

No.

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IN THE SUPREME COURT OF THE UNITED STATES

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OMAR DAVIS,

PETITIONER,

v.

THE ADMINISTRATOR OF THE NEW JERSEY  
STATE PRISON; THE ATTORNEY GENERAL OF  
THE STATE OF NEW JERSEY,

RESPONDENTS.

---

ON A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FROM THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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Theodore Sliwinski, Esq.  
45 River Road  
East Brunswick, NJ 08816  
Counsel for Petitioner  
#000731991  
(732) 257-0708

#### QUESTIONS PRESENTED

The main question in this petition is whether a petitioner's due process rights were violated because he had ineffective assistance of counsel. Here, trial counsel failed to advise the petition of his maximum sentencing exposure that he faced if he went to trial. Moreover, trial counsel also failed to advise the defendant of the outstanding plea offers propounded by the State.

#### PARTIES TO THE PROCEEDINGS

The petitioner is an inmate at the New Jersey State Prison, located in Trenton, NJ. The respondent is the Administrator of the New Jersey State Prison, the Attorney General, and the State of New Jersey. All of these individual respondents are represented by the Atlantic County Prosecutor's Office located in Mays Landing, NJ.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Omar Davis, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, for the Third Circuit.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Third Circuit, was filed on November 21, 2019. (Exhibit A) Thereafter, the petition filed a petition for a rehearing en banc. The petition for a rehearing was denied on January 3, 2020. (Exhibit B)

**STATEMENT OF JURISDICTION**

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on January 3, 2020. (App. B) The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The Third Circuit Court of Appeals entered its judgment on January 3, 2020. This petition is filed within 90 days of the judgment. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The defendant's right to a fair trial and due process was violated because he had the ineffective assistance of counsel.

Here, trial counsel failed to advise the petitioner of his maximum sentencing exposure that he faced if he went to trial. Moreover, trial counsel also failed to advise the defendant of the outstanding plea offers propounded by the State.

#### STATEMENT OF CASE

This is a petition for certiorari appeals the Third Circuit Court of Appeals decision on January 3, 2020.

#### REASONS FOR GRANTING THE WRIT

##### POINT ONE

WHETHER TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE BECAUSE SHE FAILED TO INFORM THE PETITIONER OF THE MAXIMUM SENTENCING EXPOSURE HE FACED, AND BECAUSE SHE FAILED TO INFORM HIM OF THE STATE'S PLEA OFFER.

In this case, trial counsel never informed the petitioner of the maximum sentence he faced if he were convicted at trial. In fact, trial counsel never informed the petitioner about the State's plea offer either. Had counsel informed petitioner about the maximum sentence he faced and the state's plea offer, then there is a strong presumption that the petitioner would have plead guilty.

The PCR Court stated that "Davis maintained his innocence pre-trial, at trial, and at sentencing, and that his position through the time of his PCR hearing" was the reason that the Court denied the relief sought. (Exhibits D and E) Additionally,

both the District Court and the Circuit Court erred in affirming this denial by relying on State v. Taccetta, 200 N.J. 183 (2009) and North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) for the proposition that "defendant's cannot accept a guilty plea while maintaining their innocence." State v. Taccetta, supra, 200 N.J. 184.

The Third Circuit Court of Appeals decision is contrary to its own precedent case law as enunciated in Caruso v. Zelinsky, 689 F. 2d 435 (3d Cir. 1982). Moreover, the decision in this case also contravenes other Circuit Court precedent(s) such as Carrion v. Smith, 365 F. Appx. 278 (2d Cir. 2010). In this case, trial counsel never informed the petitioner as to the maximum sentence that he faced if he were convicted at any trial. In fact, trial counsel never informed the petitioner about the State's plea offer either. Had counsel informed petitioner about the maximum sentence he faced and the state's plea offer, there is a strong presumption that petitioner would have plead guilty.

The PCR Court noted that; "Davis maintained his innocence pre-trial, at trial, and at sentencing, and that his position through the time of his PCR hearing" was the reason that the Court denied the relief sought. (Exhibits D and E) Additionally, both the District Court and the Circuit Court erred in affirming this denial by relying on State v. Taccetta, supra, 200 N.J. 183 and North Carolina v. Alford, supra, 400 U.S. 25, 91 S. Ct. 160 for the proposition that "defendant's cannot accept a guilty plea

while maintaining their innocence." State v. Taccetta, supra, 200 N.J. 183 (2009); the N.J. District Court decision in Hines v. Ricci, 2013 WL 1285290 (D. N.J. Mar. 26, 2013) ("Hines I"); and the United States Supreme Court precedent of Strickland v. Washington, 466 U.S. 668 (1984); Lafler v. Cooper, 566 U.S. 156 (2012); Florida v. Nixon, 543 U.S. 175, 187 (2004); and the Fifth and Sixth Amendment Right to the United States Constitution.

The careful consideration by this Honorable Court is necessary to secure and maintain uniformity of the established federal law. It is abundantly clear that a defendant has a Sixth Amendment Right to be apprised of any and all plea offers offered by the Government, and to be informed of the maximum sentencing exposure if the defendant goes to trial.

The Circuit Court's reliance on the District Court's opinion that "there is a likely chance that petitioner knew about the plea offer" is belied by the record. Davis v. D' Ilio, No. 14-7797 (D. N.J. Nov. 30, 2017, slip op at \*30). The District Court even noted that "there were no record of what the plea offer was, and there was no mention of the maximum sentence exposure should Petitioner proceed to trial." Id. at 30. (Exhibit C)

There was and still is a factual dispute surrounding the attorney's failure to advise the petitioner of both the maximum sentence exposure he faced if he went to trial, and the failure to advise the petitioner of the plea offer by the State. Thus, such that the Habeas Court should have *sua sponte* conducted an

evidentiary hearing to determine the truthfulness of the petitioner's claims. See, Turner v. United States, 183 F. 3d 474, 477 (6th Cir. 1999).

In the Griffin case, the Sixth Circuit observed that a defendant may enter a guilty plea while maintaining innocence under North Carolina v. Alford, supra, 400 U.S. 25, 91 S. Ct. 160 400. Here, the court held that there are "reasons other than the fact that he is guilty may induce a defendant to so plead and he must be permitted to judge for himself in this respect." Many defendant(s) believe that they must maintain innocence right up to the point of pleading guilty in order to fortify their bargaining positions. The Fifth Amendment provides a defendant the right to assert their innocence throughout a trial. In this case, trial counsel never informed the petitioner of the maximum sentence he faced, if he were convicted at trial. In fact, trial counsel never informed the petitioner about the State's plea offer either. Had counsel informed petitioner about the maximum sentence he faced and the state's plea offer, there is a strong presumption that petitioner would have plead guilty.

The PCR Court stated that; "Davis maintained his innocence pre-trial, at trial, and at sentencing, and that his position through the time of his PCR hearing" was the reason that the Court denied the relief sought. (Exhibit D) Additionally, both the District Court and the Circuit Court erred in affirming this denial by relying on State v. Taccetta, supra, 200 N.J. and North

Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) for the proposition that "defendant's cannot accept a guilty plea while maintaining their innocence." Id. It "does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. These declarations of innocence are not dispositive on the question." Id. Protestations of innocence throughout a trial are properly a factor in the trial court's analysis, however, they do not, by themselves, justify summary denial of relief without an evidentiary hearing. See, Cullen v. United States, 194 F.3d 401, 404-07 (2d Cir. 1999).

Other Circuit Courts have pointed to the disparity between the plea offer, and the potential sentencing exposure as strong evidence of a reasonable probability that a properly advised defendant wold have accepted a guilty plea offer, despite earlier protestations of innocence. See, Magana v. Hofbauer, 263 F. 3d 542 (6th Cir. 2001); (finding the difference between a ten and a twenty-year sentence significant); United States v. Day, 969 F.2d 39 (3d Cir. 1992).

The decision to plead guilty - first, last, and always - rests with the defendant, and not with his legal counsel. However, before a defendant can make an informed decision, the attorney has a clear obligation to fully inform the defendant of the available options. The failure to convey a plea offer and to explain the maximum sentence exposure constitutes ineffective

assistance of counsel. Lafler v. Cooper, supra, 566 U.S. 156, 162; Smith v. United States, 348 F. 3d 545, 553 (6th Cir. 2003); (Holding that an attorney must explain sentencing exposure the defendant will face as a consequence of exercising either option, trial or guilty plea).

A case on point is the Third Circuit case of Caruso v. Zelinsky, 689 F. 2d 435 (3d Cir. 1982). In Caruso, the defendant plead not guilty to all counts charged with. After being convicted, he unsuccessfully appealed to the State courts culminating in a habeas petition before the District Court of New Jersey. The defendant Caruso alleged that he was denied his Sixth Amendment Right to the effective assistance of counsel, in that, *inter alia*, a plea offer was communicated to his counsel. Here, but trial counsel failed to communicate the plea offer to the defendant. The District Court conditionally granted Caruso's writ of habeas corpus. On Appeal, the Third Circuit held that Caruso's trial counsel's alleged failure to advise him of a plea offer presented a substantial federal claim stating:

"The decision to reject a plea offer and plead not guilty is a decision for the accused to make. It would seem that, in the ordinary case, a failure of counsel to advise his client of a plea bargain would constitute a gross deviation from accepted professional standards." Id.

Id. at 438; see also, Sistrunk v. Vaughn, 96 F. 3d 666, 670 (3d Cir. 1996); (Noting that in a criminal defense the decision of whether to plead guilty is considered a fundamental decision for

solely the client to make). The defendant is the only person who has the right to accept or reject a plea offer, only after it is communicated to the defendant. See, Florida v. Nixon, 543 U.S. 175, 187 (2004); (a defendant has the ultimate authority to determine whether to plead guilty).

In this case, the petitioner has proven beyond a reasonable doubt that his attorney deprived him of due process by never communicating the state's plea offer to him. Moreover, trial counsel never advised the petition as to the maximum sentence exposure he faced if he went to trial. A subsequent "fair trial, conviction and sentence" does not remedy this deprivation. See, Rose v. Mitchell, 443 U.S. 545, 557-64 (1979).

Even if this court relies upon the Circuit Court's footnote that the petitioner did not raise this issue in his original or amended petition, he did in-fact, raise this issue in his reply. The District Court touched upon it in their opinion. (Exhibit C) Therefore, this Honorable Court should review the matter to avoid a manifest injustice. (Exhibit C) There is no possible way to ascertain if the petitioner would have changed his plea. The defendant was deprived of due process by his counsel's failure to advise him of the State's plea offer. Moreover, trial counsel failed to advise him as to his maximum sentencing exposure he faced if he went to trial. Therefore, his reliance on his "innocence" is belied by the record.

In the case of of Hines v. Ricci, 2013 U.S. Dist. LEXIS 48852, 2013 WL 1285290 (D.N.J. Mar. 26, 2013) ("Hines I"), filed on March 16, 2013, the Third Court held that the New Jersey courts' adjudication of Hines's ineffective assistance of counsel in plea negotiations claim was contrary to, or an unreasonable application of Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984), and Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366 (1985). See also 28 U.S.C. 2254 (d)(1).

The New Jersey Appellate Division, the last state court to explain its reasoning, had rejected Hines's ineffective assistance of counsel in plea negotiations claim without conducting an evidentiary hearing. The Appellate Division their determination on the grounds that Hines "cannot prove any prejudice from the alleged failure of counsel to provide him with an accurate explanation of his sentencing exposure because he continues to maintain his innocence." State v. Hines, 2010 N.J. Super. Unpub. LEXIS 956, 2010 WL 1753316 at \*2 (N.J. Super. Ct. App. N.J. 96, 999 A. 2d 465 Div., May 3, 2010), certif. denied, 203 (2010).

Because the prejudice standard enunciated by the Supreme Court in Strickland and Hill requires a defendant to prove that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the plea process would have been different, Lafler v. Cooper, supra, 132 S. Ct. 1376, and

because "an inquiry solely involving whether or not Hines proclaimed innocence is not the correct means by which to address prejudice when assessing a claim of ineffective assistance of counsel in the plea negotiation process." This Court held in Hines I that the New Jersey courts' adjudication of Hines's ineffective assistance claim was contrary to, or involved an unreasonable application of, clearly established federal law.

In basic terms, the Third Circuit held that the Appellate Division failed to apply the reasonable probability standard for determining prejudice set forth by the Supreme Court in Strickland and Hill. Hines I, 2013 U.S. Dist. LEXIS 48852, [WL] at \*21; see 28 U.S.C. 2254 (d) (1); see also Williams v. Taylor, 529 U.S. 362, 397, 120 S. Ct. 1495 (2000); (holding that the Virginia Supreme Court's adjudication of ineffective assistance claim was contrary to or an unreasonable application of Strickland's reasonable probability standard for prejudice, where the Virginia court ruled that a mere difference in outcome is not sufficient to find prejudice).

The Third Circuit Court in Hines also noted in its prior opinion, professions of innocence are not dispositive of the question of whether a petitioner has shown a reasonable probability that he would have accepted a plea offer, but for counsel's deficient advice. See, Hines I, 2013 U.S. Dist. LEXIS 48852, [WL] at 21 n. 9. The Third Circuit Court had agreed with

the reasoning of the Sixth Circuit:

Defendants must claim innocence right up to the point of accepting a guilty plea, or they would lose their ability to make any deal with the government. It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea. It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. Griffin v. United States, 330 F. 3d 733, 738 (6th Cir. 2003).

Based on the above legal arguments, it is most respectfully argued that the Circuit Court and the District Court erred in their decisions. Moreover, the instant judgment is contrary to established federal law, and it is in conflict with other Circuit case law. Thus, this Honorable Court should grant the petition and review this case more thoroughly. The petitioner requests the Supreme Court to review the constitutional issues raised herein, and to issue an opinion consistent with its own precedent, and provide clear instructions for the lower circuit to follow.

#### POINT TWO

**THE PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED AND THESE CONSTITUTIONAL ISSUES DESERVE SUPREME COURT REVIEW.**

The petitioner's major claim is that he alleges trial counsel was ineffective because he failed to inform him of his maximum sentencing exposure if he went to trial. He asserts that

had he known the sentence he was facing, then he would have accepted a plea agreement with the State. The State could not locate any of the records of the petitioner being advised of the sentence he was facing, if he chose to go to trial. The PCR court never even held a hearing to afford the Petitioner the same protections afforded to him under the 14th Amendment of the U.S. Constitution and under the New Jersey Constitution. (Exhibit E) (590a) (645a)

All defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, supra, 566 U.S. 156, 162. This seminal case clearly established federal law at the time of the defendant's trial held that in the context of ineffective assistance claims arising out of plea negotiations, Strickland's prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, supra, 474 U.S. 52, 59 (1985).

The relevant question specific to the petitioner's claim is whether but for trial counsel's ineffective performance, there is a reasonable probability the trial court and petitioner would have accepted the plea, and that the sentence would have been less severe than the life sentence imposed after trial. The defendant submits that his trial counsel neglected to inform him of any outstanding plea offer(s). The defendant submitted a sworn

statement to the PCR court that trial counsel had never informed him that he was facing a life sentence if he went to trial. No pre-trial memorandum or transcript of a pre-trial conference wherein the defendant was informed of the maximum sentencing exposure was submitted to the PCR court. The defendant argued he could not obtain an affidavit from his trial counsel, as she was now a sitting judge in Pennsylvania. (Exhibit E) (590a to 645a)

The parties were able to locate a transcript of a pre-trial conference dated November 7, 2001. The prosecutor indicated during that conference that "the State has made a proffered - a tentative offer in this case which was discussed with counsel, and my understanding is that there really isn't a meeting of the minds close to resolving along the terms proposed by the State." Id. at 12. There is no indication what the offer was or whether the defendant was present at this hearing. There is no mention of the maximum sentencing exposure that could be imposed if the defendant lost at his trial. (Exhibit D)

Here, the major issue is whether the New Jersey Appellate Division exercised an unreasonable application of the Strickland case. See, Branch v. Sweeney, 758 F. 3d 226, 233 (3d Cir. 2014). The state court relied on a New Jersey Supreme Court case holding a defendant was "'legally disabled from taking a plea offer'" because he testified at a PCR hearing he was innocent but would have lied under oath in order to plead guilty. Davis

II, 2013 WL 5729968 at (quoting State v. Taccetta, supra, 975 A. 2d 928, 935 (N.J. 2009)). (Exhibit D) (83a to 89a)

"The question 'is not whether a federal court believes the state court's determination' under the Strickland standard 'was incorrect but whether that determination was unreasonable - a substantially higher threshold.'" Knowles v. Mirzayance, 556 U.S. 11 (2009); (quoting Schriro v. Landrigan, 550 U.S. 465, 473 (2007)). "Because the Strickland standard is an especially 'general' one, 'a state court has even more latitude to reasonably determine' whether a petitioner has satisfied it." Mathias v. Superintendent Frackville SCI, No. 14-4694, 2017 WL 5563004, at \*10 (3d Cir. Nov. 20, 2017).

The defendant submits that the New Jersey Appellate Division's decision was an unreasonable application of Strickland and this claim should have not been denied. He also submits that he received the ineffective counsel because he was never advised as to the sentencing exposure. Pursuant to Missouri v. Frye, 132 S. Ct. 1399 (2012), the Sixth Amendment right to effective assistance of counsel extends to all critical stages of the criminal proceedings, including the consideration of plea offers that lapse or are rejected. Missouri v. Frye, supra, 132 S. Ct. at 1405. Here, the defendant was entitled to the effective counsel during the plea negotiations. "Anything less ..... might deny a defendant 'effective representation by counsel at the only

stage when aid and advise would help him.'" Missouri v. Frye, supra, 132 S. Ct. at 1407-1408.

The defendant submits that he would have accepted a plea if he was advised by trial counsel or by the court that he was exposed to a life sentence, with a 30-year stipulation of parole. The PCR court even acknowledged that there was no proof that the defendant was aware that there was a plea offer on the table. The Honorable Judge Garofolo of the Atlantic County Superior Court opined at the PCR hearing as follows:

The Court: And the first question is what's the offer. From arraignment status through status conferences, subsequent status conferences, has the offer changed, What is the offer? Okay?

Now, not to blow my own horn, because I don't intend to do that, but I was a presiding judge here for 15 years. I sat as a chair of the criminal presiding judge conference. I taught at the new judge orientation how to manage cases, how to conduct pretrial conferences, status conferences, et. cetera.

Do you think for a minute that I, or anyone, including the Prosecutor, would have wanted to engage in a trial of this difficulty after a mistrial, the length with which it took, the resources with which - that there was no effort to settle this case, that there was no offer made and that he didn't know that he stood to face life in prison if he were convicted? I mean that really - I mean that's almost akin to saying prove the sun didn't rise yesterday. You know, I mean it's so palpably, to me, not possible that this case could've gone to the jury selections and a second trial without the Defendant knowing what he faces, without there having been a tender of a plea offer.

Your only crack in the door, Mr. Kokes, Esq. is that there's nothing to support or corroborate that fact. You're trying to drive a Mack truck through that crack and you know what, you may get there. I don't know.

The PCR judge entirely contradicted himself. In the beginning of the hearing, he advised the parties that Mr. Davis had a bona fide case. However, in his findings he failed to give the defendant a plenary hearing. (Exhibit E) (639a to 645a) In the beginning of oral argument, the PCR judge advised the defendant that he had a bona fide case. However, in the PCR court's ruling, the court simply ruled that Mr. Davis did not establish a *prima facie* case. It is important to note that Judge Garofolo did not make any findings of fact that the defendant was advised of his sentencing exposure. Moreover, Judge Garofolo did not make any findings of fact that the defendant was advised of any plea offers. (Exhibit E) (639a to 645a)

In the case at bar, fundamental fairness and due process demands that the defendant should have also been definitively apprised of the State's best plea offer, and of the penal consequences of rejecting the State's plea offer in the event of conviction. (581a to 589a) These aspects of due process are embodied in Rule 3:9-3(g) and Rule 3:9-3(g).

Even if defense counsel did not convey his potential exposure, then the Atlantic Superior Court should have clearly done so. The function of the defendant's lawyer cannot supplant the Atlantic Superior Court's ultimate responsibility to convey these most important legal rights, and to determine whether they

have been understood. The trial court's duty was not fulfilled. Here, there is not a scintilla piece of evidence that the defendant understood these elemental aspects of the prosecution against him. Thus, the defendant's original sentence cannot stand. Here, the defendant should be re-sentenced within the parameters of the plea negotiations.

### POINT THREE

A REVIEW OF SUPREME COURT AND CIRCUIT CASE LAW CLEARLY PROVES THAT THE PETITIONER RECEIVED INEFFECTIVE COUNSEL BECAUSE HE WAS NOT ADEQUATELY ADVISED THAT HE COULD BE SENTENCED TO LIFE IN PRISON.

There is an abundance of case law that mandates that a petitioner has a Sixth Amendment right to be adequately advised as to his sentencing exposure. A review of federal case law demands that the defendant be re-sentenced to the original plea in this case. The defendant submits that a plea of eighteen years and a 85% NERA stip was offered in this case. The defendant submits that his case should be remanded to the Atlantic County Superior Court for re-sentencing. He should be re-sentenced to the same terms as the originally proposed plea offer.

A review of the federal case law overwhelmingly require that it is imperative that trial counsel must clearly advise the defendant of any plea offers. Illustrative is the case of United States v. Washington, 619 F. 3d 1252 (10th Cir. 2010). Here, the defendant's attorney failed to advise the defendant about the

consequences of admitting to "relevant conduct" during a pre-sentence interview with a probation officer. As a result, the defendant volunteered that he had engaged in numerous prior drug deals, which resulted in an increased sentence. The Tenth Circuit held that this amounted to ineffective assistance of counsel.

In the case of Davis v. Grigas, 443 F. 3d 1155 (9th Cir. 2006), the trial attorney was deemed ineffective by incorrectly advising the court about the sentence to which the defendant had stipulated as part of his plea. The stipulated sentence was a sentence of 6 to 15 year caps. However, the attorney told the sentencing judge that the defendant stipulated to a sentence of 15 years. This reason was grounds for federal habeas relief proceeding.

In the case of Missouri v. Frye, supra, 132 S. Ct. 1399, trial counsel failed to communicate to the defendant an outstanding plea offer. This oversight was deemed significant enough to constitute the ineffective assistance of counsel. The court ruled to show prejudice wherein a plea offer has lapsed or been rejected because of counsel's deficient performance, the defendant must demonstrate a reasonable probability both that he would have accepted the more favorable plea offer, had he been afforded the effective assistance of counsel. Additionally, the defendant must also establish that the plea would have been

entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.

In the case of Lafler v. Cooper, supra, 132 S. Ct. 1376, the United States Supreme Court held that wherein counsel's ineffective advice led to an offer's rejection, and wherein the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court. Moreover, the defendant must also prove that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

In the case of United States v. Bui, 795 F. 3d 363 (3d Cir. 2014), trial counsel erroneously advised the defendant that if he entered a guilty plea to possessing drugs within 1000 feet of a school, then he could receive safety-valve relief and receive a shorter sentence. However, the safety-valve was not available for this type of drug offense. The Third Circuit held that the attorney provided ineffective assistance in connection with the guilty plea. Thus, the guilty plea was therefore set aside.

In the case of Roundtree v. United States, 751 F. 3d 923 (8th Cir. 2014), the Eighth Circuit held that an evidentiary hearing should have been held. At the plenary hearing the court

could determine whether trial counsel failed to adequately warn the defendant that he was facing a mandatory life sentence if he was convicted at his trial.

In the case of United States v. Reed, 719 F. 3d 369 (5th Cir. 2013), the Fifth Circuit remanded this §2255 case back to the District Court to conduct an evidentiary hearing. The hearing was focused on whether trial counsel was ineffective by failing to properly advise the defendant about what sentence he would have received had he entered a guilty plea. Trial counsel (according to the defendant), advised him that he would be sentenced to 36 months if he accepted the plea offered by the government. The defendant claimed in his §2255 petition that he was actually facing between 8 - 14 months had he accepted the plea. A hearing on the merits of the claim was required.

In the case of Tovar Mendoza v. Hatch, 620 F. 3d 1261 (10th Cir. 2010), the trial attorney's grossly inaccurate statement to the defendant about the amount of time he would be required to serve if he pled guilty amounted to ineffective assistance of counsel. Thus, the guilty plea was ruled to be involuntary. Defense counsel told the defendant his sentence would be three years. The defendant was shocked when he ultimately received a sentence for 25 years.

In the case of Williams v. Jones, 571 F. 3d 1086 (10th Cir. 2009), trial counsel gave bad advice to his client that prompted

him to reject a plea agreement. The Tenth Circuit held that if an attorney gives bad advice to a client, that prompts the client to go to trial and reject a plea agreement, this may constitute ineffective assistance of trial, even if the trial was conducted in fair manner.

In the Williams v. Jones case, the defendant was offered a ten-year deal. His attorney told him that if he accepted the deal he "would be committing perjury" and the attorney would withdraw. The defendant went to trial, and he was ultimately convicted and sentenced to life without parole. The lower court found that the defendant was denied the effective assistance of counsel, and this was not appealed. The question facing the Tenth Circuit was what was the appropriate remedy. The court refused to decide what the appropriate remedy should be. Instead, the case was remanded to the lower court to fully explore the available options that would put the defendant in the situation he would be, without having been deprived of his right to effective assistance of counsel.

In the case of United States v. Morris, 470 F.3d 596 (6th Cir. 2006), in a crowded state court holding cell, the defendant met his appointed attorney met for the first time. He was offered a plea of four years, or face federal charges. The attorney had virtually no time to review discovery, or to have a private conversation with the defendant. She also provided inaccurate

advice about the possible federal sentence if he did not take the state plea offer. This level legal representation was ruled to constitute the ineffective assistance of counsel. The defendant rejected the state plea offer, and he was then prosecuted in federal court. The District Court judge concluded that the federal indictment should be dismissed so that the defendant could be given a reasonable opportunity to consider entering a plea to the state charge.

In the case of Satterlee v. Wolfenbarger, 453 F. 3d 362 (6th Cir. 2006), trial counsel's failure to communicate to the defendant a plea offer that was made by the prosecutor on the first day of trial was deemed to be ineffective assistance of counsel.

In the case of United States v. Herrera, 412 F. 3d 577 (5th Cir. 2005), the defendant claimed that if his attorney correctly advised him as to true sentencing exposure if he went to trial, then he claimed that he would have entered a guilty plea. The Fifth Circuit held that this claim merited an evidentiary hearing. The attorney supposedly told the defendant he faced a maximum 51 month guideline sentence, when, in fact, he faced a guideline range of 78 - 97 months after conviction at trial.

In the case United States v. Grammas, 376 F. 3d 433 (5th Cir. 2004), defense counsel erroneously advised the defendant that the base offense level for his crime was level 8. Whereas

the actual base offense level was 20. Counsel apparently was relying on the incorrect Guideline Manual, or did not realize that his client would be treated as an Armed Career Criminal. By underestimating the defendant's sentencing exposure, counsel breaches his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable. A remand for a hearing on the issue of prejudice was necessary.

In the case Nunes v. Mueller, 350 F. 3d 1045 (9th Cir. 2003), prior to trial, the state prosecutor offered a negotiated deal to the defendant that would have capped his sentence at eleven years. The defense attorney did not convey this offer correctly to the defendant (he portrayed the deal as a twenty-two year offer). The court focused their decision on the doctrine that the right to effective assistance of counsel includes the right to counsel during the plea negotiation process. The fundamental right that the defendant lost in this case was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate. The circumstances demonstrated the defendant would have accepted the offer had it been communicated to him properly.

In the case of Smith v. United States, 348 F. 3d 545 (6th Cir. 2004), trial counsel according to the petitioner in this §2255 petition, failed to advise him properly about a pending

plea offer. At a minimum the court should have held a hearing on this matter. Specifically, the petitioner claimed that he should have been fully informed about the various sentencing guideline scenarios that would exist following a trial, versus following the entry of a guilty plea. The possible sentence following trial was ten times harsher than the sentence that was offered in the negotiated plea and this information was not (according to the petitioner) conveyed to him.

In the case of Paters v. United States, 159 F. 3d 1043 (7th Cir. 1998), prior to trial, the government offered the defendant a five-year deal. Defense counsel incorrectly advised the defendant that he did not face more than that if he went to trial. Counsel failed to explain the concept of relevant conduct, or the acceptance of responsibility. Following a conviction at trial, the defendant was sentenced to 121 months. The government and the defendant agreed that the trial attorney's performance was deficient.

The Seventh Circuit held that the deficient performance was prejudicial, if the defendant could establish, on remand, that but for the incorrect advice, he would have accepted the plea agreement. See also, United States v. Gordon, 156 F. 3d 376 (2d Cir. 1998). Defense counsel's erroneous prediction of the Guideline sentence that the defendant faced amounted to ineffective assistance of counsel.

In the case Boria v. Keane, 99 F. 3d 492 (2d Cir. 1996), trial counsel was ineffective by failing to advise the defendant that it was in his best interest to enter a guilty plea. The plea that was offered would have resulted in a sentence of one to three years. Following his rejection of this offer, the state re-indicted under the "Rockefeller Law" and the resulting conviction resulted in a sentence of twenty years to life. Trial counsel admitted that he never advised the defendant that it was advisable to accept the plea, before the state re-indicted him.

In the case of Teague v. Scott, 60 F. 3d 1167 (5th Cir. 1995), the trial court misinformed the defendant about his sentencing exposure. The Fifth Circuit held that if counsel misinforms the defendant of the maximum possible sentence (as in this case, where the defendant was advised that the maximum sentence was twenty years, but the actual maximum was 99 years), this amounts to the ineffective assistance of counsel. Prejudice can be shown by the defendant's refusal to accept a plea offer which was far below the sentence which was ultimately imposed following a trial.

Finally, in the case Hart v. Marion Correctional Institution, 927 F. 2d 256 (6th Cir. 1991), the defendant was incorrectly advised by his attorney about the actual amount of time he might face if he entered a guilty plea. This ineffective assistance of counsel was compounded by inaccurate advice at the

guilty plea colloquy from the trial judge. The writ would be granted. See also, Sparks v. Sowders, 852 F. 2d 882 (6th Cir. 1988). Under state law, there is no such penalty as "life without parole." This, however, was what trial counsel advised the defendant he would receive if he did not plead guilty. This constitutes gross mis-advice rendering a guilty plea defective on the grounds of ineffective assistance of counsel.

POINT FOUR

THE PETITIONER RESPECTFULLY SUBMITS THAT THE PROPER REMEDY IN THIS CASE IS FOR THE UNITED STATES SUPREME COURT TO REMAND THE CASE FOR RE-SENTENCING TO ALLOW HIM TO ACCEPT THE ORIGINAL PLEA OFFER.

The petitioner submits that his case should be remanded to the Atlantic County Superior Court. The defendant submits that he was originally offered was an eighteen-year term, with the 85% NERA terms. Moreover, the petitioner submits that the appropriate remedy is that he should be offered the same plea offer that was originally offered by the Atlantic County Prosecutor's Office. If the court finds that the defendant was not properly advised as to his true sentencing exposure, then the critical remedy is what is the appropriate remedy. What remedy, if any, should be provided for ineffective assistance of counsel during the plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"

The most on point case that addresses this issue is Lafler

v. Cooper, supra, 132 S. Ct. 1376. In this assault with intent to commit murder case, trial counsel was found to be ineffective in advising respondent to reject the state's plea offer and proceed to trial. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two charges in exchange for a guilty plea. The respondent initially indicated a willingness to enter the deal, but later rejected the offer because counsel convinced him that the prosecution would be unable to establish his intent to commit murder on the basis that the victim had been shot below the waist.

After a full and fair trial, the respondent was convicted on all four counts and received a mandatory-minimum sentence of 183 to 360 months. Respondent asserted the claim of ineffective assistance of trial counsel for advising him to reject the state's plea offer. Rather than applying Strickland as was inappropriate in this circumstance, the state court simply found that respondent's rejection of the plea offer was knowing and voluntary. "By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." The Supreme Court again rejected the argument that Lockhart v. Fretwell modified Strickland. Id.

The court also reiterated the desirability of pleas as

"criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." On deficient performance, the Supreme Court noted that "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance," but the State conceded that counsel's conduct was deficient in this case. Id.

Thus, the only question before the court was how to apply Strickland's prejudice test where counsel's ineffectiveness resulted in rejection of a plea offer. The Lafler court ruled that;

In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Id. at 1376.

The respondent established a reasonable probability that he would have accepted the plea offer, and the court would have accepted the guilty plea. In addition, prejudice was shown as respondent received a sentence 3  $\frac{1}{2}$  times more severe than he likely would have received by pleading guilty. In fashioning a remedy, the court noted that "a remedy must 'neutralize the taint' of a

constitutional violation."

The correct remedy in these circumstances ..... is to order the State to re-offer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and re-sentence respondent pursuant to the plea agreement, to vacate only some of the convictions and re-sentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. Id.

The case of Padilla v. Kentucky, 130 S. Ct. 1473, 559 U.S. 356 (2010), firmly established that the Sixth Amendment guarantees effective the assistance of counsel during plea bargain negotiations - regardless of whether a defendant accepts or rejects an offer. Since this protection applies to all stages other than trial, the defendant argues prejudice cannot be judged solely by determining the fairness and reliability of a trial. Instead, the deficiency may cause prejudice if it affects "the outcome of the plea process." The defendant argues that it does not matter if he would have insisted on going to trial but for his counsel's error. Rather, the deficient performance affected the outcome of the plea process by denying him the opportunity to accept a plea deal.

The petitioner also submits the only principled and logical remedy for an ineffective-assistance claim is to put the defendant back in the position in which he would have been absent the violation. The defendant argues that placing him in the position to decide whether to accept the prior plea agreement is

a narrowly tailored and appropriate remedy.

Another similar case is Dasher v. Attorney General, Florida, 574 F. 3d 1310 (11th Cir. 2009). Here, counsel was ineffective in a drug case for advising a client to reject plea offer from the judge, and to plead guilty without any agreement on the sentence. The prosecutor offered the defendant a two-year sentence, which was rejected. Due to a huge backlog of cases and overflowing jails, the trial court, who rarely involved himself in plea negotiations, made his own offer of 13 months in a Florida State prison. The defendant, however, preferred a 12-month sentence that could be served in a county jail.

Counsel advised the defendant that if he rejected the plea offer, pled straight up, and offered some mitigating evidence, the trial court likely would not sentence the defendant to more than 13 months. The defendant pled guilty the same day and, considering a pre-sentence report prepared by defense counsel that revealed numerous juvenile and adult priors, the court sentenced the defendant to 10 years. Id. at 1,310.

Counsel's conduct was deficient in that "the advice he gave ..... was a piece of foolishness," because, with the 13 month offer, the judge was already "giving away the store." Once the defendant rejected the judge's offer and pled straight up, the judge "had no reason to give him the thirteen-month sentence he offered to induce a plea." In addition, although

counsel suggested presenting mitigation to convince the judge, "it was obvious that he was not then aware of any." Id. at 1310 to 1312.

The court further held that it does not suggest that there are no circumstances where it would be reasonable for a lawyer to advise his client to plead guilty without an agreement and throw himself at the mercy of the judge. However, the court noted that this was not such a case. The court also held that whether or not the defendant had a lengthy prior criminal record, the defendant was clearly risking a sentence of substantially more than thirteen months, and there was certainly no reason to believe he would do better. Because the defendant had served all but five months of his sentence, the sentence was modified to time served. Id. at 1310 to 1312.

In the case Nunes v. Mueller, 350 F. 3d 1045 (9th Cir. 2003), counsel was ineffective in a second degree murder case. Trial counsel gave the defendant incorrect information and advice concerning the state's plea offer, which resulted in the defendant rejecting the offer. The defendant was initially charged with murder during the first two trials, the jury hung. After the third trial, the defendant was convicted of second degree murder but that conviction was reversed on appeal. Prior to the fourth trial, the state offered the defendant a sentence of eleven years in exchange for a guilty plea to voluntary

manslaughter.

Counsel met only briefly with the defendant and he did not adequately explain the offer. The defendant believed the offer was for a 22-year sentence. The first time the defendant was able to talk to counsel again and clarify the offer was on the day of trial when the offer had expired. The defendant was convicted of second degree murder and received a 15 years to life sentence. Without holding an evidentiary hearing, the state court held that the defendant had not made out a *prima facie* case for prejudice and denied relief.

Analyzing the case under the AEDPA, the Ninth Circuit found that the state court's decision was an unreasonable application of the law to the facts, and an unreasonable application of clearly established Supreme Court law. The court held that there was ample evidence in the record to establish a *prima facie* case. The state court also unreasonably required the defendant to prove prejudice with absolute certainty when he needed only to demonstrate that there was a reasonable probability that he would have accepted the plea offer.

Here, the defendant has met that burden. To the extent the state court demanded more, it applied the Strickland test unreasonably. To the extent that the state court had made findings of fact, the court held that deference was not required because the state court did so without holding a hearing.

Prejudice was clear here in that the defendant's strategy throughout all four trials was to argue that he was guilty only of voluntary manslaughter.

Thus, the court found that it was reasonable to infer that he would have accepted an offer to plead guilty to voluntary manslaughter. To the extent that the state court made contrary inferences without a hearing, the court found that the state court decision was objectively unreasonable because there were equally valid inferences that could have been drawn in the defendant's favor. The court ordered the defendant released unless the state made an identical plea offer to the defendant.

In the case of United States v. Cobb, 110 F. Supp. 3d 591 (E.D. Pa. 2015), the court held that counsel was ineffective in a drug conspiracy and distribution case. Trial counsel incorrectly advised the defendant with respect to the possible maximum sentence, which resulted in the defendant rejecting a favorable plea offer. Prior to trial, counsel repeatedly recommended a guilty plea with continued cooperation with the government, and a sentence range of 100 to 125 months if he pleaded guilty. Counsel, however, incorrectly believed that the defendant "was a career offender - a designation that would increase his Guidelines range from 130-162 months to 360 months to life." Id.

The defendant proceeded to trial and was sentenced (with an upward departure) to 24 years. Even if the court still would have

applied the upward departure following a guilty plea, it is reasonably probable that the sentence would have been shorter than that given. While the defendant sought a new trial, the court found this would be an inappropriate "windfall" because the defendant had been convicted at a fair trial. The court noted It's discretion in the matter and ordered additional briefing on the appropriate remedy.

In the case of Harris v. United States, 701 F. Supp. 2d 1084 (S.D. Iowa 2010), the court held that counsel was ineffective in a cocaine distribution case for incorrectly advising the defendant. The defendant erroneously rejected the government's offer to plead guilty and accept responsibility for 100 grams of cocaine in exchange for a 10-year sentence. The defendant was charged with distributing on four occasions a total amount of 7.5 grams, but a superseding indictment included special findings that she was responsible for 500 grams to 1.5 kilograms.

Due to counsel's misunderstanding of the role of "relevant conduct" under the sentence guidelines, and his belief that the defendant could not be held responsible for more than 7.5 grams if she plead guilty, the defendant rejected the plea offer and entered an open guilty plea.

Over her objection, the court accepted the PSI finding that she was responsible for 315 grams and sentenced her under the guidelines to 151 months, which was later reduced to 121 months.

Counsel's conduct was deficient as counsel did not understand the application of Booker or the sentencing guidelines to the case. The court recognizes that counsel cannot be expected to predict the eventual sentence that a defendant will receive. Counsel should be expected, however, to advise a defendant on at least the fundamental provisions of the guidelines so that she can make an intelligent decision whether to accept or reject a plea. Id. at 1094. Prejudice was found as the defendant would have accepted the government's plea offer if she had been adequately advised. The remedy granted was reinstatement of the offer to plead to 100 grams of cocaine base for a 10-year sentence.

In the case of United States v. Wilson, 719 F. Supp. 2d 1260 (D. Ore. 2010), counsel was ineffective in drug case in failing to adequately advise the defendant in pretrial negotiations. The remedy ordered was reinstatement of the government's initial six year plea offer.

In the case of United States v. Kimes, 624 F. Supp. 2d 565 (W.D. La. 2009), counsel was deemed ineffective in a methamphetamine and conspiracy case for failing to advise the defendant of the potential sentencing benefits of pleading guilty. The court held that was "reasonably likely" that the defendant would have received a lower sentence if he had been adequately advised and pled guilty. The sentence vacated and resentencing ordered as if the defendant had plead guilty.

In the case Carrion v. Smith, 644 F. Supp. 2d 452 (S.D.N.Y. 2009), aff'd, 365 Fed. Appx. 278 (2nd Cir. 2010), the court held that under AEDPA, counsel was ineffective in drug and attempted murder case for inadequately advising the defendant, which resulted in rejection of the state's pre-trial plea offer. The court ordered the reinstatement of the plea offer.

In the case of United States v. White, 371 F. Supp. 2d 378 (W.D. N.Y. 2005), counsel was ineffective in drugs and weapons case for failing to know of, and to adequately advise the defendant of the consequences of a second conviction of possessing a firearm in furtherance of a drug crime. This error caused the defendant to reject a plea agreement.

Counsel's conduct was deemed deficient, because even a conviction of more than one count of the statute, even if contained in a single indictment, required a 30-year mandatory consecutive sentence. If the defendant had been adequately advised, he most likely would have accepted the plea offer. This plea offer would have required a plea to only one count of this offense, and would have required a sentence of 147 to 168 months under the Sentencing Guidelines. Although the defendant had been convicted at trial, but not yet sentenced, the court found that habeas review under 28 U.S.C. 2241(c) was appropriate. Thereafter, the court ordered that the rejected plea agreement would be enforced, and convictions were set aside. The defendant

was re-sentenced in line with that agreement and scheduled for a re-sentencing for a later date.

#### CONCLUSION

The petitioner submits that he has established that he received ineffective counsel because he was not advised as to any plea offer. He submits that he would have accepted a plea of eighteen years with a 85% stip if he was advised of it. There were no pre-trial memorandum prepared/filed that explained the defendant's sentencing exposure or plea offers generated in this case.

Additionally, the trial court also should have protected the defendant's rights and made sure that all plea offers were properly conveyed to him. In lieu of all of the above referenced legal authority, the petitioner submits that he should be re-sentenced to the term of eighteen years with an 85% NERA parole disqualifier.

  
By: THEODORE SLIWINSKI, ESQ.  
ATTORNEY FOR PETITIONER

DATE: 3/4/2020