No. 20-19-8839

SUPREME COURT OF THE UNITED STATES

CLAYTON D. MORROW,

Petitioner,

vs.

STATE OF FLORIDA;

Respondent.

On Petition for a Writ of Certiorari to
the First District Court of Appeal, Florida
Case No.: 1D19-2038

PETITION FOR WRIT OF CERTIORARI

Clayton D. Morrow, DC# 798067
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Graceville, Florida 32440-2402
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Question Presented

Does a public records request meet the criteria to establish a newly discovered evidence claim as Brady v. Maryland[1], does; especially when the information found is that of a favorable plea offer with an attached deadline that was never relayed by counsel to defendant, as announced in Missouri v. Frye[2]?

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[2] Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012).

II. LIST OF PARTIES

Office of the Attorney General, Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida 32399-1050.

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V. Petition for Writ of Certiorari

Clayton D. Morrow, an inmate currently incarcerated at Graceville Correctional facility in Graceville, Florida act *pro se* respectfully petitions this Court for a writ of certiorari to review the judgment of the First District Court of Appeal, Florida.

VI. Opinions Below

The order by the Second Judicial Circuit Court in and for Gadsden County, Florida is unpublished (May 16, 2019). (Appendix: B). The First District Court of Appeal *per curiam* affirmed without written opinion on February 28, 2020, (Appendix: A-1) rehearing was denied on April 21, 2020 (Appendix: A-2).

VII. Jurisdiction

Mr. Morrow's motion for rehearing in the First District Court of Appeal was denied on April 21, 2020. (Appendix: A-2). Mr. Morrow invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of Florida's First District Court of Appeal's judgment.

VIII. Constitutional and Statutory Provisions Involved

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

IX. Statement of the Case and Facts

1. Procedural Posture

Petitioner, who "open" pleaded guilty to one count of Attempted Sexual Battery By Serious Physical Force, and one count of Burglary of a Dwelling With a Person Assaulted, filed a post-conviction relief petition under newly discovered evidence after filing a public records request which revealed a 25-year plea offer with an attached deadline, alleging that his counsel's failure to inform him of the plea offer whatsoever, denying him Sixth Amendment effective assistance of counsel. A state court denied the post-conviction relief motion after holding an evidentiary hearing, reaching the merits of Petitioner's claim and the Florida Appellate Court per curiam affirmed with no written opinion. Petitioner, seeks review of this Court.

2. Overview

Petitioner was charged by Amended Information dated October 14, 2003, with one count of Attempted Sexual Battery By Serious Physical Force, a first-degree felony punishable by up to thirty (30) years in the Florida Department of Corrections, and one count of Burglary of a Dwelling With a Person Assaulted, also a first-degree punishable by up to life in prison.

Petitioner entered "open" pleas of no contest as charged on October 22, 2003, and on November 7, 2003, after a sentencing hearing, the Court sentenced him to 15 years in the Florida Department of Corrections on the charge of Attempted Sexual Battery By Serious Physical Force, and to life in prison on the charge of Burglary of a dwelling With a Person Assaulted.

Petitioner's counsel did not advise him of a 25-year plea offer, which expired. Over the years since Petitioner was adjudicated guilty and sentenced to prison; he has diligently sought some form of post-conviction relief effort with assistance from retained private counsel who specialized

in post-conviction relief deliberations, these efforts include his own *pro se* labors, all to no avail[1].

While researching at the prison Law Library *pro se* to seek some type of relief, he sought assistance from an inmate prison law clerk. The law clerk realized Mr. Morrow's record was incomplete and suggested that he submits a public records request under the authority of Florida Statutes § 119 to the Office of the State Attorney to obtain his complete case file. Petitioner immediately sought the records from the State Attorney's Office (hereinafter SAO) and upon the SAO receiving full payment they mailed the record to him.

Reviewing the record[2], Petitioner came across a copy of an e-mail messages that he never had seen before, the first e-mail had been initiated by SAO, Mr. Jack Campbell. Mr. Campbell sent the e-mail to Petitioner's Public Defender, Ms. Judy Hall dated: August 6, 2003, the subject: Clayton Morrow. For the first time Petitioner realized that the

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[1] Record shows assistance of retained private counsel who were trained professionals in post-conviction and appellate law. Harold S. Richmond filed a 3.800(c) and a 3.850 motion on June 21, 2004 and then appealed to the First District Court of Appeal (903 So.2d 194); Clyde M. Taylor, filed a 2nd 3.850 motion on June 15, 2006 no appeal was taken; and Crystal McBee Frusciante, filed a 3.800(a) motion on September 26, 2011 and then appealed to the First District Court of Appeal (98 So.3d 572). On March 25, 2013 Petitioner filed a pro se 3rd 3.850 motion, denied on April 22, 2013 with appeal to the First District Court of Appeal (125 So.3d 156) being denied on October 7, 2013.

[2] Petitioner received the State Attorney's file on: October 17, 2016.

SAO had offered a plea for 25 years and this offer was never relied to him by his counsel. This text read as follows:

> I am filing a motion to get a DNA sample from him. Are you going to oppose it? I have redone the scoresheet and spoken to several folks and my bottom cap idea is not going to work. He needs to agree to the 25 or I am going to file an amended information. This is just too serious to leave to chance.
> JC
> 8/6/03

Another e-mail message initiated by Assistant State Attorney, Jack Campbell sent to Ms. Judy Hall dated: August 25, 2003, subject: Re: Clayton Morrow, this e-mail shows that a time limitation was placed on the plea offer.

> He knows he did it. I am filling out the discovery now. It will be available in a couple of hours. This is not about you, it is about him. My victim deserves relief and to put this behind her ASAP. Every time I read this it reminds me more of Stephen King.... I want you to do a competent job, but he deserves no mercy. I will hold the charges as they are for two more weeks, Wednesday, September 10, so you can review the case and feel comfortable in your counsel. He pleas then or I amend the charges.
> Thanks,
> JC
> 8/25/03
>
> >>> Judy Hall 08/25/03 09:04AM >>>
> Hey what's going on? I don't even have discovery yet. I went to see him yesterday but I can't force a plea when I don't even have discovery. This is a very serious case and this is the first

CMC. What is the rush? It would be ineff ass counsel to plea him to something like this without discovery.

>>> Jack Campbell 08/25/03 08:51AM >>>
Is he taking the deal on Wednesday? If not, I am going to go ahead and file the new information. I am not agreeing to him pleaing strait up to the current charges. Please let me know how he wants to proceed.
JC
8/25/03
[end of e-mail]

3. Post-conviction Relief Motion – Newly Discovered Evidence

Petitioner retain counsel, Mark V. Murray, and filed a motion for Post-conviction relief under Fla.R.Crim.P., Rule 3.850(b)(1) (newly discovered evidence) on February 18, 2017. The post-conviction court accepted the motion as timely filed. An evidentiary hearing was held on April 30, 2019, two witnesses were called, the Petitioner and trial counsel (Ms. Judith Hall). During the evidentiary hearing Petitioner was questioned about a October 13, 2003, letter (Appendix: C) that Ms. Hall (trial counsel) had sent to the victim in a feeble attempt to regain a favorable outcome after she had let the 25-year plea offer expired on September 10, 2003, without even telling the Petitioner about the offer. When the SAO learned about this letter he immediately wrote Ms. Hall a truculent letter (Appendix: D) dated: October 16, 2003, in response to Ms. Hall's

letter. After this fiasco, Ms. Hall encouraged Petitioner to enter into an open plea with an understanding of "Adj G guidelines score points do not exceed 181.6 no agreement as to sentence." (Appendix: E). On May 7, 2019, in their written order, (Appendix: B) the post-conviction court found Petitioner failed to prove prejudice by proving that he would have accepted the 25-year plea offer from the State and that his testimony was not credible.

Petitioner appealed *pro se* to Florida's First District Court of Appeal, where the court issued a per curiam affirmed with no written opinion on February 28, 2020, (Appendix: A-1) then denied Petitioner's motion for rehearing on April 21, 2020. (Appendix: A-2).

4. Appeal of Post-conviction Motion

On appeal, Petitioner's argument was based on the post-conviction court's three basic findings. One: Petitioner failed to prove that his trial counsel was deficient for failing to convey a plea offer; Two: Petitioner failed to prove prejudice by proving that he would have accepted the 25-year offer from the State; and Three: Post-conviction court found Petitioner's testimony not credible. Then, for the first time the State raised the claim in their answer brief claiming Petitioner's post-conviction motion under Fla.R.Crim.P., Rule 3.850(b)(1) was not timely

filed. Arguing, Petitioner did not exercise due diligence to make a public records request in the fifteen years since his conviction and had filed three prior post-conviction motions. This argument was not preserved for appeal in accordance with state law; the State failed to raise this matter below; since July 1, 1996, such unpreserved error cannot be raised on appeal. *See* 924.051(3).

Since the district court of appeal issued a *per curiam* affirmed decision without a written opinion, Petitioner argued in both his reply brief and motion for rehearing that the record indicates all three of these prior post-conviction motions were filed by private counsel[3], Petitioner relied upon professional attorneys' services.

Due to the *per curiam* affirmed with no written opinion, Petitioner was left to use the same reasoning that the Eleventh Circuit does when the state has briefed both an applicable procedural bar and the merits with respect to a given point, and the appellate decision is silent on the point, it should be presumed that the state decision rests on the procedural default. *See* Bennett v. Fortner, 863 F.2d 804, 807 (11th Cir. 1989) ("This circuit to a point has presumed that when a procedural default is asserted on appeal and the state appellate court has not clearly

[3] Refer to footnote #1, *supra*.

indicated that in affirming it is reaching the merits, the state court's opinion is based on the procedural default.").

Petitioner brought to the appellate court's attention in his motion for rehearing that they had addressed a similar case[4] regarding both, public records request and satisfying the exception in Fla.R.Crim.P., Rule 3.850(b)(1). Mr. Morrow also pointed out that the Florida Supreme Court had expressed that a defendant's duty to exercise due diligence in reviewing Brady[5] material applies only after the State discloses it[6]. Petitioner theorized that a Brady claim is equivalent to Florida's Alcorn claim[7]; in that material evidence/fact was never disclosed to him.

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[4] The case was Polk v. State, 906 So.2d 1212 (Fla. 1st DCA 2005), where during appellant's incarceration, appellant obtained, pursuant to a public-records request, a copy of the Florida Department of Law Enforcement DNA Report, which excluded him as a donor of the sperm fraction obtained at the scene. The trial court refused to consider appellant's claims as they were untimely filed. On appeal, the court found that appellant satisfied the exception in Fla. R. Crim. P., Rule 3.850(b)(1) to excuse his failure to abide by the two-year limitation period for filing a post-conviction motion as the DNA evidence was material and appellant had no duty to exercise due diligence in reviewing the DNA test results before the State of Florida actually furnished them. Therefore, the trial court erred in summarily finding Polk failed to demonstrate a valid exception to the limitation period and in refusing to consider the merits of the allegations.

[5] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963).

[6] See, Allen v. State, 854 So.2d 1255 (Fla. 2003).

[7] Alcorn v. State, 121 So.3d 419, 430 (Fla. 2013) (Lays out four requirements Defendant must meet to prove defense counsel's deficient performance prejudiced the defense: (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) 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.) The Florida Supreme Court adopted the prejudice analysis of 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) in Alcorn.

IX. Reasons for Granting the Writ

A. It appears numerous jurisdictions which include Florida and the Eleventh Circuit Court of Appeals do not accept, as newly discovered evidence, when a public records requests reveals a favorable plea offer with a deadline attached that was never relayed by counsel to the defendant.

This case involves public records newly discovered evidence claim of ineffective assistance of counsel claims arising out of counsel's failure to inform the defendant of a favorable plea offer that had a deadline attached. This is a true Missouri v. Frye, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012) claim. Such claims are rooted in the Sixth Amendment to the United States Constitution, which provides that the accused shall have the right to effective assistance of counsel in all criminal prosecutions.

This Court has recognized that the plea bargaining stage is a critical one, at which defendants are constitutionally entitled to effective counsel: "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." *Id.* at 1407.

Here, Morrow's counsel failed to convey to him a twenty-five year plea offer that had a two week deadline attached. Almost two months later Petitioner entered into an "open" pleas of no contest as charged on October 22, 2003 and on November 7, 2003, the Court sentenced him to 15 years in the Florida Department of Corrections on the charge of Attempted Sexual Battery By Serious Physical Force, and to life in prison on the charge of Burglary of a dwelling With a Person Assaulted.

Over the years since Petitioner was adjudicated guilty and sentenced to prison for life with no parole, he has diligently sought some form of post-conviction relief effort with assistance from three retained private counsels who specialized in post-conviction relief deliberations, these efforts include his own *pro se* struggles, all to no avail.

While researching at the prison Law Library Morrow learned he could submit a public records request under the authority of Florida Statutes § 119 to the Office of the State Attorney to obtain his complete case file. Petitioner immediately sought the records from the State Attorney's Office (hereinafter SAO) upon reviewing the record[8], Petitioner found a copy of an e-mail message that he never had seen

[8] Petitioner received the State Attorney's file on: October 17, 2016.

before, the e-mail had been initiated by SAO, Mr. Jack Campbell. Mr. Campbell sent the e-mail to Petitioner's Public Defender, Ms. Judy Hall dated: August 6, 2003, the subject: Clayton Morrow. Petitioner now realized that the SAO had offered a plea for 25 years and this offer was never relied to him by his counsel. This text read as follows:

> I am filing a motion to get a DNA sample from him. Are you going to oppose it? I have redone the scoresheet and spoken to several folks and my bottom cap idea is not going to work. He needs to agree to the 25 or I am going to file an amended information. This is just too serious to leave to chance.
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Another e-mail message initiated by Assistant State Attorney, Jack Campbell sent to Ms. Judy Hall dated: August 25, 2003, subject: Re: Clayton Morrow, this e-mail shows that a two week time limitation was placed on the plea offer.

> He knows he did it. I am filling out the discovery now. It will be available in a couple of hours. This is not about you, it is about him. My victim deserves relief and to put this behind her ASAP. Every time I read this it reminds me more of Stephen King.... I want you to do a competent job, but he deserves no mercy. I will hold the charges as they are for two more weeks, Wednesday, September 10, so you can review the case and feel comfortable in your counsel. He pleas then or I amend the charges.
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response to Ms. Hall's letter. After this fiasco, Ms. Hall encouraged Petitioner to enter into an open plea with an understanding of "Adj G guidelines score points do not exceed 181.6 no agreement as to sentence." (Appendix: E). On May 7, 2019, in their written order, (Appendix: B) the post-conviction court found Petitioner failed to prove prejudice by proving that he would have accepted the 25-year plea offer from the State and that his testimony was not credible. Petitioner appealed *pro se* to Florida's First District Court of Appeal, where the court issued a per curiam affirmed with no written opinion on February 28, 2020, then denied Petitioner's motion for rehearing on April 21, 2020.

On appeal, Petitioner's argument was based on the "post-conviction court's abused its discretion by ignoring factual findings that were supported by competent substantial evidence during the 3.850 evidentiary hearing." These three basic findings were: One: "Petitioner failed to prove that his trial counsel was deficient for failing to convey a plea offer"; Two: "Petitioner failed to prove prejudice by proving that he would have accepted the 25-year offer from the State"; and Three: "Post-conviction court found Petitioner's testimony not credible." In the State's answer brief, for the first time the State raised the claim that Petitioner's

post-conviction motion under Fla.R.Crim.P., Rule 3.850(b)(1) was not timely filed. Arguing, Petitioner did not exercise due diligence to make a public records request in the fifteen years since his conviction and had filed three prior post-conviction motions. The State's argument was not preserved for appeal in accordance with state law; in that the State failed to raise this matter below; since July 1, 1996, such unpreserved error cannot be raised on appeal. *See* 924.051(3) Florida Statutes.

Since the State district court of appeal issued a *per curiam* affirmed decision without a written opinion, Petitioner attempted to argue in both his reply brief and motion for rehearing that the State's argument was not preserved for appeal and the record indicates all three of Petitioner's prior post-conviction motions were filed by private counsel[9], Petitioner relied upon professional attorneys' services.

Due to the *per curiam* affirmed with no written opinion, Petitioner was left to use the same reasoning of this Court and the Eleventh Circuit Court of Appeals that when a state has briefed both an applicable procedural bar and the merits with respect to a given point, and the appellate decision is silent on the point, it should be presumed that the

[9] Refer to footnote #1, *supra*.

state court's decision rests on the procedural default. See Harrington v. Richter, 562 U.S. 86, 99-100, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court has adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. . . . The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely.") and Bennett v. Fortner, 863 F.2d 804, 807 (11th Cir. 1989) ("This circuit to a point has presumed that when a procedural default is asserted on appeal and the state appellate court has not clearly indicated that in affirming it is reaching the merits, the state court's opinion is based on the procedural default.").

Petitioner brought to the appellate court's attention in his motion for rehearing that they had addressed a similar case[10] regarding both, public records request and satisfying the exception in Fla.R.Crim.P., Rule

[10] The case was Polk v. State, 906 So.2d 1212 (Fla. 1st DCA 2005), where during appellant's incarceration, appellant obtained, pursuant to a public-records request, a copy of the Florida Department of Law Enforcement DNA Report, which excluded him as a donor of the sperm fraction obtained at the scene. The trial court refused to consider appellant's claims as they were untimely filed. On appeal, the court found that appellant satisfied the exception in Fla. R. Crim. P., Rule 3.850(b)(1) to excuse his failure to abide by the two-year limitation period for filing a post-conviction motion as the DNA evidence was material and appellant had no duty to exercise due diligence in reviewing the DNA test results before the State of Florida actually furnished them. Therefore, the trial court erred in summarily finding Polk failed to demonstrate a valid exception to the limitation period and in refusing to consider the merits of the allegations.

3.850(b)(1). Mr. Morrow also pointed out that the Florida Supreme Court had expressed that a defendant's duty to exercise due diligence in reviewing Brady[11] material applies only after the State discloses it[12]. Petitioner theorized that a Brady claim is equivalent to Florida's Alcorn[13] claim; in that material evidence/fact was never disclosed to him.

Additionally, the State's argument is flawed because under both Florida Public Records, Florida Statutes § 119.071(1)(d)1 and the Freedom of Information Act, 5 U.S.C. 552(b)(5) the e-mail manages in question are except, because they are considered "attorney work product". These e-mails meet the criteria described as "[...] prepared at the attorneys express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney [...]". *Id.* § 119.071(1)(d)1. See also Clark v. Exec. Office of United States Attys., 601 F.Supp.2d 170 (D.D.C. 2009)(Executive Office of The U.S. Attorneys and Office of Information and Privacy were entitled to summary judgment as to FOIA

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[11] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963).

[12] See, Allen v. State, 854 So.2d 1255 (Fla. 2003).

[13] Alcorn v. State, 121 So.3d 419, 430 (Fla. 2013) (Lays out four requirements Defendant must meet to prove defense counsel's deficient performance prejudiced the defense: (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) 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.) The Florida Supreme Court adopted the prejudice analysis of 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) in Alcorn.

request for plea negotiation records because an adequate search was made and draft plea agreement and handwritten notes were properly withheld under Exemption 5 of FOIA at 5 USCS 552(b)(5).).

It appears Florida and the Eleventh Circuit Court of Appeals are in unison, that a public records request does not satisfy the prerequisites of a newly discovered claim. In the case of In re: Victory, 2018 U.S. App. LEXIS 29600 (11th Cir. 2018) the Eleventh Circuit held that Victory was convicted in 2003, and relied on newly discovered evidence. He asserted that an acceptable pre-trial plea offer was erroneously mailed to the wrong attorney. He submitted that, in January 2018, he made a public records request to the State Attorney's Office and was provided with a previously undisclosed plea offer. He contended the plea offer was newly discovered evidence that only became known to him because he was preparing a clemency application. He asserted he was not previously advised about the plea offer by any party and that he could not have known about it. He also submitted he would have accepted the plea offer had he known about it.

The court ruled that Victory has not met the statutory criteria for filing a successive 2254 petition based on his newly discovered evidence

claim. Although he alleges that the plea agreement only recently became available to him, he has not shown that it was "new" within the meaning of the statute because it existed before Victory's trial. *See* 28 U.S.C. § 2244(b)(2)(B). Further, Victory did not show why this evidence could not have been discovered earlier through the exercise of due diligence. *See id.* Although he asserts that he only just learned of the plea agreement because it was sent to the wrong attorney, he fails to explain why he could not have made the public records request between his conviction in 2003 and his first habeas petition, which he filed in 2010. *See* In re: Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997) (discussing the due diligence requirement applicable to state prisoners under 2244(b)(2)(B)(i), and noting that the applicant's own ignorance of the factual predicate for the newly proposed claim is insufficient, as the issue is whether a reasonable investigation taken before the initial 2254 proceedings would have uncovered the "newly discovered" facts) and in In re: Figueroa, 2018 U.S. App. LEXIS 31026 (11th Cir. 2018) (In his application, Figueroa indicates that he wishes to raise one claim in a successive 2254 petition. Figueroa asserts that the state offered to him a plea which his attorney did not disclose to him. He asserts that this claim relies upon newly-discovered

evidence, because he could not discover the existence of the plea offer until someone helped him make a public records request. Assuming without deciding that the basis for Figueroa's claim could not have been discovered through due diligence before his 2002 initial habeas petition, Figueroa does not establish that the new evidence, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.").

Florida cases are in sync with the Eleventh Circuit, the most recent being Taylor v. State, 248 So.3d 280, footnote #1 (Fla. 5th DCA 2018) reads as follows:

> 1. [...] Otherwise, an evidentiary hearing is required to resolve the motion, including determining whether Taylor exercised due diligence in discovering the plea offer. The present order had no record attachments. Second, the court's indication in its denial order that Taylor essentially failed to establish under *Wright v. State*, 857 So.2d 861 (Fla. 2003), that "the newly discovered evidence is of such a nature as to probably produce an acquittal" has no application here as Taylor's "newly discovered" claim is based upon an allegedly undisclosed plea offer. *See Petit-Homme v. State*, 205 So.3d 848, 849 (Fla. 4th DCA 2016) (reversing a summary denial of a newly discovered plea offer claim and remanding for further proceedings to address whether the defendant could have

learned of the offer within the two-year time limit of rule 3.850).

As to the Florida Supreme Court adopting the prejudice analysis of Frye, and Lafler in Alcorn v. State, 121 So.3d 419 (Fla. 2013) the court explained their interpretation of cases which involve ineffective assistance of counsel claims arising of counsel's failure to correctly inform or failing to inform a defendant of a favorable plea offer. Such claims are rooted in the Sixth Amendment to the United States Constitution, which provides that the accused shall have the right to effective assistance of counsel in all criminal prosecutions. See Frye. This Court has recognized that the plea bargaining stage is a critical one, at which defendants are constitutionally entitled to effective counsel: "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." *Id.* at 1407.

By this Court's decisions in Frye and *afler*, the Court has now firmly established that plea negotiations are a "critical point" in the course of a criminal proceeding, during which the Sixth Amendment guarantees

criminal defendants the right to effective assistance of counsel. Frye, 132 S.Ct. at 1407 (recognizing that plea negotiations are a "critical point" in the course of a criminal proceeding where effective assistance of counsel is required); Lafler, 132 S.Ct. at 1384 (holding that a criminal defendant's Sixth Amendment right to counsel "extends to the plea-bargaining process," during which he or she is entitled to effective assistance of competent counsel). In reaching the conclusion that Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) also extended to situations where defendants *failed to accept a plea offer* and then proceeded to trial as a result of their attorney's deficient performance, this Court has pointed to the contemporary plea bargaining process as a chief component of the administration of the criminal justice system, concluding that "[i]n 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." Frye, 132 S.Ct. at 1407-08; *see also* Lafler, 132 S.Ct. at 1388.

This Court in Frye and Lafler determined the appropriate remedy when alleged deficient performance by counsel led to the defendant's non-acceptance of a plea offer and further proceedings resulted in a less

favorable outcome. In Frye, the defendant asserted that his attorney rendered ineffective assistance in failing to inform him of a plea offer, after which the offer expired. Frye, 132 S.Ct. at 1404. The defendant later pled guilty without a plea agreement and was sentenced to a term of imprisonment longer than what he would have served had he accepted the lapsed plea agreement. *Id.* at 1404-05. In evaluating the defendant's claim of ineffective assistance based on the uncommunicated plea offer, this Court applied the two-pronged test of Strickland. *Id.* at 1404. After concluding that counsel rendered deficient performance, the Court turned to the second prong of the Strickland test and held that "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id.* at 1409. Noting that a defendant has no right to be offered a plea bargain, however, this Court further held that a defendant must also show that "if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would

have prevented the offer from being accepted or implemented." *Id.* at 1410. Petitioner has met these requirements.

In Lafler, the companion case to Frye, this Court again applied Strickland to a claim of ineffective assistance of counsel arising from plea negotiations. There, the defendant rejected a plea offer based on counsel's misadvice and was later convicted at trial. Lafler, 132 S.Ct. at 1383. Because all parties had conceded before this Court that the defendant's counsel rendered deficient performance, the Court did not address the first prong of Strickland. *Id.* at 1384. In applying the second prong, the Court echoed Frye's holding: "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* Specifically, the Court held that where "ineffective advice led not to an offer's acceptance but to its rejection," in order to establish prejudice 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 1385. This Court concluded that this standard was satisfied under the facts of that case. *Id.* at 1391. The Court rejected the argument that there can be no finding of prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. *See id.* at 1385-88.

This Court in Lafler then addressed the appropriate remedy. In Lafler, the Court explained that remedies for Sixth Amendment violations should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 1388 (quoting *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). "Thus, a remedy must 'neutralize the taint' of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* at 1388-89 (quoting *Morrison*, 449 U.S. at 365).

This Court explained that a defendant who declines a plea offer as a result of ineffective assistance of counsel and then receives a greater sentence at trial, might endure a "specific injury" that comes "in at least

one of two forms," and the remedy should be tailored accordingly. *Id.* at 1389. The first category involves typical cases where " the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial." *Id.* When this occurs, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the [State] offered in the plea, the sentence he received at trial, or something in between." *Id.*

In the second category, however, resentencing based on a conviction at trial alone is insufficient because it does not fully redress the constitutional injury. *See id.* This situation can arise, for example, where "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial." *Id.* "In these circumstances," the Court reasoned, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* Presuming the defendant accepts the offer, the trial court "can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id.*

In Lafler, the defendant rejected the State's offer to dismiss two of his charges in exchange for a guilty plea. *Id.* at 1383. This Court held that the "correct remedy" under these facts was not to order specific performance of the original plea agreement, but "to order the State to reoffer the plea agreement" under the second category of available remedies. *Id.* at 1391. The Court left "open to the trial court how best to exercise that discretion in all the circumstances of the case." *Id.*

With respect to the limits circumscribing the trial court's discretion, this Court expressly declined to set any such limits, instead stating "[p]rinciples elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion." *Id.* at 1389. The Lafler Court noted two relevant considerations, however: (1) a court may take into account a defendant's expressed willingness, or unwillingness, to accept responsibility for his or her actions; and (2) while it was not necessary to decide whether a judge is required to disregard any information concerning the crime that was discovered after the plea offer was made, the baseline of the positions the

prosecution and defendant occupied prior to the rejection of the plea offer could be consulted. *Id.*

Petitioner Mets the Criteria Established by Frye and Lafter:

1. Petitioner did not know about the twenty-five-year plea offer until he received the records from the SAO, nor did his trial counsel convey this information to him. Petitioner was prejudiced by entering into an open plea with the Court and was sentenced to life in prison with no chance of parole. Therefore, Petitioner has overcome the successive motion bar and furthermore since counsel's failure to convey the plea offer has also constituted ineffective assistance of counsel. Petitioner alleged (1) that counsel failed to communicate a plea offer; (2) that the he would have accepted the plea offer but for the inadequate communication and that it was not his choose to dare plea open to the court where the sentence could have been a life sentence; (3) that acceptance of the plea offer would have resulted in a lesser sentence; and both the SAO and the trial court would have accepted the plea. In addition to proving his allegations of counsel's deficient performance, Petitioner has proved prejudice. The record does not indicate that the trial judge would not have accepted the offer. Petitioner also alleged and proved a reasonable

probability, defined as a probability sufficient to undermine confidence in the outcome, that the court would have accepted the offer, 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.

There is no conclusive proof in the record that Petitioner knew or should have known that the State had made a twenty-five-year offer when he filed his original rule 3.850 motion. An inherent prejudice results from Petitioner's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer. Furthermore, the newly discovered evidence indicates that State had set a time limitation on defendant as to whether to accept the 25-year plea offer or the State was going to amend the charges and go for the life sentence.

2. Petitioner alleged that his trial counsel actions were deficient, and that he has shown that there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Prejudice is not determined by a "more likely than not"

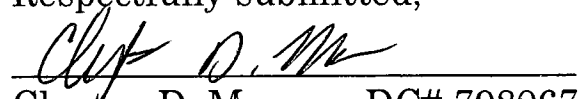
standard but rather is expressed in terms of undermining confidence in the outcome. Mr. Morrow has met his burden.

3. Mr. Morrow's claim is founded upon newly discovered evidence, should not have been argued on appeal by the State that it was untimely because the post-conviction court held an evidentiary hearing and reached the merits of the claim. Mr. Morrow has made a legitimate showing that the documents contained within his public records requests contain newly discovered evidence likely to entitle him to relief.

X. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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No. 20-_____

SUPREME COURT OF THE UNITED STATES

CLAYTON D. MORROW,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

TABLE OF APPENDICES

APPENDIX: A-1