No. 18-9770

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

LIONEL TOYE, Petitioner,

V.

STEVEN RACETTE, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Lionel Toye, #11-A-0726
Petitioner *Pro se*
Elmira Correctional
Facility
P.O. Box 500
Elmira, New York 14901

QUESTION PRESENTED

WHETHER THIS COURT SHOULD REVISIT THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING PLEA NEGOTIATIONS WHEN COUNSEL FAILS TO DISCUSS THE PROS AND CONS WITH HIS CLIENT IN NOT ACCEPTING A FAVORABLE PLEA, INCLUDING THE SENTENCING EXPOSURE, WEAKNESSES IN THE DEFENSE AND THAT THE EVIDENCE OF GUILT APPEARED OVERWHELMING? *LAFLER V. COOPER*, 566 U.S. 156 (2012); *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUES

TABLE OF AUTHORITIES

FEDERAL STATUTES

UNITED STATES CONSTITUTION

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit in denying rehearing *en banc*, which was unpublished is attached as Appendix A. The opinion of the United States Court of Appeals for the Second Circuit in denying a Certificate of Appealability, which was unpublished is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §~~1257(a)~~ 1254(1). The decision of the United States Court of Appeals for the Second Circuit for which petitioner seeks review was issued on January 18, 2019, denying a petition for panel rehearing and rehearing *en banc* review. The United States Court of Appeals for the Second Circuit's order denying petitioner's request for a Certificate of Appealability was denied on July 26, 2018.

This petition is filed within 90 days of the United States Court of Appeals for the Second Circuit denial of petitioner's panel rehearing and rehearing *en banc* review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL AND SATUTORY PROVISIONS INVOLVED

The Counsel Clause of the Sixth Amendment of the United States Constitution provides: In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. §2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States: or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.

STATEMENT OF THE CASE

A. Introduction

On February 26, 2010, the petitioner was charged, via felony complaint, in connection with a robbery in the City of Albany, in the State of New York. The top charge was robbery in the third degree in violation of NY Penal Law ("PL") §106.05, class D nonviolent felony, and criminal possession of stolen property in the fifth degree in violation of PL §165.40, a class A misdemeanor.

Following a trial, the petitioner was convicted of robbery in the first degree after allegedly taking $73.00 from Jane Smith while she awaited entrance into an apartment building in the City of Albany. The trial court found the petitioner to be a persistent violent felony offender and sentenced him 25 years to life as a result of the conviction.

The alleged incident itself was recorded on closed circuit security surveillance which shows an approximately sixty-five second incident between the victim and a robber. Immediately following the robbery, Ms. Smith approached two officers to report the incident and she was invited to ride along in the police car in search of the robber. The police car, equipped with a camera, recorded the entire ride along with the officers and Ms. Smith as they conducted their search. Approximately forty minutes following the robbery, the officers pointed out a man on the street, the petitioner, that Ms. Smith identified as the robber. During the ride back to the station, Ms. Smith discussed the incident with the officers and noted, "Now he tell me he had a gun on him, but I didn't think he had a gun, but I wasn't sure." She also expressed curiosity about how long the process was going to take in giving a statement at the police station because she had not eaten yet. The officer responded, "I apologize for that, ma'am, but this guy just robbed you, ok?"

Based upon his interview with Ms. Smith, Officer Mulligan swore out a felony complaint for robbery in the third degree, stating that the petitioner said "Give me all your money or I will

shoot you." Notably, there is no mention that the petitioner possessed a firearm or that one was shown to Ms. Smith in the course of the robbery. As noted above, Officer Mulligan also swore out a felony complaint for criminal possession of stolen property for the $73.00 taken from Ms. Smith. The petitioner was arraigned on February 27, 2010 in the Albany City Court. The petitioner was represented by the Albany Public Defender's Office as of March 3, 2010.

Following the appointment of the public defender, the petitioner was apparently offered a plea to robbery in the third degree with an indeterminate sentence of 2 to 4 years which was rejected. On March 17, 2010, the petitioner appeared at the courthouse for Grand Jury and was advised for the first time by his attorney that the hearing was scheduled for that day. The petitioner's trial counsel provided him no advice about whether to testify or not at the Grand Jury, so he reluctantly did so, after requesting that the hearing be adjourned for lack of notice to him.

On that day, March 17, 2010, the Grand Jury handed down a two count indictment for robbery in the first degree in violation of Penal Law §160.15(4), a class B violent felony, and for criminal possession of stolen property in the fifth degree in violation of Penal Law §165.40, a class A misdemeanor. For the first time in the case, there appeared allegations that the petitioner "displayed what appeared to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, to wit: ... he placed his hand in his pocket and demanding (sic) money, and during the course of the commission of the crime, he displayed what appeared to be a handgun."

On or about May 21, 2010, the petitioner's appointed counsel submitted an omnibus motion seeking various forms of relief, and noting the rejected plea offer. According to the motion, once the petitioner was indicted on robbery in the first degree, the lowest possible plea bargain that could be offered was 12 years to life in prison. The trial court issued its decision on June 11, 2010 which found the Grand Jury evidence legally sufficient and ordered *Huntley*, *Wade*, *Dunaway*, and

Sandoval hearings.[1] On July 15, 2010, the petitioner appeared in court with his defense attorney for the suppression hearing and advised the court that he had received repeated, substandard legal representation to date. The petitioner advised the trial court that he had very little contact with Mr. Berry and that he had failed to be advised of the decision on the omnibus motion for over a month. Following the court's discussion with Mr. Berry, he removed him from the case, stating, "You're out Mr. Berry. That's not sufficient representation. A person facing a persistent felony status, facing 25 to life sitting in jail without you talking to him. That is just not what it calls for." Thereafter, the Public Defender's Office reassigned the case to George Mehm.

The case proceeded to trial after the suppression hearing resulted in an unfavorable decision for the petitioner, and thereafter, the petitioner retained private counsel. Glen Hammond, Esq., of Kindlon & Shanks, advised the petitioner that he was "going to get [him] into a program." However, five days before trial, Mr. Hammond visited the petitioner in jail and told him that "the DA said F [him] and trial was imminent." The petitioner alleges that Mr. Hammond did not discuss a defense with him or whether he or other witnesses would testify in his defense.

The trial opened on November 12, 2010 with jury selection and the People's case. However, the People attempted to have their witnesses support the "display" element of the aggravated robbery in the first degree. However, the People's lead witnesses, Officer Mulligan, clearly acknowledged on cross-examination that he never discovered a pistol on the petitioner's person, that there was no pistol visible on the surveillance tape, and that Ms. Smith never stated that she witnessed a weapon in the robber's hand either before or after the ride along in the police car. On cross-examination. Ms. Smith admitted that, during the 65 seconds of the incident, she never saw a

[1] *People v. Huntley*, 15 NY2d 72 (1965); *United States v. Wade*, 388 U.S. 218 (1967); *Dunaway v. New York*, 442 U.S. 200 (1979); *People v. Sandoval*, 34 NY2d 371 (1974).

pistol. Instead, Ms. Smith states that she saw something that "just looked bulky" and that she "supposed it could have been a pistol."

The defense moved, following the close of the People's case, for a dismissal based upon insufficient evidence concerning the display of a firearm, as is required to support a conviction of robbery in the first degree which was denied. The defense then rested without calling witnesses. Following the charge from the court, the jury returned a verdict of guilty on both counts in the indictment.

On February 16, 2011, the court denied the defense's motion to set aside the verdict. The trial court conducted a hearing to determine whether the petitioner qualified as a persistent violent felony offender and the court so found. The petitioner was sentenced to 25 years to life imprisonment.

I. State Court Proceedings

a. Appellate Division

The petitioner appealed his conviction, as relevant here, challenging defense counsel's failure to properly advise him to accept a plea to robbery in the third degree prior to encouraging him to testify before the Grand Jury. On June 13, 2013 the Supreme Court, Appellate Division, Third Judicial Department affirmed petitioner's judgment of conviction. As relevant here, the court found as follows:

> Nor do we find merit to defendant's claim of ineffective assistance of counsel. Initially, to the extent that defendant cites deficiencies in counsel's performance relative to the grand jury proceeding or the initial plea offer tendered in this matter, these claims involve matters outside the record and, as such, are more properly the subject of a CPL article 440 motion (*see People v. Bahr*, 96 A.D.3d 1165, 1166, 946 N.Y.S.2d 675 [2012], *lv. denied* 19 N.Y.3d 1024, 953 N.Y.S.2d 557, 978 N.E.2d 109 [2012]; *People v. Moyer*, 75 A.D.3d at 1006, 906 N.Y.S.2d 175). As to the balance of defendant's claim, a defendant will be deemed to have received the effective assistance of counsel "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided

meaningful representation" (*People v. Bahr*, 96 A.D.3d at 1166, 946 N.Y.S.2d 675 [internal quotation marks and citations omitted]; *accord People v. Battease*, 74 A.D.3d 1571, 1575, 904 N.Y.S.2d 241 [2010], *lv. denied* 15 N.Y.3d 849, 909 N.Y.S.2d 26, 935 N.E.2d 818 [2010]). Here, the record reveals that counsel presented a plausible defense, offered intelligent and articulate opening and closing statements, effectively cross-examined the People's witnesses and made appropriate objections. The record further reflects that counsel discussed the possibility of charging the jury with the affirmative defense set forth in Penal Law § 160.15(4), as well as the lesser included offense of robbery in the second degree, and that defendant, in turn, declined to make requests to charge on those issues (*see* note 1, *supra*). Under these circumstances, we are satisfied that defendant received meaningful representation (*see People v. McRobbie*, 97 A.D.3d 970, 972, 949 N.Y.S.2d 249 [2012], *lv. denied* 20 N.Y.3d 934, 957 N.Y.S.2d 693, 981 N.E.2d 290 [2012]; *People v. Pinkney*, 90 A.D.3d 1313, 1317, 935 N.Y.S.2d 374 [2011]; *People v. Battease*, 74 A.D.3d at 1575–1576, 904 N.Y.S.2d 241).

Finally, we are unpersuaded that defendant's sentence is harsh or excessive. In view of the serious nature of the crime and defendant's extensive criminal history, we find no abuse of discretion or extraordinary circumstances that would warrant disturbing the sentence imposed (*see People v. Castellano*, 100 A.D.3d 1256, 1258, 954 N.Y.S.2d 677 [2012], *lv. denied* 20 N.Y.3d 1096, 965 N.Y.S.2d 792, 988 N.E.2d 530 [2013]; *People v. Boland*, 89 A.D.3d at 1146, 931 N.Y.S.2d 791).

ORDERED that the judgment is affirmed.

People v. Toye, 107 AD3d 1149 (A.D. 3 Dept. 2013).

The New York Court of Appeals denied petitioner's leave application by certificate dated January 7, 2014. *People v. Toye*, 22 NY3d 1091 (2014).

b. Post-Conviction Motion

On or about September 4, 2015, petitioner filed a post-conviction motion to vacate the judgment pursuant to NY Criminal Procedure Law "CPL" Section 440.10. In that motion, petitioner argued that he was denied the effective assistance of trial counsel when counsel failed to exercise his professional judgement in failing to explain or advise him about a plea offer of 2 to 4 years which was communicated to him by Assistant Public Defender Joseph McCoy.

By decision and order dated October 28, 2015, the trial court denied the post-conviction motion. The court found that "[d]efendant was dissatisfied with each of the three of his assistant

public defenders. During an appearance on July 15, 2010, in responding to an allegation that he did not sufficiently explain the plea offers, Assistant Public Defender Berry stated that defendant had 'indicated to me very clearly that he didn't accept two to four prior to indictment. Why would [he] take 12 to life or anything above that?'. Thus the record reflects that there were conversations concerning plea offers and that defendant's reason for not accepting a plea agreement was that he did not want to plead guilty rather than being due to a lack of adequate explanation from his attorney." *See*, Decision & Order dated October 28, 2015 at p.6, ¶3.

The court also found that "[i]t may be that defendant wishes that his attorney could have obtained a plea offer sanctioned by the court for 2 to 4 years. Assuming that there was no court sanctioned offer of 2 to 4 years, the inability of the attorney to obtain such a minimal sentence on a lesser non-violent charge does not equate with ineffective assistance of counsel. Instead, an inability to obtain such a sentencing commitment would relate to the nature of the charges and defendant's prior criminal history." [citation omitted]. *See, id.* at p.7, ¶2.

The court went on to find "[i]t may also be that, in hindsight, defendant wishes that he had accepted such an offer prior to indictment because after indictment and conviction on the higher degree of felony the sentence was much longer. However, this does not mean that he received the ineffective assistance of counsel." *See, id.* at p.7, ¶3.

c. Federal Habeas Proceedings

In 2015, petitioner filed a petition for a writ of habeas corpus challenging his State court conviction. In that petition, as relevant here, he argued that he was denied the effective assistance of trial counsel when counsel failed to exercise his professional judgement in failing to explain or advise him about a plea offer of 2 to 4 years which was communicated to him by Assistant Public Defender Joseph McCoy.

After the District Judge adopted the Report and Recommendations of the Magistrate judge, to deny the petition, the court issued its decision denying habeas relief. Petitioner then filed a request for a Certificate of Appealability which was denied. Ten days later, petitioner filed a petition for panel rehearing and rehearing *en banc* review which was also denied.[2]

SUMMARY OF ARGUMENT

Petitioner contends that counsel's performance was constitutionally deficient in this case. He was denied the effective assistance of counsel at plea negotiations because counsel failed to discuss the pros and cons of not accepting the plea offer of 2 to 4 years, including the sentencing exposure, weaknesses in the defense and that the evidence of guilt was overwhelming. This inability to discuss the facts, evidence or law with counsel, petitioner contends, led him instead to proceed to trial and receive a sentence of 25 years to life, a disparity of 23 years.

REASONS FOR GRANTING THE WRIT

This case presents an issue of national importance to the public and a strong vehicle for this Court to revisit the claim of ineffective assistance of trial counsel during plea negotiations when counsel fails to discuss the pros and cons with his client in not accepting a favorable plea, including the sentencing exposure, weaknesses in the defense and that the evidence of guilt appears overwhelming. *See, Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Strickland v. Washington*, 466 U.S. 668 (1984).

PETITIONER WAS DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING PLEA NEGOTIAIONS

[2] It is worth noting that, petitioner has followed all State & Federal procedures in attacking his claim of ineffective assistance of trial counsel. The claim has been entertained on their merits as opposed to being deemed procedurally defaulted. Particularly, in his federal court proceedings, petitioner contends he has met the deferential standard of review codified at 28 U.S.C. §2254. Petitioner also contends that he has made a showing of a denial of a constitutional right as required under 28 U.S.C. §2253(c). Indeed, the United States Court of Appeal for the Second Circuit, under the particular circumstances of this case, should have either issued a certificate of appealability or granted *en banc* rehearing review.

Here, the facts are clear. Petitioner was denied the effective assistance of counsel at plea negotiations because counsel failed to discuss the pros and cons of not accepting the plea offer of 2 to 4 years, including the sentencing exposure, weaknesses in the defense and that the evidence of guilt appeared overwhelming. This inability to discuss the facts, evidence or law with counsel, petitioner contends, led him instead to proceed to trial and receive a sentence of 25 years to life.

As is evidenced by the record, the petitioner had no less than five attorneys in this matter from the time he was initially arraigned on the felony complaint for robbery in the third degree on February 27, 2010 through his sentencing on February 16, 2011.

Prior to indictment, the petitioner was offered and rejected a plea bargain offer to plead to a non-violent felony with an indeterminate sentence of 2 to 4 years. Following the petitioner's indictment, however, due to his prior criminal history of 2 prior violent felony convictions and pursuant to NY PL §70.08 and the plea bargaining restrictions set forth in CPL §220.10(5)(d)(ii), the lowest possible plea bargain that could have been extended to the petitioner was an indeterminate sentence with a minimum of 12 years and a maximum of life in prison.

When petitioner was offered the 2 to 4 years, he was informed by counsel that his parole time of two years and three months would be served consecutively to the 2 to 4 years. In other words, petitioner thought that he would have to serve the 2 to 4 years first, then serve the parole time of two years and three months. At that time, counsel did not exercise his professional judgment by informing petitioner how the calculation of the terms of imprisonment would run according to New York's Sentencing statute PL §70.30 (Calculation of terms of imprisonment).

In support of petitioner's contentions, the following exchanges occurred:

> **THE DEFENDANT:** Prior to me testifying before the Grand Jury I spoke to my counsel and I told him I would accept the offer of two to four. It was not a Robbery in the Second Degree. The offer was based on a Robbery in the Third

Degree, Class D felony. I asked him could he have my Parole run consecutively – I mean concurrently with that? He told me no, it would run consecutively.

THE COURT: It can't run concurrently by operation of law.

THE DEFENDANT: I understand that. I understood that after I spoke with someone.

THE COURT: He told you it couldn't be; right?

THE DEFENDANT: He told me it would run consecutively.

THE COURT: Which is correct.

THE DEFENDANT: You Honor, I wasn't made aware of that, it would go on the back, two to six, because I have two years and three months left on parole. Had I known that, it would go on the back, I would have took the two to four, with the two years running on the back. I thought I had to do the two to four, then I had to do two years, three months left. That was my understanding. Misconception here with my counsel. I would definitely have taken the two to four, your Honor, had I known.

THE COURT: We will put that as a notation. So you are rejecting this offer; correct?

THE DEFENDANT: Additionally, I was made aware that the Second Circuit nullified the –

THE COURT: No, they didn't. they nullified the permissive persistent felony offender. They did nothing, nothing, to negate the persistent violent felony offender statute. I have read the case three times. Go talk to your jailhouse lawyer. You want further advice on that, take it. Now, do you want to accept this or reject this?

THE DEFENDANT: You Honor, I'm asking you if I could get the initial plea back on.

THE COURT: I can't. By operation of law, I have to deal with the indictment as it is.

THE DEFENDANT: But robbery? Where is the Robbery in the First Degree? It was initially a Robbery Third. It is going to be elevated to a Robbery in the First Degree. It was initially Robbery Third. How did the Grand Jury raise it to a Robbery First, Class B felony?

THE COURT: This is not a deposition or an interrogation, sir. We are here today for you to say you are accepting or rejecting.

THE DEFENDANT: Rejecting.

THE COURT: Fair enough.

See, Proceedings Transcript dated April 19, 2010.

Nor did counsel inform petitioner that it was in his best interest to accept the plea of 2 to 4 years due to petitioner's criminal violent past. In addition, counsel failed to inform petitioner that he could receive an enhanced sentence of 25 years to life as a violent persistent if he rejected the plea of 2 to 4 years. Counsel simply failed to discuss the pros and cons of petitioner not accepting the 2 to 4 year-plea, including the sentencing exposure, weaknesses in the defense and that the evidence of guilt appeared overwhelming.

It is well settled that, the prevalence of plea bargaining over the last several decades has fundamentally altered the modern criminal justice system. Whereas the system originally was premised on confrontation at trial, plea bargaining has supplanted the jury trial, and the full panoply of rights that follows, as the primary mode of resolving criminal prosecutions. As a result, the main function of defense counsel in the vast majority of cases has become the negotiation of an effective plea bargain.

As this Court has observed, disposition of charges through a plea is not only an essential part of the process, but a highly desirable one:

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971).

However, "all of these [benefits] presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* For the plea bargain *process* itself to be fair, as contemplated in *Santobello*, constitutionally effective assistance of defense counsel is required during that process.

In *United States v. Wade*, 388 U.S. 218 (1967), this Court explained that the right to effective assistance of counsel extended to all "critical stages" of a criminal proceeding. Not surprisingly, given its observation in *Santobello*, this Court has recognized that plea bargaining is a critical stage of a criminal prosecution: "We have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel." *Padilla v. Kentucky* , 130 S. Ct. at 1486 (2010) (emphasis in original); *see, also, Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 3385 ("The plea bargaining process is a critical stage of a criminal prosecution."). Because the decision to enter a guilty plea "ranks as a 'critical stage' at which the right to counsel adheres," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), it necessarily follows that a decision to reject a guilty plea is also a critical stage at which the right to effective assistance of counsel adheres. *See, United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("We have held that entering a guilty plea ... is a critical stage .... It seems to us that the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches.").

Moreover, to achieve fair and reliable results, the criminal justice system relies upon defense counsel to effectively navigate plea negotiations and the plea process. This unquestionably includes communicating plea offers to the client as well as accurately applying the applicable law when advising the client to reject or accept a plea. A defendant who, through the error or neglect of

counsel, does not accept a plea bargain that is more favorable than the conviction and sentence he ultimately receives is prejudiced when he loses the benefit of that initial bargain. Similarly, a defendant is prejudiced if, through the error or neglect of counsel, he rejects a plea, goes to trial, and is convicted of multiple charges or charges for a higher offense. Indeed, the practice of overcharging, which commonly is employed by prosecutors to encourage defendants to settle the case through a plea, can easily prejudice a defendant who does not accept a plea offer due to counsel's ineffective performance.

Because the overwhelming majority of criminal cases are settled through the plea process, counsel's effective assistance to his client during this process is critical to the overall administration of justice. The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. The Court's well-established precedent that a defendant must show that counsel did not exercise reasonable competence in representing him, *Strickland,* 466 U.S. at 688, is sufficiently rigorous in the plea bargaining process to prevent ineffective assistance of counsel claims from deteriorating into post-sentencing expressions of "defendant's remorse." Thus, under the Court's decisions, petitioner is aware that not every error or neglect by counsel in the plea bargain process is sufficient to state an ineffective assistance claim. Rather, the defendant must carry the heavy burden of showing that counsel's failure to demonstrate reasonable competence was of constitutional dimension. *See, Premo v. Moore,* 131 S. Ct. at 741 (holding that "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargaining stage.").

Here, when considering the People's case against petitioner, defense counsel should have noticed that the evidence against his client appeared overwhelming. Hence, counsel's general duty,

after evaluating the evidence, was to advise petitioner to accept the 2 to 4-year plea. *Cullen v. United States*, 194 F.3d 401, 404 (2 Cir. 1999); *Boria v. Keane*, 99 F.3d 492, 496-97 (2 Cir. 1996). In *Boria*, the defendant had proclaimed his innocence to his lawyer, the prosecution had offered a plea bargain with a sentence of one to three years, and, without the plea bargain, the defendant faced sentencing for a Class A-I felony, for which the minimum term of imprisonment is 15 to 25 years and the maximum term is life. There, the Second Circuit ruled that failure to give any advice concerning acceptance of the plea bargain was below the standard of reasonable representation. *See*, *Boria*, 99 F.3d at 496-97. Here, not only did defense counsel fail to advise petitioner to accept the plea, but he also failed to discuss the sentencing exposure in the event petitioner was found guilty after trial.

PETITIONER WAS PREJUDICED BY COUNSELS LACK OF ADVICE

To establish prejudice when, as here, ineffective assistance is alleged to have resulted in a rejection of a plea offer and the defendant is convicted at the enduing trial, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 132 S.Ct. 1376, 1384. This Court requires a three-part showing of such a defendant. He must demonstrate that: (1) "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court," (2) "the court would have accepted its terms," and (3) "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 1385.

Here, petitioner meets the three-part showing discussed in *Lafler v. Cooper, supra.* For instance, in regards to the first showing, counsel's lack of advice caused petitioner to reject the plea and proceed to trial without counsel considering petitioner's sentencing exposure, weaknesses in the

defense and that the evidence of guilt appeared overwhelming. This lack of effective advice, petitioner contends, subjected him to a sentence of 25 years to life, a disparity of 23 years.

However, in regards to the second showing, the trial court would have certainly accepted the terms of the plea, since it was *prior* to petitioner being indicted to robbery in the first degree. The trial court only stated that "[b]y operation of law, [it] [has] to deal with the indictment as it is", since petitioner was already indicted. *See*, Proceedings Transcript dated April 19, 2010 (THE COURT: I can't. By operation of law, I have to deal with the indictment as it is).

With respect to the third and final showing, both the conviction and sentence would have also been less severe than under the judgment and sentence that was in fact imposed. Petitioner was initially charged with robbery in the third degree a lesser offense of robbery in the first degree. *See*, *People v. Gethers*, 212 AD2d 544 (A.D. 2 Dept. 1995) (the conviction of robbery in the third degree is a lesser-included offense of robbery in the first degree).

When considering petitioner's circumstances as a whole, counsel's performance was unreasonable and it fell outside the "wide range of professionally competent assistance." *Kovacs v. United States*, 744 F.3d 44, 50 (2 Cir. 2014). When reviewing the circumstances of this particular case, this issue presents a national importance to the public as a whole. Hence, this Court is urged to revisit this issue of national importance. *Lafler v. Cooper*, 132 S.Ct. 1376; *Strickland v. Washington*, 466 U.S. 668.

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that this Court grant the writ of certiorari and permit briefing and argument on the issues presented.

DATED: APRIL 15, 2019

TO:

Honorable Letitia James
NYS Attorney General
Attorney for Respondent
28 Liberty Street (14th Floor)
New York, N.Y. 10005
Attn: Michelle Maerov
Assistant Attorney General

Respectfully Submitted,

Lionel Toye, #11-A-0726
Petitioner *Pro se*
Elmira Correctional Facility
P.O. Box 500
Elmira, N.Y. 14901