No. 19-6409

IN THE

SUPREME COURT OF THE UNITED STATES

SEAN REILLY,

Petitioner,

VS.

STATE OF FLORIDA,

Respondents.

ORIGINAL

FILED
OCT 07 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO
DISTRICT COURT OF APPEAL, FIRST DISTRICT, FLORIDA

PETITION FOR WRIT OF CERTIORARI

Sean Reilly DC#N21886
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OVERVIEW

Sean Reilly was diagnosed with attention-deficit disorder (ADD).His learning disability required him a distraction-free environment with additional time to concentrate on college exams.After graduating from Florida State University, Reilly was charged with several misdemeanors and felonies.Reilly hired private defense counsel who was required to have his best interests at heart. Counsel was aware that Reilly suffered fromADD and he had to be extra careful with him.

During trial counsel's representation, the prosecutor spoke to Reilly's counsel in person and on the phone about two plea bargains. Neither of which were reduced to writing. The first plea offer had two options: either a felony conviction or three misdemeanor convictions with either three years probation or minimal jail time. The second offer was a deferred prosecution deal, allowing him to further his career.

The first offer was rejected. The second offer was never conveyed to Reilly. A written offer would have cleared up any misunderstandings. After rejecting the only offer that was explained to him, Reilly proceeded to trialon all charges. He was found guilty and sentenced to an aggregate 15 year state prison term.

Reilly moved the state court for postconviction relief. The trial judge ruled that defense counsel's performance was not deficient. The lack of a written offer led to a misunderstanding and Reilly's loss of liberty.This case concerns the roles of defense attorneys and prosecutors during the plea bargaining process.

QUESTION PRESENTED[1]:

Whether counsel for the accusedhas a constitutional duty under the Sixth Amendment to documentand present the client plea offers (contracts)in written form; or stated differently, is it the State's prerogative to promulgate rules that would require plea offers to be in writing to ensure against misunderstandings?

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[1]This case presents a constitutional issue that was left open in*Missouri v. Frye,* 566 US 134, 132 S. Ct 1399 (2012) and *Lafler v. Cooper,* 566 US 156, 132 S Ct 1376 (2012). Mr. Reilly's question requires a higher level of scrutiny for the plea bargaining process; thus, applying contract law to plea offers.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[✓] For cases from state court:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or

[✓] has been designated for publication but is not yet reported; or

[] is unpublished.

JURISDICTION

[] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____. A copy of that decision appears at Appendix _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeal on the following date:_____ and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____.

[✓] For cases from state court:

The date on which the highest state court decided my case was May 24, 2019 . A copy of that decision appears at Appendix A

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was thereafter denied on the following date July 10, 2019 and a copy of the order denying rehearing appears at Appendix D

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No. _____

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

AMENDMENT 14

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is a compelling one. This case concerns the interaction between defense attorneys and prosecutors during the plea bargaining process, which is a critical stage of criminal proceedings that often prove costly to the accused and society as a whole. Popular myth shrouds criminal defendants and their ability to make rational decisions. Any fair understanding of this case, and Reilly's arguments, first requires shedding its lore.

Debunking myth No. 1. This case is not about a criminal defendant's failure to accept a plea offer, and never was. The issue concerns why plea bargains should be in writing. Because it was not in writing, Reilly never knew it existed.

This case, just like many other cases lacking recorded plea offers, presents an injustice that needs to be rectified by the United States Supreme Court's intervention. The question presented here was left open in *Missouri v.* Frye, 566 U.S. 134, 132 S. Ct. 1399 (2012). The circumstances in *Frye* did not present the opportunity for the Supreme Court to answer the questionherein. However, Mr. Reilly's plightallows the Supreme Court to clearly define the role of criminal defense attorneys during plea bargaining.

A.

Trial counsel never conveyed a deferred prosecution agreement to Reilly. While serving his prison sentence, Reilly learned, for the first time, that the prosecutor had offered a non-prosecution deal prior to the first trial. Instead, Reilly proceeded to three jury trials and one bench trial; ultimately, resulting in several

felony convictions and an aggregate 15-year state prison sentence. Such a charitable offer would not have been rejected by any rational defendant facing a trial. Naturally, a criminal defendant's goal in proceeding to trial is to secure an acquittal; here, Reilly would have been able to secure an acquittal, without any risk of losing his liberty, by simply accepting the State's deferred prosecution agreement, and satisfying the no-contact provision.

I.

Petitioner Sean Reilly was convicted in Tallahassee, Florida, Leon County, Case No. 2008-CF-4221A, of two counts of criminal use of personal identification and sentenced to 364 days in the county jail followed by community control and probation.[2](R-4). The conviction and sentence were affirmed on direct appeal. *Reilly v. State*, 75 So.3d 725 (Fla. 1st DCA 2011). The mandate issued on December 28, 2011. (R. 4).

On April 5, 2013, Mr. Reilly filed an amended motion for postconviction relief under Fla. R. Crim. P. 3.850, raising nineteen grounds for relief. (R. 4-48). In ground 16, Mr. Reilly alleged that his attorney rendered ineffective assistance by giving him incorrect advice that led him to reject a plea offer. (R. 41-42). Mr. Reilly said that the plea offer he rejected was for six months time served on a misdemeanor charge. (R. 42).

---

[2]The State of Florida attempted to have Mr. Reilly drop his appeal and when he refused the prosecutors retaliated on him by filing a new charge of aggravated stalking to keep him incarcerated. *See U.S. Supreme Court docket: Sean Reilly v. Florida, 16-9525, certiorari petition asked a constitutional question of whether the First Amendment was violated where a Florida Bar complaint against Reilly's ex-girlfriend, whom is a private attorney in Florida, was used to convict him of harassment.*

NO RECORD OF ANY PLEA BARGAIN IN PROSECUTOR'S FILES

On July 18, 2013, in response to an order to respond by the Florida Bar, former Assistant State Attorney Eric Abrahamsen filed a response to a bar complaint filed by Mr. Reilly. (R. 107-110). In the response, Mr. Abrahamsen stated that he offered Mr. Reilly "a deferred prosecution agreement whereby all the charges would be dismissed if he just agreed to stop contacting the victims in the case." (R. 108).No written plea offers were found in defense counsel or the prosecutor's personal files on Reilly's case.

After Mr. Reilly received a copy of this letter, he filed an amended motion for postconviction relief, supplementing his prior allegations with two additional claims. (R. 102).One of the new claims was an allegation that counsel was ineffective for not conveying to him the State's offer of a deferred prosecution agreement. Mr. Reilly alleged that he never knew about this offer until reading Mr. Abrahamsen's response to the Florida Bar. (R. 102).

The trial court conducted an evidentiary hearing on April 19, 2018. (R. 186). Mr. Reilly abandoned all of his claims except for the claim of ineffective assistance of trial counsel for failing to convey the deferred prosecution offer. (R. 192-193).

II. PROSECUTOR ERIC ABRAHAMSEN

Eric Abrahamsen testified that he worked for the State Attorney's Office in 2007. (R. 195). He prosecuted a couple of stalking cases involving Mr. Reilly and a young woman. (R. 195). There was a violation of an injunction and two misdemeanor stalking cases. (R. 196). Mr. Reilly was represented by privately

retained counsel, Mr. Paul Villeneuve. (R. 196). Eventually, there was a third stalking case involving a different victim, also filed in county court. (R. 197).

They were unable to resolve the cases, and the violation of injunction case went to trial first. (R. 197). Mr. Reilly was found guilty and placed on probation. (R. 197) In a second trial, Mr. Reilly was accused of supposedly using the victims' personal identification to log into their accounts at Florida State University and drop them from their classes. (R. 198) After that there was a third jury trial witness tampering charge and a violation of probation. The witness tampering was a felony that moved the case to circuit court. (R. 197).Mr. Villeneuve was Mr. Reilly's attorney throughout this entire process. (R. 198).

Defendant's Exhibit 1 is Mr. Abrahamsen's July 18, 2013, letter to the Florida Bar. (R. 199). Mr. Abrahamsen testified that before any felony charges were filed and the cases were all in county court, there was discussion about how to resolve the cases. (R. 200). Mr. Reilly and the victim were in a romantic relationship for an extended period of time that ended in a bad breakup. All the victim wanted was to have no more contact. Mr. Reilly was a graduate student at Florida State University with a promising future, and everyone on the prosecution side agreed that if Mr. Reilly would stop contacting the victims, it would be appropriate to drop the criminal charges. (R. 201). Therefore, he extended a 12-month deferred prosecution agreement offer. (R. 201).

Mr. Abrahamsen said that the offer was rejected but didn't say by whom. The violation of injunction case then went to trial and all of the other things happened

after that. (R. 201). The deferred prosecution offer was revoked when the violation of injunction case went to trial in November 2007. (R. 201). He would have kept it on the table until then. (R. 202).

Mr. Abrahamsen said the deferred prosecution offer was conveyed to Mr. Villeneuve, and they discussed it on more than one occasion. (R. 202). They both wanted to resolve the case without a trial. (R. 202). Mr. Abrahamsen admitted that he is "historically bad at documenting things" and the offer was most likely conveyed to Mr. Villeneuve verbally and in person. (R. 203-204). Had Mr. Reilly accepted the offer prior to trial, Mr. Abrahamsen would have honored it. (R. 204). However, counsel informed him that Mr. Reilly did not accept the offer. (*R.* 205).

On cross-examination, Mr. Abrahamsen said that after the violation of injunction case went to trial and Mr. Reilly was found guilty, the court imposed a sentence of probation. (R. 207) State's Composite Exhibit 1 included an email that Mr. Abrahamsen sent to defense counsel Villeneuve on September 27, 2007. (R. 207-208). The email reads as follows:

> Mr. Reilly has until 5:00pm on Tuesday, October 2, 2007 to accept the plea that we discussed. This will give Mr. Reilly a long weekend to think about it. After that time the plea will be withdrawn and if he wants to plea he will have to throw himself at the mercy of Judge Hawkins via a straight up plea (which generally includes jail if a last minute plea)
>
> Thank you for your time, please let me know of the decision asap.
>
> Sincerely,
> Eric Abrahamsen
> Assistant State Attorney

(R. 174) (emphasis added).

Defense counsel Villeneuve then forwarded this email to Mr. Reilly with the following additional note:

> Sean,
>
> FYI re: the status of the plea offer, p.

(R. 174).

Neither the email from Assistant State Attorney Abrahamsen nor theemail forwarded with defense counsel Villeneuve's add-on note contained any description of the plea offer's terms or stated that this was a different offer from any previous offers known to Mr. Reilly. Mr. Reilly was not aware that the offer had changed from a conviction to a deferred prosecution deal. Mr. Reilly then replied, "no I do not accept their offer." (R. 174)

Mr. Abrahamsen testified that the September 27 email was "before we would be picking a jury. And I'm saying that, you know, 'Hey, I'm extending the offer....'"(R. 208). If Mr. Reilly did not accept the offer before the final plea date, Judge Hawkins' usual position was to not accept a negotiated plea after a certain date.*Id.* Mr. Abrahamsen admitted that Mr. Reilly's conduct up until that point had been "pretty minor." (R. 210). He also admitted that the temporary injunction that Mr. Reilly violated was overbroad and was ultimately found to be overbroad by Judge Reynolds. However, that did not affect how the violation went forward in misdemeanor court.[3](R. 210).

[3]The challenge to the misdemeanor conviction for violating an overbroad injunction that restricted

On redirect, Mr. Abrahamsen said that had Mr. Reilly accepted the offer of deferred prosecution, acceptance by the judge would not have been required because it would be a prosecutorial decision in the nature of a pretrial intervention. (R. 212).

III. TRIAL COUNSEL PAUL VILLENEUVE

Paul Villeneuve then testified about his role as Mr. Reilly's attorney in this case. (R. 213). He testified that he conveyed the deferred prosecution offer to Mr. Reilly but could not recall how or if it was by phone or in his office. (R. 214). The offer was very generous and required very little in return. (R. 214). He was dismayed that the offer wasn't accepted. (R. 214).

Mr. Villeneuve was then questioned about his email correspondence with his client. (R. 214). Mr. Reilly's first email to defense counsel Villeneuve was dated June 24, 2007, and asked for the details of the State's plea offer:

> Paul,
>
> What is the state offering me as a plea bargain? And how do you feel about it?
>
> Please Respond and enjoy your vacation next week.
>
> With much Respect,
>
> Sean

(R. 172)

Mr. Villeneuve did not remember getting this email, but the address was accurate and he had no reason to think it wasn't genuine. (R. 215).

Mr. Reilly's access to 6 public places was the basis of two certiorari petitions. *See Reilly v. Campbell, No. 12-5244, 568 US 902, 133 S Ct 314 (2012); Reilly v. Florida, No. 13-5492, 571 US 918, 134 S Ct 298 (2013).*

Mr. Reilly then sent a second email to Mr. Villeneuve on August 13, 2007, apparently in response to an initial plea offer:

> Tell Abrahamson to go fly a kite. I am not flexible here and I am firm on my decision. I will settle for nothing less than 3 to 6 months probation and leave it as a misdemeanor. I feel strongly about these allegations and all their evidence is bogus bullshit. If they can't agree than we will have no choice but to go forward with the trial. (R. 173).

There is no documentary record of the plea offer Mr. Reilly is referring to in this email. Mr. Villeneuve admitted that Mr. Reilly's reference to a misdemeanor charge and probation indicates that he was aware of something that was more severe than deferred prosecution. (R. 217).

Mr. Villeneuve repeated that he conveyed Mr. Abrahamsen's offer of deferred prosecution and Mr. Reilly didn't accept it. (R. 218). This confused him because the State's offer would have dropped all of the charges and everything would go away completely. (R. 218).

On cross-examination, Mr. Villeneuve said he had communications with Mr. Reilly other than on those depicted in the emails. (R. 220). The prosecutor asked if he would have explained what a deferred prosecution agreement is and that it results in the complete dropping of the charges, to which Mr. Villeneuve replied that he would do so. (R. 220).

IV. PETITIONER SEAN REILLY

Sean Reilly testified that he was the defendant in this case. (R. 223). He hired Mr. Villeneuve on January 25, 2007, to handle the temporary injunction case.

(R. 224). He then moved back to Miami to get away from the victim. (R. 225). At that point, there were no criminal charges against him. (R. 225). Mr. Villeneuve offered to represent him on the criminal charges that came later. (R. 225).

Reilly proffered that Mr. Villeneuve did not convey the deferred prosecution offer to him. (R. 225). The plea offer that Mr. Villeneuve did tell him about involved having a conviction on his record. (R. 226). Mr. Reilly had just graduated from Florida State University and was pursuing a graduate degree, so he didn't want a conviction on his record. Mr. Villeneuve informed him that the State was offering a plea that would include a conviction, possibly a felony conviction. (R. 226). That was the plea offer he was referring to in his August 13, 2007, email to counsel. (R. 226).

Mr. Reilly said that his father was with him on the phone and in Mr. Villeneuve's office when plea agreements and plea offers were discussed. The only offers mentioned to them involved a felony conviction or multiple misdemeanors with multiple years of probation. (R. 227). Had Mr. Villeneuve informed him that the State was offering deferred prosecution with no conviction, he would have accepted it and honored the agreement by staying away from his ex-girlfriend.*Id.*

On cross-examination, Mr. Reilly said that he had no criminal history prior to this case, but now has four felony convictions. (R. 228-229). One was a stalking charge that occurred while he was in prison. (R. 230) He now has a five-year mandatory sentence. (R. 230). He had no contact with the victim while the case was still a misdemeanor and plea negotiations were taking place. (R. 231). The plea offer was made in 2007, whereas some of the subsequent acts occurred in 2012. (R.

231).Mr. Villeneuve explained some things about the criminal justice system, but never conveyed the deferred prosecution offer. (R. 232-233).

V. PETITIONER'S FATHER JOSEPH REILLY

Joseph Reilly testified that he is the Petitioner's father. (R. 234). He had conversations with Mr. Villeneuve personally and came up to meet him in 2007. (R. 235). Petitioner was also present. (R. 235). He was hoping that there could be a resolution to the case that would result in the charges being dropped. (R. 235-236). He would have insisted that his son accept the deferred prosecution offer had it been mentioned. (R. 236).He never heard of the deferred prosecution agreement until Mr. Abrahamsen responded to a Florida Bar complaint. (R. 237). Mr. Villeneuve said that his son would have to accept a charge of some kind as part of the settlement, and his sondidn't want to accept a charge. (R. 237).

On cross-examination, Joseph Reilly said that in 2007 he lived in Miami. (R. 238). Mr. Villeneuve's first act as his son's attorney was to delay the injunction hearing. That caused tension right away because the restraining order was overbroad and things just kept getting worse. (R. 240).

Joseph Reilly didn't remember exactly when he came to Tallahassee to see the attorney because this happened more than ten years ago. (R. 241). He came up a couple of times in 2007 before the trial in November. (R. 242-243). He may have met with Mr. Villeneuve both times. (R. 244). There were also a couple of party-line calls with Mr. Villeneuve on the telephone. (R. 243). He also tried to contact Mr. Villeneuve by email, but Mr. Villeneuve did not get back to him. (R. 244). He

probably had a total of two hours of contact with the attorney overall. (R. 244).

There were plea negotiations, but never heard anything about deferred prosecution being mentioned. (R. 245). He's certain they never talked about that. (R. 245) He doesn't know what his son and Mr. Villeneuve may have discussed outside of his presence. (R. 245-246).

B. TRIAL COURT'S *STRICKLAND*[4] ANALYSIS

The trial court found that there was no deficient performance by counsel. The court accepted Mr. Villeneuve's testimony, rejected the testimony of the Petitioner and his father, and found that Mr. Villeneuve conveyed the plea offer. (R. 259-260). The court also found that there was no prejudice because even if the Petitioner had accepted the offer, his subsequent conduct in Case No. 2008-CF-781 would have violated the agreement and produced the same outcome. (R. 261-263).

The amended information filed in Case No. 2008-CF-781 alleged that between November 3, 2007, and March 1, 2008, Mr. Reilly unlawfully and knowingly used intimidation or physical force, threats, or attempts thereto, or offered pecuniary benefit or gain to a witness with the intent to influence that person's testimony in an official proceeding. (R. 180).

The court also relied on conduct occurring in 2010 when Petitioner violated the terms of his probation by failing to remain in his residence (R. 262), and in December of 2013 when Petitioner had contact with the victim. (R. 263).

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[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

The trial court entered a final written order denying the motion for postconviction relief on April 19, 2018. (R. 181). Petitioner appealed to the First District Court of Appeal in Florida. (R. 184).

C. APPEAL TO THE HIGHEST STATE COURT

On appeal, Mr. Reilly argued that there were two plea offers. The first involved a misdemeanor or felony conviction and probation, which Petitioner rejected. The second offer was a deferred prosecution, but that offer was not on the table in June when the Petitioner had his first email exchange with defense counsel. The prosecutor testified that September was when he first extended the offer of deferred prosecution (R. 208), giving the Petitioner "a long weekend to think about it." (R. 174). Counsel then forwarded this email to Petitioner, but it contained no description of the offer or even said that it was for deferred prosecution. It merely said that there was an offer, it didn't go into detail.

When trial counsel was asked if he conveyed the deferred prosecution offer to Petitioner, trial counsel gave the following response:

> I know I did. I -- can't sit here and tell you exactly how, if it was on the phone, in my office. I know that we discussed it because I believe it was a -- a generous proposal with very little expected in return.

(R. 214).

Counsel did not say that he discussed the offer with the Petitioner on the phone and in his office, nor did he rule out the possibility that he conveyed the offer by email. He merely said that he could not recall exactly how he conveyed the offer or if it was conveyed by phone or in his office.

Mr. Reilly argued that this is not a case involving a credibility contest to be resolved solely by the trier of fact with full deference given by the appellate court. Defense counsel testified that he passed along the State's deferred prosecution offer to Petitioner, but could not remember when and how he did so. (R. 214). The documentary record answers that question, showing that counsel conveyed the offer by forwarding the State's September 27themail to Petitioner. (R. 174). However, neither the State's email nor counsel's attached note contained any description of the offer's terms. It merely referenced the plea that the prosecutor and defense counsel discussed and gave the Petitioner a "long weekend to think about it." *Id.*

Petitioner had previously rejected an offer by stating that he would accept no more than a misdemeanor conviction and probation (R. 173), suggesting that the offer he rejected was more severe than that. With only the State's September 27themail and no further information from Reilly's attorney, the Petitioner had no way of knowing that the State madetheir offer and that deferred prosecution was now on the table as a means of avoiding both a conviction and probation.

Petitioner and his father both testified at the evidentiary hearing that they had no idea that deferred prosecution had ever been offered. (R. 225-226, 237). In addition, Petitioner filed a postconviction claim in 2013 which shows that he continued to believe the State's only plea offer was for a conviction and jail time. (R. 42). It was only when the Petitioner received the prosecutor's response to a bar complaint that Petitioner learned about the deferred prosecution offer and amended his claim to allege that his attorney should have told him about it. (R. 102, 107).

Counsel's testimony also establishes that he was confused about the timing of the two plea offers. The prosecutor's testimony and his email propose that the deferred prosecution agreement was offered in September of 2007 (R. 208), after the Petitioner's August 13 email rejecting the initial offer and asking for a plea with a misdemeanor conviction and probation. Counsel testified that he "could have easily contacted him and talked to him *in personor by phone*" in response to Petitioner's June 24 and August 13 emails. (R. 217). However, this testimony did not establish that he had ever described the terms of the deferred prosecution offer because it hadn't been offered yet.

The only time when counsel could have discussed the deferred prosecution offer would have been during the "long weekend" between September 27 and October 2, 2007. The State didn't present any evidence of any conversations between trial counsel and the Petitioner during that time period other than counsel's September 27 email, where counsel only stated, "FYI re: the status of the plea offer, p." (R. 174). The evidence did not support the state court's finding that counsel properly advised the Petitioner about the deferred prosecution offer or the trial court's conclusion that under the *Strickland* analysis counsel must provide Petitioner Reilly constitutionally effective assistance in that regard.

D. CLOSING ARGUMENT ON REHEARING

Trial counsel never conveyed the deferred prosecution agreement to Reilly. Such a charitable offer would not have been rejected by any rational defendant facing a trial. Naturally, a defendant's goal in proceeding to trial is to secure an

acquittal; here, Reilly would have been able to secure an acquittal, without any risk of losing his liberty, by simply accepting the State's deferred prosecution agreement.

Reilly's post-conviction counsel presented several e-mails at the hearing. The e-mail exchanges were between Reilly and his trial counsel, and they revealed that Reilly had asked counsel for details about the State's new offer. One e-mail from Reilly, dated August 13, 2007, reveals that after receiving a response from counsel regarding the State's new offer, Reilly rejected the offer, and stated that he would "settle for nothing less than 3 to 6 months probation and leave it as a misdemeanor," in an obvious mis-phrasing, which meant to say "no more than."(R. 173). "If they can't agree," Reilly told counsel, "than [sic] we will have no choice but to go forward with the trial." (R. 173).

When questioned about this e-mail communication, trial counsel admitted that Reilly's statement in the e-mail response, dated August 13, 2007, confused him because it indicated that Reilly appeared to be unaware of the deferred prosecution agreement and was referring to an offer that was more severe. (R. 217). Counsel was confused because Reilly rejected the State's new offer and yet expressed his willingness to plea to a misdemeanor offense with jail time. (R. 217).

Despite this critical e-mail evidence being presented at the post-conviction evidentiary hearing, the trial court found that trial counsel's testimony was more credible than both Reilly's testimony and that of Reilly's father, which corroborated Reilly's testimony. Ultimately, that the lack of a written contract most certainly complicated and clouded the issue.

Even a cursory examination of the post-conviction evidentiary hearing testimony, along with the e-mail evidence presented at the hearing, raises a serious concern as to the accuracy and veracity of trial counsel'sstatement about conveying the offer of deferred prosecution to Reilly. After all, why would Reilly reject a deferred prosecution agreement (which entailed no conviction and no jail time), and request a plea offer for a misdemeanor offense (which entailed not only a conviction, but also jail time)? No wonder Reilly's August 13, 2007, e-mail confused counsel when counsel reviewed it at the hearing—the e-mail makes absolutely no sense, *if what counsel was saying was true.* But on the other hand, Reilly's e-mail makes perfect sense if what counsel was saying wasn't true, *and counsel did not convey the deferred prosecution agreement to Reilly.*

Simply put, Reilly's August 13, 2007 e-mail proves unequivocally that counsel was mistaken about conveying the deferred prosecution agreement to Reilly.

It cannot be ignored that trial counsel actually testified, at the post-conviction evidentiary hearing, that he was "confused" about Reilly's e-mail rejecting the State's deferred prosecution agreement and asking for a misdemeanor with jail time. Counsel stated that Reilly's language in the e-mail "added to [his] confusion as to why [Reilly] didn't want to do a deferred prosecution agreement." T. 32. But if counsel was so confused as to why his client would be asking for a misdemeanor with jail time when he could have had dismissal of the charges, then counsel had a constitutional duty to clarify to Reilly that the State's offer was better than a misdemeanor with jail time; indeed, it was for no conviction at all (assuming

satisfaction of the terms of the non-prosecution deal).

Ultimately, trial counsel's admitted confusion, along with Reilly's e-mail requesting a counteroffer for a misdemeanor with jail time; prove that counsel *did not* convey the offer for deferred prosecution to Reilly.

CRIMINAL DEFENDANTS WITH LEARNING DISABILITIES

Magnifying counsel's failure to put the non-prosecution offer in writing and failing to communicate the deal to Reilly is the fact that Reilly suffers from AttentionDeficit Disorder. Trial counsel Villeneuve was aware of his client's learning disability. This makes it even more imperative that the plea offer must be in writing to ensure that he had enough time to review the terms of any plea offer.

Petitioner prays for the Justices to step in and create a precedent for criminal defense lawyers to obtain any and all plea offers[5] in writing. This issue was not resolved in *Missouri v.* Frye, 566U.S. 134, 132 S. Ct. 1399 (2012) because the plea offers in *Frye*werewritten, but Reilly's case presents a scenario where the plea offers were not in writing. If Reilly did not file a complaint to the Florida Bar against the prosecutor, he would have never learned about the nonprosecution deal, because the offer was never in writing and there was no record of it in the prosecutor's files or his defense counsel's files.

Reilly asks this court to implement a remedy for a situation that affects many criminal defendants across the country.

[5] A plea offer or a non-prosecution deal is equivalent to a contract.

REASONS FOR GRANTING THE PETITION

This case asks the Court to apply a basic business law concept to the plea bargaining process. The refusal to hear this case would permit injustice to pervade the plea bargaining process. This case would demonstrate everything that is at stake when injustice is tolerated. Criminal defendants' lives are not the only thing impacted by the disgraceful conduct between defense attorney and prosecutor of failing to document plea offers. Ultimately, this affects the assembly line known as the criminal justice system where criminal defendants are being traded like horses in courtrooms across the country; the uncontrollable prison population; the dichotomy between the guilty and the innocent; the victims; the families of all those involved; and, finally, the taxpayers. The time has arrived to remedy this appalling indolence and clearly define defense counsel's role in plea bargaining.

In this case, this criminal defendant was offered a deferred prosecution prior to trial, an offer for which he never knew existed, until over 3 years into his prison sentence. The agreement between trial counsel and prosecutor was not in writing. There was nothing in the prosecutor's file about any plea offer or non-prosecution deal. If it weren't for this criminal defendant's persistence in complaining to the Florida Bar about the prosecutor's conduct, the non-prosecution deal would have been concealed forever. The failure to decide this issue has, and will continue to, plague trial courtswith misunderstandings. Petitioner is seeking certiorari review so this Court can set some boundaries and provide better regulation.

The plea-bargaining process is a subject worthy of regulation, since it is the

means by which most criminal convictions are obtained.The question presented in this case has the potential to end the careless practices of trial attorneys and prosecutors not putting plea offers in writing. This issue was left unresolved by the High Court. Due to similar scenarios, there needs to be a remedy or some regulation to the plea-bargaining process.

The instant case presents a question that was left open in United States Supreme Court precedent *Missouri v. Frye*, 132 S. Ct. 1399, 1404, 182 L. Ed. 2d 379 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).This case goes one step further than *Frye* or *Lafler*. It is important for this Court to clarify this issue and obligate criminal trial lawyers to have all plea deals reducedto writing. Failure to do so creates confusion, misunderstandings and unwarranted disputes that could lead to drastic ramifications, such as:many years of imprisonment, lost wages, and loss of familial companionship.

A.

Most criminal prosecutions are settled without a trial.[6] The parties to these settlements trade various risks and entitlements: the defendant relinquishes the right to go to trial (along with any chance of acquittal), while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible. The resulting bargains differ predictably from what would have happened

[6]In 1989, 86% of all federal criminal cases were disposed of without a trial. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 502 tbl. 5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990). The same phenomenon occurs in state cases: in 1988, 91% of felony convictions in the 75 most populous counties in the United States were obtained through guilty pleas. *Id.* at 526 tbl. 5.51.

had the same cases been taken to trial. Defendants who bargain for a plea serve lower sentences than those who do not.[7] On the other hand, everyone who pleads guilty is, by definition, convicted, while substantial minorities of those who go to trial are acquitted.[8] Plea bargaining must be interpreted under basic contract law.

There is something perplexing about the polarity of contemporary reactions to this practice. Most legal scholars oppose plea bargaining, finding it both inefficient and unjust.[9] Meanwhile, the courts have proceeded to construct a body of contract-based law to regulate the plea bargaining process, taking for granted the efficiency and decency of the process being regulated. But the intuition that plea bargaining is fundamentally flawed is too strong and too widespread to be ignored.

Plea bargains are both paradigmatic bargains of the sort we routinely enforce in other contexts and the product of a seriously flawed bargaining structure. There are fundamental structural impediments in the plea bargaining context that may

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[7]In 1986, among defendants convicted in a state court trial of a serious felony, the average sentence was 145 months; the comparable figure for defendants who pled was 72 months. The difference in median sentences for the same year is not as striking, but nevertheless is substantial: the median for those convicted at trial was 90 months; for those who pled guilty it was 60. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 517 (Kathleen Maguire & Timothy J. Flanagan eds., 1989)

[8]In 1989, the acquittal rate in federal criminal trials was 23%. 1990 SOURCEBOOK, *supra* note 1, at 502 tbl. 5.25. The rate of acquittal is slightly lower for felony defendants in state court. *Id.* at

[9]The most influential (and prolific) critics are Albert Alschuler and Stephen Schulhofer, both professors at the University of Chicago. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988);Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037(1984); Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37.

underlie the widespread antipathy to the practice. These barriers to efficient bargaining are not, however, grounds for abolition, but instead suggest more focused reforms of current practices.

PLEA BARGAINING UNDER CONTRACT LAW

The criminal process that law students study and television shows celebrate is formal, elaborate, and expensive. It involves detailed examination of witnesses and physical evidence, tough adversarial argument from attorneys for the government and defense, and fair-minded decision-making from an impartial judge and jury. For the vast majority of cases in the real world, the criminal process includes none of these things. Trials occur only occasionally—in some jurisdictions, they amount to only one-fiftieth of total dispositions.[10] Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge.[11] To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.

The idea of allocating criminal punishment through what looks like a street bazaar has proved unappealing to most outside observers. Critics point to the seeming hypocrisy of using an elaborate trial process as window dressing, while

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[10] *See* MALCOLM L. FEELEY, THE PROCESS IS THE PUNISHMENT (1979).

[11] *See* MILTON HEUMANN, PLEA BARGAINING (1978).

doing all the real business of the system through the most unelaborated process imaginable.[12] Defendants accept bargains because of the threat of much harsher penalties after trial; they are thus forced to give up the protections that the trial system's many formalities provide.[13]

Before contracting, the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial followed by acquittal. Thereafter, the defendant bears the risk that a trial would have resulted in acquittal or a lighter sentence, while the prosecutor bears the risk that she could have obtained the maximum (or at least a greater) sentence if the case had gone to trial. Plea bargaining provides a means by which prosecutors can obtain a larger net return from criminal convictions, without having to use all of their available resources. Criminal defendants, as a group, are able to reduce the risk of the imposition of maximum sanctions.

I.

The United States Supreme Court has set forth the proposition that, when properly administered, plea bargaining is a proper method for administering justice.

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called plea bargaining, is an essential component of the administration of justice, and, when properly administered, is to be encouraged.

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[12] *E.g.*, John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977); Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753 (1981).

[13] *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527 (1979).

Santobello v.New York, 404 U.S. 257, 92 S. Ct. 495 (1971). The Supreme Court noted that if every criminal charge were subjected to a full-scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities. *Id.* The Court said that "disposition of criminal charges after plea discussions or plea bargaining is not only an essential part of the criminal process but a highly desirable part for the reasons that: (1) it leads to prompt and largely final disposition of most criminal cases, (2) it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial, (3) it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release, and (4) by shortening the time between charge and disposition, and it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Id.* The Court cautioned, however, "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor." *Id.*

Of course, it is the defense counsel, and not the accused, who should conduct the negotiations. *See Torcia, Wharton's Criminal Procedure § 341* (12thed)

Can defensecounsel be deemed ineffective under the Sixth Amendment for failing to ensure that a plea offer is in writing?

In regards to plea offers, how much does the 6th Amendment require of trial counsel? Is it the criminal defendant's responsibility to clarify the plea offer with his lawyer? Or is it defense counsel's responsibility to clarify and explain the terms of any plea offer? More specifically, this case presents the High Court with the

opportunity to extend the Sixth Amendment to compel criminal trial attorneys to obtain all plea offers in writing. A plea offer is the same as a contract.[14]Thus, any competent lawyer would make sure that a contract is in writing. For too long, lawyers have been able to get away with making verbal agreements, based simply on a handshake deal. Can the court determine under the Sixth Amendment that a trial attorney conveyed a plea offer to a defendant based solely on his testimony in a post-conviction evidentiary hearing, even though the evidence suggests that defense counsel did not inform his client of the offer or that he did not adequately explain the terms to his client? Should the burden shift to the defense counsel to prove that his client would reject a favorable deal? Or is it a State's prerogative to implement rules to require plea offers be made in writing? As mentioned in Justice Kennedy's majority opinion in *Frye*, are there any exceptions to the circumstances of this case?

Florida Bar's Consumer Pamphlet: Legal and Binding Contracts

Written contracts are almost always preferable to oral contracts, because a written document helps eliminate disputes about terms and conditions of the agreement. Also, oral contracts can be difficult to enforce in a court of law. To avoid disputes and litigation, the best practice is to get an agreement in writing. The written contract will help ensure that all parties understand their rights and obligations under the contract.

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[14]Black's Law Dictionary defines a "contract" as (1) "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"; (2) "The writing that sets forth such an agreement"; (3) "A promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law; the writing expressing that promise or set of promises." *See Black's Law Dictionary 389-390* (10th Ed. 2009)

Reilly's point is a simple one: that counsel was ineffective for not demanding that the Deferred Prosecution be put in writing. The only sensible way for this agreement, or contract, to be transacted would be for it to have been in writing. Without a written agreement, it became a "he said/she said" case.

Even the Florida Bar's Consumer Pamphlet on Legal Binding Contracts states that "the best practice is to get an agreement in writing."

The dilemma here is that many defense lawyers may be overworked, and disorganized as a result. The prosecutors may be, also. So both sides tend to only discuss the plea deals in person or over the phone and never actually write the terms of the deal on paper or in contract form. The problem with this is that when myriad criminal defendants learn of the plea deal, after they have been languishing in prison, the terms of the deal were never in writing and then it turns into a credibility contest. Most of the time, the outcome never benefits the defendant.

In this case, trial counsel stated that he told Reilly about a non-prosecution deal, but instead, Reilly opted to go to trial and risked losing his liberty.The State court ruled that counsel's performance was not deficient because he testified that he told Reilly about the deferred prosecution agreement. However, there was no agreement in writing. This turns into a credibility contest. And now, the trial courts have a tendency to believe a trial attorney over a convicted felon. Unfortunately, in this case, felony convictions resulted from counsel's obvious failure to obtain the deferred prosecution agreement in writing.

Reilly's attorney was wrong: The email evidence suggests that Reilly was

only aware of a plea involving a conviction with jail time or probation. Defense counsel even admitted in a response to the Florida Bar complaint that a deferred prosecution is a "contractual agreement reduced to writing and signed by all parties." [*See Appendix H*] Reilly argues that the Sixth Amendment requires trial counsel to obtain any plea offer in writing. The lack of a written offer led to a misunderstanding and Reilly's loss of liberty.

I.

"The plea-bargaining process is often in flux," as Justice Kennedy noted, "with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense." *Frye at 1499.*This is largely because "discussions between client and defense counsel are privileged." *Id.* "The prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event." *Id.* While Petitioner agrees that a criminal defendant does not have a constitutional right to receive a plea offer, he argues that plea bargaining needs some sort of regulation. This is why Petitioner urges this Court that plea offers must be in writing.

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours ``is for the most part a system of pleas, not a system of trials," *Lafler*, post, at ___, 132 S. Ct. ___, 182 L. Ed. 2d

398, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.*Id.* "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."*Scott &Stuntz, Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992).*See also Barkow, Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)).

As Justice Kennedy noted in *Frye's* majority opinion:"In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."

II.

This petition presents a scenario slightly different from *Frye*, it makes the inquiry of how to define the duty and responsibilities of defense counsel in the plea bargain process ripe for review. *Frye*did not present the necessity to define the duties of defense counsel in this respect; however, Reilly's case presents the occasion to clarify whether defense counsel specifically has a duty or responsibility to record plea offers, whether it should be written on paper or in digital form.

This Court decided that defense attorneys must communicate and explain the terms of all plea offers. *See ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a)* (3d ed. 1999) (American Bar Association recommending that defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.") The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. *See, e.g., Fla. Rule Regulating Bar 4-1.4* (2008); *Ill. Rule Prof. Conduct 1.4* (2011); *Kan. Rule Prof. Conduct 1.4* (2010); *Ky. Sup.Ct. Rule 3.130, Rule Prof. Conduct* 1.4 (2011); *Mass. Rule Prof. Conduct* 1.4 (2011-2012); *Mich. Rule Prof. Conduct* 1.4 (2011). Diligent counselwould have had plea deal in writing. *Fla. Rule Regulating Bar 4-1.3 (2019).*

Not only did defense counsel fail to convey the deferred prosecution offer, he failed to explain that the terms of the deferred prosecution agreement were different and more generous than the original plea offer. However, what makes this case even more compelling is that the deferred prosecution deal was not in writing and counsel did not even attempt to have this generous plea offer put in writing. The heartbreaking ingredient of this case is that if Reilly never filed a complaint to the Florida Bar about the prosecutor, he would have never learned about the plea because it was never presented in writing. Moreover, many criminal defendants often times never discover that a plea offer ever existed prior to trial and cannot prove that the offer existed because it was never reduced to writing.

In post-conviction proceedings, defense attorneys and prosecutors have to recall discussions from many years earlier. Without anything in writing, the judge

has to make a determination on who is telling the truth and it is more common for the judge just to side with defense counsel over the defendant.[15] This case is important as it will clear up misunderstandings by having everything documented.

In the end, criminal defendants are harmed by these clandestine discussions between defense counsel and the prosecutor.

The outcome in Reilly's case is far from unique. A Connecticut appellate court, for example, denied Dario Bertotti's claim that his lawyer, without consulting him, rejected a plea agreement that offered an eight-year sentence. His lawyer's actions caused him to go to trial, where the court sentenced Bertotti to twelve years' imprisonment. *Bertotti v. Comm'r of Correction*, 44 A.3d 892 (Conn. App. Ct. 2012). His lawyer, however, argued that Bertotti rejected the offer because he thought he would receive a more lenient sentence after trial due to his cooperation with the authorities. *Id.* No record existed to validate either side's assertions.

This case is another example of the evidentiary burden faced by defendants seeking to vindicate their Sixth Amendment rights under *Lafler*and *Frye.*

Is it the State's prerogative to promulgate rules that would require plea offers to be in writing to ensure against later misunderstandings?

In *Frye,*Justice Kennedy noted that "the prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading

[15] *See* Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U. Penn. L. Rev. 683, 714 (2014) (arguing that the burden should shift to the defense lawyer to prove that the decision to reject an plea bargain offer was clearly contrary to the best interests of the criminal defendant.)

to conviction with resulting harsh consequences."*Id. at 1501.*"First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, *States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings* or fabricated charges." *Id. at 1501;SeeN. J. Ct. Rule 3:9-1(b)* (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. *See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiaein Missouri v. Frye,* 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald,* 198 Ariz. 406, 10 P.3d 1193 (App. 2000)); *see also N. J. Ct. Rules 3:9-1(b), (c)* (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz,* 2 Cal. 4th 924, 938, n. 7, 830 P.2d 747, 756, n. 7 (1992) (encouraging parties to ``memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant's response to the plea bargain offer'').

B.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. *Laflerat* 165.To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness"and that he was prejudiced as a result. *Ibid.*

This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a deferred prosecution, a more lenient proposal that offered terms that would have dismissed the chargesas opposed prison time after multiple trials. The initial question is whether the constitutional right to counsel outlined in *Frye* and *Lafler*obligates criminal defense lawyers to obtain plea offers in writing. If there is a right to effective assistance with respect to written plea offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. For instance, how would a defendant prove that he was not aware of a deal to avoid prosecution if it is not in writing? Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, should be considered in this certioraripetition. In Reilly's case, does the Court have to accept the deferred

prosecution offer because it is the prosecutor's discretion? But Reilly does, in fact, recognize the prong in *Lafler/Frye* to be problematic as it gives the trial court a way to get out of re-offering the plea by arbitrarily claiming that the court would not have accepted the plea. This was addressed in Justice Alito's *Lafler*dissent.

In *Frye* and *Lafler*, the United States Supreme Court held that not only must defendants demonstrate a reasonable probability they would have accepted the plea offer had they been afforded effective assistance of counsel, they "must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."*Frye*, 132 S. Ct. at 1409.

In *Alcorn v. State*,121 So. 3d 419, 422 (Fla. 2013), the Florida Supreme Court held that to prove ineffectiveness where a defendant rejected a favorable plea offer based upon the advice of counsel, the defendant must establish (1) that he would have accepted the offer had counsel advised correctly, (2) that the State would not have withdrawn its offer, (3) that the court would have accepted the offer, and (4) that the resulting conviction or sentence, or both, would have been less severe. *See also 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)).

Here, Reilly satisfied *Alcorn's* pleading requirements, and yet the trial court still denied him relief. The undisputed evidence in this case reveals that, after Reilly expressed interest in entering a plea and rejected the State's initial plea offer, the State then verbally extended an offer of deferred prosecution to Reilly's trial

counsel; and the State followed up with an e-mail to counsel referencing the deferred prosecution offer, but did not specifically outline the offer's terms. Counsel forwarded the State's e-mail to Reilly, but in so doing, counsel did not adequately explain the offer's terms. Consequently, when Reilly read the State's e-mail, he did not fully understand the specific terms of the State's new offer and what it entailed (*i.e.*, dismissal of the charges and no jail time), he apparently rejected an offer that was in his best interests, was later convicted at trial, and sentenced to state prison.

At the post-conviction evidentiary hearing on this claim, trial counsel claimed to have conveyed the State's offer of deferred prosecution to Reilly, but could not remember whether he did so over the phone or in person at his office. R. 214. Counsel reluctantly admitted that the offer was very generous and required very little in return. R. 214. And he claimed to have been upset that Reilly rejected it. *Id.*

As reason dictates, Reilly's August 13, 2007, e-mail demonstrates that trial counsel did not convey the deferred prosecution agreement to Reilly, or else Reilly would have accepted it, without question, in light of Reilly's express willingness to plea to a misdemeanor offense with jail time. The trial court's credibility determination, regarding whether trial counsel conveyed the offer to Reilly, is not supported by competent, substantial evidence.

C. THE NECESSITY FOR A REMEDY

This case would have a significant impact on the plea-bargaining process. Petitioner Sean Reilly wants to make sure that the injustice in his case does not happen to anyone else. This is why Mr. Reilly created an online petition to bring

change to this area of law.[16] In Mr. Reilly's case, the prosecutor extended an offer verbally in person to Reilly's defense attorney; it was to drop all charges in exchange for no contact with his accuser. This was called a Deferred Prosecution Agreement. However, this "once in a lifetime offer" was never made in writing, unfortunately the defense attorney never communicated this offer in any way, shape or form to Sean Reilly or his family. It appeared that his defense attorney had a large caseload and simply dropped the ball. There was evidence of unanswered emails to the attorney where Sean expressed interest in negotiating for a plea that would allow him to further his education and pursue his career. Sean did not want a felony conviction on his record. In another email, Sean expressed to his attorney that he wouldn't take a plea for a felony but rather a misdemeanor. The prosecutor would not agree as this was supposedly after not accepting the offer of dropping all charges. This does not make sense...Who would turn that down?

Ultimately after several trials, Sean received a total of 15 years in prison. He has now served about 10 years of that sentence. While in prison, Sean has filed complaints to the Florida Bar against the prosecutor and his trial lawyer, regarding any misrepresentations in his case. In response, Sean then learned for the first time of the plea offer to drop all charges prior to any other less favorable plea offers or trial. Sean and his family were devastated to find this out, knowing for the first

[16]See online petition meant to bring awareness to this problem of not obtaining plea offers or nonprosecution deals in writing. http://www.change.org/p/florida-governor-force-written-plea-bargains

time that all the years in prison and all the taxpayer dollars being spent could have and should have been avoided. Sean has spent most of his youth and formative years incarcerated. His family has suffered also. Sean's postconviction attorney demonstrated in court that there was an offer to drop all charges. Sean's trial attorney did not have the offer in writing. Sean would have taken that deal without question. The evidence that supports this is that if Sean was willing to accept a misdemeanor conviction then he would have taken the plea to drop the charges. However, the Judge concluded that he believes that based on his knowledge of the trial attorney's reputation, that the deal was offered to Sean and that he rejected it. There was no evidence to support the Judge's decision.

This is a terrible example of the criminal justice system lacking integrity, compassion, humanity and fairness. Sean pleads to the court to have mercy and grant this petition to force defense attorneys to maintain a documented record of plea offers. In this case, due to trial counsel's ineffectiveness, it would cause the prosecutor to again offer the plea to drop the charges, overturn his convictions and, finally, set him free again after all these years.

CRIMINAL DEFENDANTS WITH DISABILITIES

Even more compelling, Reilly suffers from a learning disability, in this case Attention Deficit Disorder. Almost certainly, there are many criminal defendants who suffer from learning disabilities or mental illness, such as: dyslexia, attention deficit disorder, attention deficit hyperactivity disorder, autism, among many others, that ultimately affect their ability to concentrate, discern or analyze details

and their decision-making. Criminal defense attorneys must put plea offers in writing for their clients, especially when they suffer from a disability that would demand some extreme focus.*See Fla. Rule Regulating Bar 4-1.14 (2018) (Client Under a Disability).*

Support from this Court would force defense attorneys to do their job andmake sure that all plea offers were in writing. This will also make them serve copies to the defense and defendant which would have to be signed as accepted or rejected by all parties involved. This would help make plea bargains honest and transparent.

CONCLUSION

The petition for a writ of certiorari should be granted. Mr. Reilly respectfully asks this for a narrow exceptionto resolve many misunderstandings that occur due to lack of written plea offers. This case asks this Court to apply a basic business law concept to the plea bargaining process.

The Supreme Court's decisions in *Lafler v. Cooper* and *Missouri v. Frye* were a step forward in protecting citizens' Sixth Amendment rights. The decisions represented the Court's first overt recognition that the Sixth Amendment right to counsel is distinct from the right to a fair trial, extending to plea bargaining even when the defendant received a fair trial. However, the right to be informed of, and properly advised on, plea offers is far less meaningful when its vindication depends upon counsel's good will and good memory in later ineffective assistance of counsel proceedings. Even more compelling, some criminal defendants suffer from mental

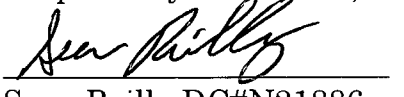
disabilities, which would require more attention to detail on a written plea offer.

In order to secure the rights of their clients, the criminal defense bar should adopt a standard record of the plea bargaining process. Such a practice is consistent with the lawyer's duties to preserve issues for appeal and to advocate zealously on behalf of her client. Further, it would provide a roadmap for the lawyer to ensure adequate investigation and advice and would discourage corner cutting. Even though the record would be additional work for defense lawyers, the bar can tailor it to minimize the impact. The criminal defendant is truly at the mercy of the defense lawyer, and the good advocate should seek to guarantee the rights of their clients.

This will prevent criminal defendants from being deprived their constitutional rights, liberty, educational opportunities and familial companionship. It's really a shame that Mr. Reilly had to navigate through the state courts, where his postconviction motion languished for many years, until arriving at the Supreme Court;where had the non-prosecution deal simply been put in writing this would have never happened.[17] The lack of this documentary requirement simply opens the door for this type of negligence. Perhaps a good question is: why transcribe trials or hearings at all? Why not just trust that everybody can remember what happened?

Dated this 7th day of October 2019.

Respectfully Submitted,



Sean Reilly DC#N21886

[17]Five trials leading to five convictions and a lengthy 15-year prison sentence; this was ultimately a sad ending to a promising future for the college graduate.