NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JAIME I. ESTRADA,

Petitioner,

v.

MARTIN BITER, Warden

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner established by a preponderance of evidence trial counsel's violation of the Sixth Amendment: failure to communicate a favorable plea offer petitioner would have accepted had the offer been disclosed to him.

2. Whether the district court clearly erred when it found that petitioner failed to show a favorable offer had been communicated to counsel but not to him.

PARTIES TO THE PROCEEDING

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

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Jaime I. Estrada respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's June 13, 2019 opinion affirming the district court's denial of Estrada's federal habeas claim for ineffective assistance of counsel was not selected for publication. Appendix A1-2. Estrada' petition for panel rehearing was denied July 2, 2019 in an unreported Ninth Circuit order. Appendix D1. Neither the district court's order nor the magistrate's recommendation to deny federal habeas relief were published decisions. Appendix B1-4 and C1-8.

JURISDICTIONAL STATEMENT

The Ninth Circuit entered its decision on June 13, 2019 and denied Estrada' petition for reconsideration on July 2, 2019. This petition is timely filed within 90 days after the entry of the judgment. Sup.Ct.Rule 13(3).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The pertinent section of the Anti-Terrorism and Effective Death Penalty Act provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under Paragraph (1) only if the applicant has made a

> substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c).

STATEMENT OF THE CASE

Petitioner Jaime Estrada was charged and convicted of second-degree murder and two counts of carjacking in state court. Following the direct appeal, Estrada filed several state collateral challenges of his conviction which included claims of ineffective assistance of trial counsel during plea negotiations. In response to his Sixth Amendment claims the state district attorney filed a brief which included her declaration and internal memoranda outlining the prosecution's assessment of its case as very problematic given Estrada's strong claim of self-defense. This evidence established that the prosecution had determined to offer a voluntary manslaughter plea in an effort to avoid losing its case at trial. From these documents Estrada learned for the first time of a nineteen-year manslaughter offer. Based on this newly discovered evidence, petitioner Estrada amended his state habeas petition with an allegation of ineffective assistance of counsel for failure to communicate the offer. Petitioner Estrada exhausted his state remedies and filed a claim for federal habeas relief. During the pendency of that claim an evidentiary hearing was conducted regarding the existence of a voluntary manslaughter offer and whether that offer was extended outside Estrada's presence and not communicated to him by his trial counsel.

The district court denied the petition, concluding that Estrada had failed to establish by a preponderance of the evidence the offer had been made outside his presence. Appendix C6-7. A certificate of appealability was granted: whether petitioner had presented sufficient evidence to demonstrate that a favorable plea offer was made to his trial counsel, that his trial counsel failed to communicate the offer to Estrada, and Estrada would have accepted it had it been disclosed to him. Appendix. B4.

The Ninth Circuit affirmed the district court's denial of Estrada's ineffective assistance of counsel claims, finding that the district court had not clearly erred when it found Estrada had failed to show that an "off-the-record nineteen-year plea offer was communicated to his counsel, but not to him." Appendix A2.

Estrada timely filed a motion for reconsideration. Estrada argued that the Circuit Court had overlooked facts which substantiated his claim that the preponderance of the evidence established a manslaughter offer had been made to trial counsel but was not communicated to him. Motion for Panel Reconsideration, *Estrada v. Biter*, No. 18-15267 (9th Cir. June 27, 2019). On July 2, 2019, a three-judge panel denied Estrada's motion for reconsideration, without opinion.

Estrada remains in state prison serving a 46-years to life sentence.

REASONS FOR GRANTING THE PETITION

A. Defense Counsel's Failure to Communicate a Favorable Plea Offer to the Accused Violated the Sixth Amendment

Well-established federal precedence has held that the Sixth Amendment guarantee to the effective assistance of trial counsel extends to the plea-bargaining process. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Here petitioner's defense counsel had "the duty to communicate formal offers from the prosecution . . . that may be favorable to the accused," but failed to communicate the offer to defendant. This constituted deficient performance under the Sixth Amendment. *Missouri v. Frye*, *supra*, 566 U.S. at 145*; see also United States v. Blaylock,* 20 F.3d 1458, 1466 (9th Cir.1994).

The benchmark for assessing claims of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir.2003) (quoting *Strickland v. Washington,* 466 U.S. 668, 686 (1984). A criminal defendant must first show both that his counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, at 687-688. It is well settled that the right to the effective assistance of counsel applies at critical stages of the criminal proceedings including trial preparation, trial, plea negotiations, and appeal. *Montejo v Louisiana*, 556 U.S. 778, 786 (2013)

(*quoting United States v. Wade*, 388 U.S. 218, 227-228 (1967); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *Missouri v. Frye, supra*, 566 U.S. at p. 145; *Hill v. Lockhart*, 474 U.S. 52 (1985); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

A petitioner shows prejudice due to ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," but a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington, supra*, 466 U.S. at p. 693 (1984).

It was petitioner's burden to prove by a preponderance of the evidence ineffective assistance of his trial counsel. That standard is satisfied by evidence which is more probable or more likely than not to be true. *In re Winship*, 397 U.S. 358, 371-372 (1970); "a preponderance of the evidence standard . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence . . ." Either direct or circumstantial evidence may establish those facts. When there is a lack of evidence that trial counsel made an effort to communicate an offer, and there was no evidence petitioner's conduct interfered with trial counsel's ability to do so, it must be concluded trial counsel did not make a meaningful

attempt to inform petitioner of the plea offer. See *Missouri v. Frye, supra*, 556 U.S. at 149.

Petitioner's allegations that he had not been advised of a voluntary manslaughter offer must be accepted as true and is sufficient to establish a constitutional deficiency satisfying the two-part test set forth in *Strickland*: (1) whether counsel was ineffective and (2) whether the deficiency resulted in prejudice. *Missouri v. Frye*, *supra*, 566 U.S. at 140; *Strickland v. Washington, supra,* 466 U.S. at p. 698. See also *Padilla v. Kentucky*, supra, 130 S.Ct. at p. 1483. Petitioner met these evidentiary requirements: trial counsel never advised petitioner of the voluntary manslaughter offer, and this failure precluded petitioner from choosing to plead under the offered terms instead of going to trial. As a result, petitioner was sentenced to an indeterminate life term instead of a determinate term of nineteen years.

The testimony and documentary evidence established by a preponderance of the evidence that petitioner's defense counsel failed in his constitutional duty to convey the prosecution's voluntary manslaughter offer. The district court's de novo review to the contrary was in clear error.

B. Both the District Court and the Circuit Court Were Required to Conduct De Novo Review of the Evidence

Petitioner's petition for a writ of habeas corpus was rightfully determined to be outside the deference described under the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. § 2254(d). Thus, the district court adjudicated petitioner's claim de novo. Evidence both

testamentary and documentary were presented to the district court during an evidentiary hearing. This evidence established by a preponderance of the evidence that a voluntary manslaughter offer had been made to petitioner's trial counsel which was not communicated to petitioner in violation of the Sixth Amendment.

The core documentary evidence that established a voluntary manslaughter plea offer consisted of documents Deputy District Attorney Bishop ("Bishop"), chose from the prosecution files to prove that a nineteen-year offer and not an eight-year offer had been discussed with petitioner's counsel. These documents were filed as attachments to Bishop's declaration in response to Estrada's April 17, 2013 state habeas petition. These internal memoranda revealed that beginning in January of 1995, Bishop, assessed the strength of petitioner Estrada's claim of self-defense as being strong enough to pose a real threat of the prosecution losing at trial, and suggested that a manslaughter disposition seemed "appropriate". Seven months later Bishop still thought that a manslaughter settlement remained an "appropriate" resolution, even though petitioner Estrada had picked up two additional charges and had been held to answer on the murder charge.

It was the policy of the District Attorney's office that prior approval to settle a murder charge for a lesser offense had to be obtained from the District Attorney before it could be extended to the defense. Consistent with the district court's findings the uncontradicted direct evidence established

that on August 17, 1995, Bishop took steps to obtain approval for a manslaughter offer. At Bishop's request, Jim Brazelton, Bishop's supervisor, pitched a voluntary manslaughter offer with a stipulated sentence to District Attorney Dan Stahl. Stahl concurred that the District Attorney's Office should "attempt to settle the case for voluntary manslaughter along with other charges".

Stahl's approval was followed by Deputy District Attorney McKenna making calculations, at Stahl's request, for a voluntary manslaughter plea in a "turnaround" document to be used during his appearance at a pretrial conference. McKenna's calculation of the maximum sentence for the plea was nineteen years. The parties agreed that McKenna's turnaround calculations were consistent with a voluntary manslaughter offer.

McKenna testified that he had written both the turnaround document and the "green" memorandum but had no independent recollection of the August 17, 1995 pretrial hearing. His testimony regarding the meaning of each document was based on his knowledge and experience as a Stanislaus County Deputy District Attorney for fifteen years. Based on this experience, McKenna testified that the format of the turnaround was consistent with the information he would have needed to advise the court of a guilty plea to voluntary manslaughter. According to McKenna the turnaround was not written up as an offer, but that an offer may have been made by someone else. In which case McKenna would not have had the responsibility to make

the offer.

McKenna's testimony established that the discussion within the district attorney's office whether to make a voluntary manslaughter offer, more likely than not, resulted in the conveyance of the offer to trial counsel. This view of the evidence is consistent with McKenna's turnaround document calculating the terms for the offer and consistent with his memorandum whether the prior Merced conviction qualified as a strike prior would alter those calculations. If no offer was to be made there would be no reason for McKenna to make the calculations or to research the impact of a potential prior strike. Further, both Bishop and McKenna testified that once Stahl approved the voluntary manslaughter offer it was likely the offer was made as a Deputy District Attorney would not countermand the decision of the District Attorney.

Evidence that both the prosecution and the defense discussed a voluntary manslaughter plea as a resolution to the murder charge prior to trial is corroborated by the trial court's statements during petitioner Estrada's criminal trial. On August 25, 1995, during a jury instruction conference, Judge Vanderwal, cited counsels' earlier discussions of a voluntary manslaughter in the case.

The above-referenced evidence, highlighted by the testimony of McKenna regarding the purpose and context of his writings, that it appeared an offer had been made by someone, and Judge Vanderwal's reference eight

days later to the parties' earlier discussions about "a voluntary manslaughter in the case", established a sufficient probability that petitioner Estrada's trial counsel received a voluntary manslaughter offer which he failed to communicate to petitioner.

The district court's finding that the minute order established than an offer was made at the pretrial hearing but that the particulars of that offer were unknown is a conclusion not supported by the facts. Appendix C6. The minute order from the pretrial hearing August 17, 1995, referred to an "indicated disposition: plea ct I, II and dism. ct III". *Ibid*. An indicated disposition means what a plea might be to, or it means an offer was made, or could be an indication of how a judge would sentence the defendant. McKenna testified that the indicated disposition in the minute order matched McKenna's turnaround "except for count 1." Count I referred to the Penal Code section 187 murder charge in the criminal complaint, not to voluntary manslaughter under Penal Code section 192 described in McKenna's turnaround document. This testimony was omitted from the district court's factual findings, and from its analysis.

Also omitted from the district court's findings was that the court clerk wrote down on the minute order what was said in court regarding offers, an offer for murder not voluntary manslaughter. McKenna's testimony contradicted Bishop's belief that an indicated disposition to "ct. I" could have been either to murder or to a lesser included offense such as voluntary

manslaughter, and the way the indicated disposition was written it left the plea offer unknown. The minute order was a "shorthand version of what the people were offering." If that offer were to voluntary manslaughter under Penal Code section 192(a), then the clerk would have written that down. However, the minute order indicates a plea as charged to Count I, and not an offer to plead to voluntary manslaughter. The testimony of Bishop corroborates this conclusion when she stated that the way the minute order was written the notation "plea to ct I" was to a murder charge under Penal Code 187.

The preponderance of the evidence supports the conclusion that during the pretrial hearing an indicated disposition was put on the record in the presence of petitioner Estrada to plead to the murder charge, Count I, and one carjacking Count II, with the dismissal of Count III. The minute order did not reflect an offer for voluntary manslaughter.

The district court's findings speculated that a voluntary manslaughter plea was extended on the record because it had been authorized by D.A. Stahl but that the plea offer was "likely not so straightforward" because of "prior strikes and other offenses and the calculations were complicated and subject to debate", so that when the offer was made petitioner Estrada may not have understood that the offer was for voluntary manslaughter. Appendix C7. If petitioner Estrada rejected a less-than-life offer without knowing he had done so, then counsel was constitutionally ineffective, and

as a result of trial counsel's ineffective assistance during the plea negotiation process, petitioner Estrada went to trial and received a more severe sentence at trial than he would likely to have received by pleading guilty to an offer that did not include an indeterminate term for murder. *Lafler v. Cooper*, *supra*, 566 U.S. at p. 166.

In order for an indicated disposition to be considered a plea offer, it should have generally set out with particularity the charges a criminal defendant had agreed to plead, because the court's indicated disposition or sentencing would be based on those charges. Without those details, the court would not be able to indicate how it would sentence a defendant for that plea[1]. This is true even for charges which are lesser included offenses; a murder plea under Penal Code section 187 is a life sentence while a voluntary manslaughter plea under Penal Code section 192 carries a determinate term. In 1995, the sentencing triad for voluntary manslaughter was 3/6/11. To reflect an offer for voluntary manslaughter, the minute order would have stated it as "ct. I-vol mans", to distinguish it from a murder plea. This is consistent with the manner in which the prosecution abbreviated the term. Without this wording, McKenna reviewed the minute order and

[1] This minute order lacks an indication by the court as to the sentence petitioner Estrada would receive if he pled guilty to the listed charges. Without an indication of the disposition or sentence there is no indicated disposition which can be considered a plea offer. (See *Bedolla Garcia v. Runnel*, 2004 WL 1465696 (N.D.Cal.2004), fn. 1.)

concluded that the indicated disposition was consistent with his turnaround calculations except for count one, the murder charge.

These facts establish that the minute order did not reflect any offer other than an indicated disposition for murder. The district court's findings to the contrary were unreasonable as unsupported by the evidence.

C. The Preponderance Of The Evidence Established A Voluntary Manslaughter Offer Was Made But Not Communicated To Estrada

Contrary to the findings of the district court, there was no evidence from which the district court could reasonably determine that petitioner Estrada was aware of plea negotiations and was not interested in a plea. Appendix C7. In an earlier decision, the district court had determined that petitioner had not learned of the predicate facts, the voluntary manslaughter offer, until 2013, and for this reason denied respondent's motion to dismiss the petition as untimely. Dkt. 20. The district court also determined that the nature of the documents supporting the predicate facts could not have been known by petitioner prior to the date Bishop revealed them in the opposition to petitioner's state habeas petition challenging his first trial counsel advice to reject an eight-year plea. *Ibid*. The district court found sufficient evidence to rule that petitioner Estrada did not know of a voluntary manslaughter offer before 2013, *i.e.*, his trial counsel did not tell him of the voluntary manslaughter offer. Appendix C1-2.

These prior consistent statements corroborated petitioner's testimony

during the evidentiary hearing, he had had no knowledge of a nineteen-year voluntary manslaughter offer prior to the disclosure of the internal memoranda[2]. If a determinate sentence offer had been made at pretrial he would have remembered it, because he would have accepted the offer, but petitioner was not advised of a determinate sentence offer.

The carjacking charges and the jail assault charges were not an impediment to a voluntary manslaughter plea, petitioner intended to plead guilty to those charges. Each of those charges carried a determinate prison term[3]. These charges did not worry him, it was the potential life sentence for the Penal Code section 187 murder charge that he wanted to avoid, and this motivated him to accept any determinate sentence less than life.

This evidence supported a finding that the only offer made in petitioner's presence was the pretrial indicated disposition for murder. There was no evidence petitioner rejected any plea offer except for murder.

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[2] The district court determined that the factual predicate of petitioner's claims of ineffective assistance of counsel at the plea bargaining stage could not have been discovered earlier through the exercise of due diligence, therefore, the limitations period did not begin until petitioner was provided the prosecution's internal memoranda June 21, 2013. Dkt. 20.

[3] The district court described "outstanding questions leading up to the pretrial conference regarding the effect of petitioner's prior Merced convictions, as well as how to deal with petitioner's assault charges." However, Don Stahl's notes at the bottom of the July 31, 1995 letter, indicated the prosecutor's intention for petitioner to plead to the two assault charges, which petitioner was willing to do, and an acknowledgment that the Merced conviction was not a qualifying strike for the Stanislaus County charges. Petitioner had already admitted to killing the victim but that he had done so in self-defense.

The district court's findings to the contrary are without any factual support. The district court's conclusion to the contrary was clear error.

The facts established that the offer approved by District Attorney Stahl for voluntary manslaughter was discussed with defense counsel at some point before trial. The indicated disposition to plea to the murder count at the August 17, 1995 pretrial conference would not have precluded the prosecution from off the record settlement discussions that included a voluntary manslaughter plea as evidenced by Judge Vanderwal's reference of such discussions on the fourth day of trial. Neither counsel disputed that the parties had engaged in discussions regarding voluntary manslaughter prior to August 24, 1995.

The reasonable probability that settlement discussions occurred without petitioner's knowledge is consistent with petitioner's verified statements and testimony that he was never advised of a voluntary manslaughter offer. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland, supra,* 466 U.S. at 694. See also, *Holland v. Jackson*, 542 U.S. 649, 654 (2004). The testimony and documentary evidence established by a preponderance of the evidence that petitioner's trial counsel failed in his constitutional duty to convey the prosecution's voluntary manslaughter offer.

D. CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 33.2

I, Carolyn D. Phillips, counsel for petitioner, certify that this document is prepared in accordance with the requirements of Supreme Court Rule 33.2, and contains 3,696 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance, as counted by the word count program of Microsoft Word, version 16.29.1.

I certify that this brief complies with typeface requirements and has a proportionately spaced typeface of 12 points Century Schoolbook font.

Dated: September 26, 2019

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