No. 20-5574

ORIGINAL

Supreme Court, U.S.
FILED
AUG 17 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Jose Luis Torres — PETITIONER
(Your Name)

vs.

Smithfield SCI, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Luis Torres (I.D. No. KK-9715)
(Your Name)

Dallas SCI, 1000 Follies Road
(Address)

Dallas. PA 18612
(City, State, Zip Code)

N/A
(Phone Number)

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2. WHETHER A PROMISE TO DISMISS A LESSER OFFENSE OF RECEIVING STOLEN PROPERTY AS AN INDUCEMENT TO PLEAD GUILTY WAS VIOLATED WHEN THE PETITIONER WAS CONVICTED OF THE GREATER OFFENSE OF BURGLARY AT A SEPARATE TRIAL?

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## LIST OF PARTIES

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

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

Heather F. Gallagher, Esq.
Lehigh County Office
of District Attorney
455 West Hamilton Street
Allentown, PA 18101

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## RELATED CASES

Commonwealth of Pennsylvania v. Jose Luis Torres, Nos. 2821, 2822, 2828-2011 and 282, 289, 3824-2012, Court of Common Pleas of Lehigh County, PA. Judgment entered June 21, 2013.

Commonwealth of Pennsylvania v. Jose Luis Torres, No. 2117 EDA 2013, Superior Court of Pennsylvania. Judgment entered October 31, 2014.

Commonwealth of Pennsylvania v. Jose Luis Torres, No. 872 MAL 2014, Supreme Court of Pennsylvania. Judgment entered April 7, 2015.

Jose Luis Torres v. Kevin Kauffman, et al., No. 15-2703, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered September 12, 2019.

Jose Luis Torres v. Smithfield SCI, No. 19-3398, U.S. Court of Appeals for the Third Circuit. Judgments entered April 2, and June 4, 2020.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 2, 2020.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 4, 2020, and a copy of the order denying rehearing appears at Appendix D.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

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

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of a state prisoner to have the effective assistance of counsel at all critical stages of the criminal proceedings, including the entry of a guilty plea, is guaranteed by the Sixth Amendment to the U.S. Constitution. Missiouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379, 387 (2012).

The right of a state prisoner to be free from successive trials for the same offenses is guaranteed by the Double Jeopardy Clause, Fifth Amendment to the U.S. Constitution. Sanabria v. U.S., 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978).

Any promises that were made to a state prisoner as an inducement to plead guilty must be fulfilled pursuant to "due process of law" under the Fourteenth Amendment to the U.S. Constitution, Santobello v. New York, 404 U.S. 257, 262, 265, 266, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); and pursuant to the "law of contracts," Puckett v. U.S., 129 S. Ct. 1423, 1430 (2009).

The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 U.S.C. § 2254. The standard for relief under "AEDPA" is set forth in 28 U.S.C. § 2254(d)(1).

### STANDARD OF REVIEW

In Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029 (2003), this Court clarified the standards for issuance of a certificate of appealability (hereafter "COA"):

> A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further ... We do not require petitioner to prove before the issuance of a COA that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration that petitioner will not prevail.

Id, 123 S. Ct. at 1034, citing Slack v. McDaniel, 529 U.S. 473, 484 (2000).

## STATEMENT OF THE CASE

Between June 2010 and May 2011, Petitioner committed a series of ten burglaries in Lehigh County, Pennsylvania & neighboring jurisdictions. One of these burglaries, occurring on May 28, 2011, involved the residence of Michael Garman from where Petitioner removed a Smith & Wesson "9mm pistol." On June 3, 2011, police conducted a traffic stop where the Petitioner was arrested in possession of the 9mm pistol.

Two separate indictments or criminal informations were issued charging Petitioner, in relevant part, with possession & theft of the 9mm pistol as follows: On July 28, 2011, the Lehigh County District Attorney's Office charged Petitioner with:

CP-39-CR-2822-2011 (hereafter "first set") (Appendix N):

Count 1 - Receiving Stolen Property (hereafter "RSP") (18 Pa.C.S.A. § 3925(a)).

Count 2 - Persons Not To Possess Firearms (hereafter "PNTPF") (18 Pa.C.S.A. § 6105(a)(1)).

On February 14, 2012, the Lehigh County District Attorney's Office charged Petitioner with:

CP-39-CR-289-2012 (hereafter "second set") (Appendix O):

Count 25 - Burglary (18 Pa.C.S.A. § 3502(a)).

Count 28 - RSP (18 Pa.C.S.A. § 3925(a)).

Count 32 - PNTPF (18 Pa.C.S.A. § 6105(a)(1)).

On July 5, 2011, the Petitioner waived his preliminary hearing on the first set of charges in exchange for a promise from the prosecutor that any future sentences imposed, between those possession & theft counts, would run concurrent with each

other.[1]

On February 26, 2012, counsel presented Petitioner with a plea offer on the first set of charges: guilty plea to possession of the 9mm pistol (PNTPF) in exchange for a promise from the prosecutor that it would dismiss & not further pursue the theft of the firearm (RSP).

The Petitioner expressed a double jeopardy concern to counsel that the plea offer should also include & resolve the second set of charges because Petitioner believed both sets charged the same, exact offenses, in duplicate: PNTPF & RSP; and lesser & greater included offenses: Burglary & RSP.[2]

The following day, on February 27, 2012, in court, counsel advised Petitioner that the separate sets did not charge the same offenses, but were actually distinct offenses;[3] and, so, therefore, the prosecutor would not offer him a plea bargain which resolved both sets of charges at the same proceeding.

Petitioner was hesitant in accepting counsel's advice & asked counsel if she could request a continuance; in order to give Petitioner more time to consider the plea offer & to research whether counsel's advice was correct. Counsel stated that she would not request such a continuance because there were no double jeopardy concerns,[4] and that Petitioner had but two choices to make on February 27, 2012: either accept the plea offer or proceed immediately to trial.[5]

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1 See, N.T. 5/29/13, PCRA Evidentiary Hearing, pg. 15 (Appendix P).

2 Id, pgs. 88-89.

3 Counsel later explained that she believed the offenses were distinct from each other because: (1) the dates of the offenses were different; (2) they did not involve the same 9mm pistol; and (3) even if the same firearm were involved, the Petitioner could lawfully be charged more than once with possession of the same firearm. (Id, pgs. 24-25).

4 Id, pg. 33.

5 Id, pg. 65.

Based on counsel's advice insisting that both sets of charges were distinct & did not require consolidation under the law, Petitioner accepted the plea offer on the first set of charges, entering a guilty plea to PNTPF & receiving a sentence of 5 to 10 years imprisonment. In exchange for this conviction, as a quid pro quo part of the agreement, the prosecutor agreed to dismiss & not further pursue the RSP count.[6]

The factual basis for the guilty plea established that the 9mm pistol was the one stolen from the residence of Michael Garman & recovered from the Petitioner's vehicle at the time of his arrest.[7]

Thereafter, Petitioner had counsel appointed stand-by & proceeded pro se on second set of charges. On September 10, 2012, Petitioner accepted another plea offer which now resolved the second set of charges contrary to the first set. Petitioner now entered a guilty plea to the Burglary count in exchange for dismissal of the PNTPF count. In accordance with this plea agreement, the Petitioner received a sentence of 7 1/2 to 15 years imprisonment for his Burglary conviction; however, consecutive to the previous sentence of 5 to 10 years for PNTPF.[8]

The factual basis for this guilty plea also established the same facts as before: that the 9mm was the one stolen from the residence of Michael Garman & recovered from the Petitioner's vehicle at the time of his arrest.[9]

Post-Conviction History

Petitioner did not file a direct appeal, but on February 19, 2013, he filed

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6 See, N.T. 2/27/12, Guilty Plea & Sentencing, pgs. 2-4 (Appendix Q).

7 Id, pgs. 6-7.

8 See, N.T. 9/10/12, Guilty Plea & Sentencing, pgs. 2-5 (Appendix R).

9 Id, pg. 17.

a timely Pennsylvania Post Conviction Relief Act (PCRA) petition in the Court of Common Pleas of Lehigh County, Pennsylvania.[10] Counsel was appointed for Petitioner for his PCRA action, but the court-appointed attorney filed a Finley[11] no-merit letter and sought to withdraw from the case.

The PCRA court permitted appointed counsel to withdraw and after holding an evidentiary hearing denied the PCRA petition on June 24, 2013 (Appendix G). Petitioner filed a timely appeal to the Superior Court of Pennsylvania and on October 31, 2014, the Superior Court affirmed the denial of the PCRA petition (Appendix F). The Petitioner filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania and on April 7, 2015, the state Supreme Court denied the petition (Appendix E).

Petitioner filed a timely 28 U.S.C. § 2254 habeas petition on May 7, 2015, in the U.S. District Court for the Eastern District of Pennsylvania (Appendix K).[12] On April 30. 2018, U.S. Magistrate Judge Perkins issued a Report & Recommendation,

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10 The PCRA petition alleged ineffective-assistance based on counsel's failure to challenge offenses contained in separate indictments which were the same and/or related, prior to entering into the first plea agreement. Petitioner argued that counsel should have filed motions to consolidate the separate indictments & dismiss the duplicate counts pursuant to Pa.R.Crim.P 582: "Joinder of Offenses," and 18 Pa.C.S.A. § 110: "Compulsory Joinder Statute." Petitioner further alleged that counsel's failures subjected him to breaches of his plea agreements and/or double jeopardy under state law.

11 Com. v. Finley, 550 A.2d 213 (Pa. Super. 1988).

12 The habeas petition challenged the February 27, 2012 guilty plea which dismissed a lesser offense of RSP as an inducement to plead guilty to PNTPF, on the basis of ineffective-assistance where counsel failed to raise a 5th Amendment challenge to the same offenses contained in a separate case, advised there were no double jeopardy concerns and, thereafter, the prosecution offered another plea bargain which dismissed, in reverse order, the same PNTPF offense as an inducement to plead guilty to the greater offense of Burglary, breaching the terms of the former agreement (See, ground one & supporting facts of habeas petition, pgs. 8, 8(a)-(c)). Petitioner, also, filed separate Memorandums of Law clarifying his habeas claims (Appendices L & M).

recommending that habeas relief be denied (Appendix C), and on June 15, 2018, Petitioner filed Objections to the Report & Recommendation (Appendix J). On September 12, 2019, the District Court overruled Petitioner's Objections, adopted the Report & Recommendation, denied the § 2254 habeas petition and ruled that no probable cause existed to issue a certificate of appealability (Appendix B).

On October 1, 2019, Petitioner filed a timely Notice of Appeal to the U.S. Court of Appeals for the Third Circuit and a timely Petition for Certificate of Appealability on October 26, 2019 (Appendix H). On April 2, 2020, the Court of Appeals denied the Petition for Certificate of Appealability (Appendix A) and on May 8, 2020, Petitioner filed a timely Petition for Rehearing, which was denied on June 4, 2020 (Appendix D). The instant, timely Petition for Writ of Certiorari follows.

## REASONS FOR GRANTING THE PETITION

(Argument Summary)

This case presents a question regarding an ineffectiveness-assistance claim in the plea bargain context which this Court has found to be a question of tantamount importance & concern.[13] The particular facts & circumstances of this case sets it apart from others,[14] in that: counsel's deficient performance[15] caused separate & distinct plea bargains to be accepted which resolved the same offenses differently in each agreement; effectively causing the following three breaches:

Breach # 1: The first plea agreement dismissed a lesser offense of RSP as an inducement to plead guilty to PNTPF. The second plea agreement convicted Petitioner of the greater offense of Burglary.

Breach # 2: The second plea agreement dismissed the PNTPF offense as an inducement to plead guilty to Burglary. The first plea agreement convicted Petitioner of that same offense of PNTPF.

Breach # 3: The first plea agreement promised concurrent sentences between PNTPF & the lesser offense of RSP. The second plea agreement imposed consecutive sentences between the same PNTPF & greater offense of Burglary.

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13 Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379, 389 (2012) ("...pleas account for nearly 95% of all criminal convictions. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas not a system of trials,'" citing Lafler v. Cooper, 566 U.S. 156, 182 L. Ed. 2d 398, 411 (2012).

14 Lee v. U.S., 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017) & Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (setting aside guilty pleas because counsel had misinformed the defendants of its immigration consequences); Missouri, supra & Lafler, supra (setting aside guilty pleas where counsel's deficient performance caused favorable plea offers to lapse or be rejected).

15 (1) failing to file a motion to join two separate indictments containing the same offenses; (2) failing to file a motion to quash duplicate counts; and (3) advising that the offenses were not the same & presented no double jeopardy concerns prior to entry of a guilty plea.

## This Court Should Reject The Lower Courts' Denial Of Habeas Corpus Relief Because Their Decisions Are Contrary To, And Conflict With, Relevant Decisions Of This Court, And Other Federal & State Courts.

The U.S. Court of Appeals did not provide independent reasons for denying the COA. It relied on the same reasons provided by the U.S. District Court. Hence, only a review of the District Court's reasons are necessary.

### Merit

Since Petitioner's ineffective-assistance claim hinges on whether or not separate indictments, in fact, charged the same offenses which required joinder; as a threshold matter, the District Court needed to correctly determine all of the following:

Multiplicious Offenses of PNTPF:

Concerning duplicate counts of PNTPF, the District Court stated:

> "Moreover, Petitioner fails to provide support for the proposition that double jeopardy only permits a single prosecution for possession of a particular gun no matter how many distinct incidents involved that gun. There is no basis in the record to conclude that Petitioner could not be charged for possessing the Smith & Wesson gun at different times & in different places."

See, District Court's September 12, 2019 Opinion, at pg. 5, n5.

This determination is contrary to both, clearly established federal & state law as follows: The Double Jeopardy Clause protects a defendant against: (1) successive prosecutions; (2) multiple charges under separate statutes requiring proof of the same factual events; and (3) multiple charges under the same statute. U.S. Const. Amend. V. The multiplicity doctrine involves the third of these protections. Sanabria v. U.S., 437 U.S. 54, 65 n. 19, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). Also see, Bell v. U.S., 394 U.S. 81, 83-84, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (When a defendant is charged with violating one statute multiple times, "the question is whether the facts underlying each count were intended by [the legislature] to constitute separate 'units' of prosecution").

Concerning a defendant being charged with violating the Uniform Firearms Act (18 Pa.C.S.A. § 6101, et seq.) multiple times, Pennsylvania courts have answered the question posed in Bell clearly in the following cases: Com. v. Brandrup, 366 A.2d 1233 (Pa. Super. 1976), and Com. v. Woods, 710 A.2d 626 (Pa. Super. 1988):

> Here, this firearm offense [Former Convict Not To Possess A Firearm - 18 Pa.C.S.A. § 6105] was a continuing one ... the [defendant] had possession of the firearm on October 23 and 24, 1974, and continued to have it in possession until it was removed from him by police [on October 25, 1974] ...[defendant] continuously violated [18 Pa.C.S.A. § 6105] during the periods of time which he had possession of the firearm. Brandrup, 366 A.2d at 1235.
>
> The violation of the Firearms Act [possession/carrying] was separate and apart from [defendant's] usage of the firearm in the assaults ... [thus] the Commonwealth's decision to charge him with two violations [under the Firearms Act] is wholly arbitrary ... In the context of an uninterrupted or continuous carrying of a weapon, at what point does one stop carrying a firearm on the street and start anew? Does one commit a violation of the Act with every step he takes while carrying a firearm? Or does one commit a violation based upon a certain passage of time? If so, how much time must pass before a new offense begins? Is it a separate offense for every hour one carries a weapon? Or every ten minutes? ... [the defendant's] carrying of the weapon must be construed from a logical standpoint, to represent a single offense of the statutory prohibition against carrying a weapon. Woods, 710 A.2d at 631.

Contrary to the District Court's statement that the Petitioner failed to provide support for his proposition, the above authorities were provided to the court in supporting briefs (Appendices L, pgs. 2-5, and J, pgs. 3-6). The following federal cases also support the same proposition: U.S. v. Horodner, 993 F.2d 191 (9th Cir. 1993) (holding that defendant who was charged with two counts of being a felon in possession of a firearm retained "constructive possession" of the firearm at different places & times throughout a ten day period constituting only "one uninterrupted course of conduct"); U.S. v. Jones, 533 F.2d 1387, 1389-92 (6th Cir. 1976) (holding that defendant who was charged with three counts of possession of the same revolver on three separate dates & in different places constituted a "course of conduct, not an act." Thus, the defendant could only be convicted once for his possession of the firearm).

Thus, due to all of the above, the District Court's Opinion stating that the Double Jeopardy Clause permits multiple prosecutions for possession of a single firearm is clearly erroneous. The Petitioner, indeed, was charged in two separate counts with having possessed the Smith & Wesson, 9mm pistol "at different times & in different places": On May 28, 2011, in Berks County, Pennsylvania at the time of the burglary; and on June 3, 2011, in Lehigh County, Pennsylvania at the time of the traffic stop. However, between those two dates & counties, the Petitioner retained "constructive possession" of the firearm. Thus, Petitioner should not have been charged twice for "one uninterrupted course of conduct." As the Sanabria Court correctly stated, "a single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged. Sanabria, supra, 437 U.S. at 66 n. 20).

Multiplicious Offenses of RSP:

Concerning duplicate counts of RSP contained between separate indictments, the District Court determined that the record was unclear as to whether the counts were for being in "receipt of the same gun, another gun or some other stolen property" (pg. 5 of District Court's Opinion). The District Court's statement here was incorrect for the record does clearly establish that both counts of RSP involved receipt of the same 9mm pistol as follows:

Count 1 of 2822-2011 charged that Petitioner "did unlawfully receive ... a Smith & Wesson Model 659, 9mm pistol, serial # TBF2165, the property of Michael Garman." The notes of testimony of 2/27/12 further established that the firearm was recovered from the Petitioner's vehicle at the time of arrest (pgs. 6-7).

Count 28 of 289-2012 charged that Petitioner "did unlawfully receive ... movable property of another, as set forth in count 27 herein." Count 27 of 289-2012 described that movable property as "an electronic safe, two firearms ... property of Michael Garman. The notes of testimony of 9/10/12, at pg. 17, established that

the "electronic safe, two firearms, one of which was a 9mm Smith & Wesson pistol was recovered from [Petitioner's vehicle]" at the time of arrest.

Thus, the record does establish that Petitioner was charged with two counts of RSP for receipt of the same firearm. The following state authorities, consistent with the multiplicity doctrine cited in Sanabria & Bell, clearly establish that a defendant cannot be charged with multiple counts of RSP involving receipt of the same stolen firearm. See, Com. v. Farrar, 413 A.2d 1094, 1098 (Pa. Super. 1979) (The statute defining the crime of RSP makes the offense an ongoing or continuing one); State v. Schneller, 199 La. 811, 7 So. 2d 66 (1942) (The unlawful possession of stolen goods by a defendant over a period of several days constitutes a continuing offense and not a separate & distinct offense for each day he retained the goods); Annotation, Possession Of Stolen Property As A Continuing Offense, 24 A.L.R. 5th 132, Subsections 3(a), 4(a) (1994) (The crime of RSP begins at the time of receipt of stolen property and ends only when the defendant is divested of the stolen property). The above citations to the record & authorities were provided to the District Court at Appendix L, pgs 2-5.

Greater & Lesser Offenses: Burglary & RSP:

The District Court failed to determine whether separate indictments or cases contained greater & lesser offenses which should have been resolved together at one proceeding. See, Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (The Fifth Amendment forbids successive prosecutions and cumulative punishments for a greater & lesser offense");[16] Also see, Jeffers v. U.S., 432 U.S. 137, 150, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977) (defendant is entitled to have

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16 The general rule is well settled that upon an indictment charging a particular crime the defendant may be convicted of a lesser offense included within it. Thus, a person charged with burglary may be convicted of larceny, if the proof fail of breaking & entering. Hunter v. Com., 79 Pa. 503 (Pa. 1875).

charges on a greater & lesser offense resolved at one proceeding). It was critical for the District Court to rule on this issue because, as alleged in the habeas petition, Petitioner requested that counsel move to consolidate the Burglary at count 25 of 289-2012 with the RSP at count 1 of 2822-2011 for the purpose of resolving them together at the same guilty plea proceeding. However, counsel failed to raise the joinder issue with the court & advised that the prosecution was correct in refusing to consolidate those offenses; a grave error on counsel's part and a prosecutorial decision prohibited by the Fifth Amendment. The above argument on greater & lesser offenses was presented to the District Court at Appendix L, pgs. 6-7.

Deficient Performance

Thus, due to all of the above, it is clear that there should not have been multiple charges for a single offense in this case, nor separate guilty plea proceedings which resolved the same offenses. Hence, trial counsel should have moved to consolidate the separate indictments or cases and further moved to quash the duplicate counts which existed on Fifth Amendment grounds. Had counsel filed those motions, Petitioner would have ended up facing single counts of PNTPF & RSP relative to the 9mm pistol; and those single counts would have been resolved, jointly, with the related Burglary count at the same guilty plea proceeding. A result with a much different outcome than the result caused by the separate proceedings as addressed in the next section: "Prejudice."

Instead, counsel failed to file the above motions & advised Petitioner incorrectly that no double jeopardy concerns existed, based on his flawed beliefs and understanding of the relevant facts & law in this case (refer to fn. 3 herein). Hence, counsel's performance under Strickland[17] was deficient. See, Hinton v.

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

Alabama, 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) (It is well established that an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland).

Wherefore, because of all of the above, the District Court's determination that "counsel's performance was not constitutionally deficient"[18] is erroneous and contrary to Strickland.

Prejudice

Deficient performance must be paired with specific prejudice - "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The "traditional inquiry for prejudice in the plea context is whether there is a reasonable probability that, but for counsel's errors, the petitioner would have foregone a guilty plea and insisted on trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

This Supreme Court has expanded this inquiry to cover instances in which the deprivation of the right to trial was not the concern, but rather the opportunity to enter a different guilty plea. However, there must be a showing as to whether the other plea would have been available, accepted by both petitioner & the court, and importantly, that the other plea offered 'less severe' terms than the 'judgment & sentence' that was in fact imposed." Lafler, supra, 566 U.S. at 163-64.

Yet, there is another component of prejudice that must be considered in this case because it involves breaches of the plea agreements, that would not have occurred were it not for counsel's unprofessional errors. This Court has stated

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18 pg. 4 of District Court's Opinion.

that, "if the prosecution breaches its promises with respect to an executed plea agreement, then the defendant's conviction cannot stand" because "whether purposeful or inadvertent, that breach must be remedied regardless of whether the defendant was prejudiced thereby" Santobello, supra, 404 U.S. at 262-63. Also see, Dunn v. Colleran, 247 F.3d 450, 463 (3d Cir. 2001) (Under the law of the U.S. Court of Appeals for the Third Circuit, Santobello errors are to be treated as akin to structural defects and are not susceptible of harmless error analysis in habeas proceedings).

Keeping all of the above in mind, The District Court's determination that Petitioner suffered no prejudice from counsel's failure to act cannot stand[19] for the following reasons. Before arriving at the prejudice prong, the District Court had already failed to correctly determine the first two prongs: Merit & Deficient Performance;[20] and failed to address any of the three, specific allegations of attorney error made in the habeas petition (refer to footnote 15). The Court's Opinion completely misconstrued the Petitioner's claim of attorney error as challenging counsel's failure to file a motion to dismiss three offenses in the latter prosecution on the ground that Petitioner had already been convicted or acquitted of those same offenses previously. The habeas petition never claimed any such thing.

Had the District Court addressed the correct claims of attorney error and made the correct determinations, it would have found that Petitioner would not have

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19 pgs. 5-7 of District Court's Opinion.

20 In review of ineffective assistance of counsel claims, a defendant must establish: (1) that his underlying claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) that he was prejudiced by counsel's ineffectiveness. Com. v. Small, 980 A.2d 549, 558 (Pa. 2009). Also see, Wertz v. Vaugh, 228 F.3d 178, 203-04 (3d Cir. 2000) (recognizing that Pennsylvania's standard for assessing claims of counsel's ineffectiveness is materially identical to Strickland).

plead guilty to PNTPF in the first place, had counsel validated his double jeopardy concerns & filed the appropriate motions. Had counsel filed those motions, the Petitioner would not have been offered two separate & distinct plea bargains involving the same offenses; but would have only been offered one which resolved all of the PNTPF & Burglary offenses against Petitioner in a single proceeding, as was indeed offered & accepted by both Petitioner & the court on September 10, 2012.[21]

The September 10, 2012 bargain dismissed all of the PNTPF offenses, including the one at count 31 involving the 9mm pistol, as an inducement to plead guilty to ten counts of Burglary and one count of Criminal Conspiracy to Commit Burglary. The Petitioner was sentenced to concurrent sentences of $7\frac{1}{2}$ to 15 years imprisonment for his convictions. Had it not been for counsel's unprofessional errors, Petitioner would not currently be serving a separate, consecutive sentence of 5 to 10 years imprisonment for a duplicate offense of PNTPF which should have never existed pursuant to the authority of the Fifth Amendment.

Thus, based on all of the above, the Petitioner has met all three prongs of the Lafler prejudice test: (1) a plea offer dismissing all of the PNTPF offenses in exchange for guilty pleas to only the Burglary/Conspiracy offenses was indeed "available;" was indeed "accepted" by both Petitioner & the court; and (3) offered "less severe" terms than the judgment & sentence imposed on February 27, 2012, for an illegal, duplicate offense which the latter agreement actually dismissed as a quid pro quo part of the agreement. The above arguments were presented to the District Court at Appendices L, pgs. 11-13 & J, pg. 9.

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21 The 9/10/12 plea bargain resolved 12 counts of PNTPF (including two at counts 31 & 45 which were illegally charged in duplicate at the former prosecution); and resolved 10 counts of Burglary & related offenses (including the RSP at count 28 which was illegally charged in duplicate at the former prosecution).

## Breach of the Plea Agreement

The conviction & sentence for PNTPF cannot stand for the plea agreement was breached when the RSP count, which was dismissed & promised not to be further pursued as an inducement to plead guilty in the former prosecution, was pursued resulting in a conviction of the greater offense of Burglary in the latter prosecution. See, Santobello, supra, stating:

> Where the plea bargain is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case, whether due process requires (a) that there be specific performance of the plea bargain, or (b) that the defendant be given the option to go to trial on the original charges. One, alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court aught to accord a defendant's preference considerable, if not controlling weight in as much as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the state.

Santobello, 404 U.S. at 267.

The Petitioner prefers that the conviction & sentence of 5 to 10 years for PNTPF be vacated consistent with the specific performance of the agreement reached on September 10, 2012, dismissing that same offense at count 31 of 289-2012 as an inducement to plead guilty to Burglary. This would also satisfy the rule stating, that any ambiguity in the plea agreement be strictly construed against the government.[22] In the alternative, Petitioner prefers concurrent sentences between the PNTPF & Burglary convictions consistent with the July 5, 2011 promise of concurrent sentences between PNTPF & the lesser offense of RSP. Lastly, Petitioner wishes in the alternative to withdraw his guilty plea to PNTPF. The above argument on breaches of the plea agreement was presented to the District Court at Appendix M.

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22 U.S. v. Baird, 218 F.3d 221, 229 (3d Cir. 2000).

## Excusing A Procedural Default

In Martinez v. Ryan, ___ U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Court stated:

> "Where state law requires a prisoner to raise a claim of ineffective assistance of counsel in a collateral proceeding rather than on direct review, a procedural default of those claims will not bar their review by a federal habeas court if three conditions are met: (a) the default was caused by ineffective assistance of post-conviction counsel or the absence of counsel; (b) in the first collateral proceeding in which the claim could be heard; and (c) the underlying claim of trial counsel ineffectiveness is substantial."

Martinez, 132 S. Ct. at 1318-20.

The Petitioner has met all three of the above conditions for excusing a procedural default as follows. The Petitioner's ineffective assistance of trial counsel claim is substantial,[23] as demonstrated in all of the above. Petitioner's PCRA counsel should have, thus, amended his inartfully drafted pro se PCRA petition to include the meritorious 6th, 5th, & 14th Amendment claims presented herein. Instead, PCRA counsel filed a no-merit letter and petitioned to withdraw from the case, offering no assistance. Hence, Petitioner may be excused from a procedural bar, and the District Court's determination (at pg. 7 of its Opinion) stating, that the "Martinez exception to procedural default is inapplicable here" is erroneous & contrary to the decision reached in Martinez. The above argument on excusing procedural defaults was presented to the District Court at Appendices J, pgs. 10-16 & L, pgs. 17-18.

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23 Meaning the "claim has some merit," analogous to the substantiality requirements for a COA. Martinez, Id.

## CONCLUSION

WHEREFORE, for all the reasons given above, including that it makes the requisite substantial showing of the denial of Petitioner's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, Petitioner respectfully requests and prays that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

Jose L. Torres

Jose Luis Torres, pro se

Date: August 17, 2020