identical to the one the petitioner put forth in *Lafler*. In *Lafler*, this Court set forth the facts as follows:

> On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

Id., 182 L. Ed. 2d at 405.

As in *Lafler,* Stepp alleged that his trial attorney told him the state's evidence was weak and that the state would therefore be unable to prove its case against him. And, once Stepp rejected the 10-year plea, the state—out of what some might call spite—empanelled a grand jury and indicted Stepp with first degree murder; and significantly, the state did so with the very same evidence that existed at the time the 10-year offer was extended. In other words, counsel's assurance that the state's evidence was insufficient to garner a conviction was entirely unsound; and had Stepp been properly informed, he would have accepted the 10-year offer, without question, and he would not be serving a life without parole sentence in the Florida Department of Corrections.

Contrary to the district court's findings, other courts in the federal system have construed both *Lafler* and *Frye* to apply where a defense attorney advises a defendant to reject a plea offer due to the prosecution's purported lack of evidence. *See United States v. John Smith*, 2017 U.S. Dist. LEXIS 194856 (U.S. Dist. Ill., Nov. 28, 2017) ("It is true that an attorney who... advises the client to reject a 'highly favorable plea offer' by unreasonably asserting that the defendant would not be convicted at trial, has fallen below the Sixth Amendment standard.") (citing *Delatorre v. United States*, 847 F.3d 837, 845 (7th Cir. 2017) (emphasis added)).

Accordingly, Stepp's claim that he was deprived effective assistance of counsel based on his attorney's advice to reject the ten-year plea offer based on the State's purported lack of evidence, which resulted in him rejecting a highly favorable plea offer, was a cognizable claim under *Lafler* and *Frye*. And because he satisfied the pleading requirements of *Lafler* and *Frye*, Stepp was entitled to relief on his claim of ineffective assistance of counsel.

CONCLUSION

Because the federal district failed to apply the "look through" presumption enunciated in *Wilson v. Sellers*, and because the Eleventh Circuit Court of Appeals sanctioned such failure by denying Stepp a certificate of appealability, certiorari relief is warranted since the application of the "look through" presumption would have warranted the granting of ground six of Stepp's federal habeas petition.

South Bay, Florida
May 15, 2019

Respectfully Submitted,

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