NO. 20-7173

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

VENECIA DEPAULA - PETITIONER

v.

MARK INCH, SEC'Y FLORIDA DEPARTMENT OF CORRECTIONS - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SECOND DISTRICT COURT OF APPEALS OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

VENECIA DEPAULA, DC#155466
Homestead Correctional Institution
19000 S.W. 377th Street
Florida City, Florida 33034

QUESTIONS PRESENTED

I. WAS COUNSEL'S ASSISTANCE RENDERED INEFFECTIVE BY HIM ALLOWING PETITIONER TO REJECT A FAVORABLE PLEA OFFER WHERE COUNSEL POSSESSED KNOWLEDGE THAT PETITIONER SUFFERED FROM MENTAL HEALTH ILLNESS; AND WAS IT SO PREJUDICIAL AS TO HAVE RENDERED THE PETITIONER'S TRIAL A VIOLATION OF THE U.S. CONSTITUTION?

II/III/IV. COULD COUNSEL HAVE PROTECTED THE PETITIONER'S CONSTITUTIONAL RIGHTS BY MOVING THE COURT TO CONDUCT A HEARING TO RULE ON THE QUESTION OF PETITIONER'S COMPETENCY?

V. DID COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DISCLOSED PRIVILEGED COMMUNICATION TO THE STATE TRIAL COURT ABSENT A VALID WAIVER?

VI. WAS COUNSEL RENDERING INEFFECTIVE ASSISTANCE WHEN HE CONCEDED THAT THE PETITIONER ACTUALLY CREATED/WROTE THE TEXT MESSAGE ORIGINATING FROM THE PHONE REGISTERED TO HER?

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district of appeals appears at Appendix ____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at **Appendix A** to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the _____
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

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

The date on which the United States Court of Appeals decided my case was _____.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 1254(1).

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

The date on which the highest state court decided my case was **September 16, 2020**. A copy of that decision is appears at **Appendix A**.

[x] A timely petition for rehearing was thereafter denied on the following date: **October 28, 2020**, and a copy of the order denying rehearing appears at **Appendix B**.

[ ] 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

UNITED STATES CONSTITUTION, AMENDMENT FIVE -
An individual's right to a fair trial.

UNITED STATES CONSTITUTION AMENDMENT SIX -
An individual's right to assistance of counsel.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN -
An individual's right to due process of law.

STATEMENT OF CASE

The State of Florida charged the Petitioner with one (1) count of first-degree murder with a firearm for the August 2, 2009 death of Felipe Perez (R16-17).

Prior to trial, the Petitioner's counsel file a Notice of Intent to Rely on the Defense of Battered-Spouse Syndrome and/or the Insanity Defense (R44-45). Psychologists who examined the Petitioner ultimately determined that she did not meet the legal standard for the insanity defense (Supp. 125; Vol. VI: T608-609).

The trial court granted the State's Motion in Limine to exclude evidence of battered-spouse syndrome because the Petitioner was not alleging physical abuse or that the killing occurred in self-defense (Supp. 137-138, 144).

Mr. Perez marries Jadie Serra in 2002 and they separated shortly thereafter. They never divorced or reunited, but remained friendly and stayed in touch. After his separation from Ms. Serra, Mr. Perez became romantically involved with the Petitioner (Vol. IV, T323-325, 330).

Mr. Perez and the Petitioner lived together for as while in Sarasota, Florida. The Petitioner had a daughter named Nadelyn from a prior relationship and Mr. Perez had developed a fatherly bond with Nadelyn. The couple moved to Tampa in the months prior to Mr. Perez's death but lived separately. The Petitioner

lived in an apartment with her daughter and Mr. Perez lived in a house with two (2) roommates (Vol. VI, T639-640, 644-646).

At the time of the incident, the Petitioner was pregnant and Mr. Perez had begun a relationship with Leila Cunningham who lived in Sarasota (Vol. V: T474; Vol. VI: T648-649). Mr. Perez would spend weekends in Sarasota with Ms. Cunningham. In early July, while Mr. Perez was with Ms. Cunningham, the Petitioner made approximately thirty (30) unanswered telephone calls to Ms. Cunningham's telephone. After Mr. Perez left the house around 1 P.M., Ms. Cunningham answered one of the calls. Ms. Cunningham testified that the Petitioner told her to stop seeing Mr. Perez because she (the Petitioner) still loved him and that he was her boyfriend. Ms. Cunningham testified that she told the Petitioner she would not stop seeing Mr. Perez and that he was her (Ms. Cunningham's) boyfriend (Vol. VI: T650, 653-658).

Ms. Cunningham knew that Mr. Perez maintained contact with the Petitioner because he was a father figure to the Petitioner's daughter. Ms. Cunningham did not, however, know that the Petitioner was pregnant (Vol. VI: T660-661, 668).

On July 27, 2009, the Petitioner went to Central Firearms in Tampa to purchase a gun. She told the salesman, Mr. Encarnacion, that she wanted the gun for personal defense, stating that she had a daughter. The Petitioner was pregnant, but she did not appear to be upset (Vol. V: T455-456, 474-478).

Mr. Encarnacion showed the Petitioner some weapons, and she settled on a Taurus revolver. She filled out the forms for the background check and paid $340 in cash for the gun. When Mr. Encarnacion explained that there was a 72-hour wait before she could take the firearm, she seemed "a little surprised." She was told she could pick the gun up on Friday (Vol. V: T457-459, 463-465).

The Petitioner came back to the store on Friday morning, July 31, 2009, but there was an additional delay in processing her background check and the gun would not be available until the following Wednesday. The Petitioner was disappointed (Vol. V: T470-472).

On Sunday, August 2, 2009, the Petitioner responded to William Abourjilie's classified advertisement for the sale of his handgun. That evening, Mr. Aboutjilie and his wife drove to Tamp and met the Petitioner in the parking lot of her apartment complex around 8 or 9 P.M. He testified that the Petitioner had a normal demeanor and did not appear to be upset. Mr. Abourjilie showed her the gun and explained how to take it apart, load it, and clean it. He sold her the gun along with magazines and ammunition for $900 cash (Vol. V: T479-488, 491).

Within approximately ten (10) minutes, the Petitioner called Mr. Abourjilie because she was having trouble loading

ammunition into the magazine. Mr. Abourjilie explained how to do it (Vol. V: T495-496, 499).

Mr. Perez spent that Sunday afternoon with friends playing dominos. His friend Jorge Cipriano testified that he last saw Mr. Perez around midnight. According to Mr. Cipriano, Mr. Perez lived with two (2) roommates and there was no reason to think Mr. Perez would be going to the Petitioner's home that night (Vol. VI: T640-644).

The following morning at around 6:45 A.M., Ms. Cunningham called Mr. Perez's cell phone. Nobody answered; however, Ms. Cunningham received a call from Mr. Perez's number a few minutes later. Ms. Cunningham recognized the voice as the Petitioner from the phone call several weeks earlier. The Petitioner asked who she was and Ms. Cunningham identified herself as "Felipe's girlfriend." The Petitioner stated, "No, you're not. I'm his girlfriend." Ms. Cunningham asked to speak to Mr. Perez, and the Petitioner told her Mr. Perez was "sleeping" (Vol. VI: T663-665).

Around 9 A.M., the Petitioner called her friend Janet Prieto. She was "[c]rying, frightened," and stating that she had done a stupid thing and had killed Mr. Perez with a revolver. Ms. Prieto asked the Petitioner for the address so that she could contact the police to see if they could help Mr. Perez. The Petitioner asked Ms. Prieto to wait for fifteen (15)

minutes before calling the police; she wanted to get to her mother's house so she could leave her daughter with her mother. She then planned to go turn herself in. The Petitioner said, "God is not going to forgive me" (Vol. IV: T408-411).

The Petitioner arrived at the Palm Springs Police Department in Palm Beach County between 11:30 and noon. She told the emergency communications officer, "I shot my boyfriend." She said she thought she had killed him (Vol. IV: T380-385, 395, 397).

Mr. Perez's body was found covered with a sheet on the couch in the Petitioner's apartment. He was wearing only underwear and he had a single bullet wound in the top of his head. The character of the entry wound suggested the muzzle was either touching the scalp or was "very, very close," perhaps an inch. It appeared as though Mr. Perez had been shot as he lay on the couch. In the bedroom on a dresser, officers found the gun wrapped in a towel (Vol. IV: T341, 356-359, 361, 374; Vol. V: T554-556).

A gun box, gun case and instruction manual were recovered from the trunk of the Petitioner's car. The instruction manual was open to instructions on how to load the magazine and firearm (Vol. V: T438).

During trial, the State introduced a series of text messages between the Petitioner and other including Mr. Perez in

the two (2) weeks leading up to Mr. Perez's death (Vol. VI: T697).

The defense sought to introduce evidence through the Petitioner's mother and other witnesses that the Petitioner was extremely depressed prior to the crime. The Petitioner's theory of defense was that she purchased the firearm with the intention of committing suicide, and that when Mr. Perez showed up at her apartment unexpectedly, she "snapped" and shot him without premeditation. In support of this theory, the defense wanted to introduce evidence that the Petitioner had attempted suicide on two (2) prior occasions, at ages fifteen (15) and eighteen (18) (Vol. VI: T601-605). The trial court ruled that evidence of depression was a backdoor attempt at getting impermissible diminished capacity evidence before the jury (Vol. VI: T607-608).

At the close of the State's case, the defense moved for a judgment of acquittal on the issue of premeditation. Counsel argued that the State's evidence of the Petitioner's state of mind was circumstantial and was not inconsistent with her theory of defense - that she purchased the gun with the intention of committing suicide and that she "snapped" and shot the victim when he showed up at her apartment unexpectedly. Defense counsel pointed to the fact that, although the Petitioner accused Mr. Perez of infidelity in text messages, there was

never any treats. The day before she applied for the purchase of the firearm at Central Firearms, the Petitioner texted a friend with the following message: "If something was to happen to me, please leave the girl with my mom." Counsel argued that this statement indicated intent to commit suicide. The trial court denied the motion (Vol. VI: T702-707, 711-712).

The defense called Venecia Sanchez, the Petitioner's mother, who testified that the Petitioner stayed with her for three (3) weeks in Palm beach County about three (3) months prior to the incident. The Petitioner was pregnant and ultimately gave birth while she was in custody after her arrest. On August 3, 2009, the Petitioner called Ms. Sanchez around 6:54 A.M. and arrived around 11 A.M. Her face was swollen and she was crying. They went to the Palm Springs Police Department where the Petitioner was taken into custody (Vol. VI: T725-728).

The jury found the Petitioner guilty as charged with a finding that she actually possessed and discharged a firearm causing death (R97; Vol. VII: T888-890).

On March 7, 2011, a timely Notice of Appeal was filed.

On February 8, 2012, the Petitioner's Initial Brief was filed by James Marion Moorman, Esq., from the Office of the Public Defender for the Thirteenth Judicial Circuit of Florida.

On July 16, 2012, the Petitioner filed a Reply Brief.

On December 5, 2012, this Honorable Court per curiam affirmed the Petitioner's cause in case number 2D11-1311, in the Second District Court of Appeals, State of Florida (Appendix C).

On December 7, 2012, the Office of the Public Defender filed a Motion for Rehearing and Request for Written Opinion.

On January 30, 2013, the Petitioner's Motion for Rehearing and Request for Written Opinion was denied (Appendix D).

On January 28, 2015, the Petitioner filed a pro se Motion for Post Conviction Relief.

On November 16, 2015, the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida entered an order dismissing without prejudice ground one (1), two (2), three (3), four (4) and five (5) and denying ground six (6) of the Petitioner's Motion for Post Conviction Relief; allowing the Petitioner leave to amend and timely file facially sufficient grounds within sixty (60) days of its order (Appendix E).

On December 31, 2015, the Petitioner filed a Motion for Enlargement of Time to amend her post conviction motion which was subsequently granted on January 7, 2016.

On February 22, 2016, the Petitioner filed an Amended grounds One (1) through five (5) of Motion for Post Conviction Relief.

On June 12, 2017, the Thirteenth Judicial Circuit entered an order dismissing without prejudice claim one (1) and

reserving ruling on claim two (2) of the petitioner's amended post conviction motion, and order denying with prejudice claims three (3), four (4) and five (5) of Petitioner's motion (Appendix F).

On July 6, 2017, the Petitioner filed an Amended Ground One (1) of Motion for Post Conviction Relief.

On August 29, 2017, the Thirteenth Judicial circuit entered a subsequent order granting leave to amend ground one (1) of her post conviction motion.

On September 22, 2017, the Petitioner filed another Amended Ground One of Motion for Post Conviction Relief (Appendix G).

On January 23, 2018, the Thirteenth Judicial Circuit entered an order granting evidentiary hearing on claim (1) of Amended Ground One (1) of Post Conviction Motion, and on claim two (2) of the Petitioner's Amended Ground One (1), Two (2), Three (3), Four (4), and Five (5) Motion for Post Conviction Relief and order setting matters for status on February 12, 2018 at 8:30 A.M. (Appendix H).

On May 16, 2018, the Petitioner filed a Motion to Appoint Conflict Free Counsel, as Kay Murray, the Public Defender assigned to represent her at evidentiary hearing demonstrated bias and did not believe, by personally knowing trial counsel Bryant Camareno, he exhibited ineffective assistance of counsel (Appendix I).

On August 30, 2018, a *Nelson* hearing was held where the Thirteenth Judicial Circuit concluded that counsel Kay Murray had not provided ineffective representation and that it would not appoint another public defender. However, the court did grant a continuance to the Petitioner to have private counsel.

On February 8, 2019, an evidentiary hearing was held before the Honorable Mark D. Kiser.

On March 13, 2019, the Thirteenth Judicial Circuit entered a final order, denying all Petitioners' grounds for relief of her Post Conviction Motion (Appendix J).

On March 20, 2019, the Petitioner filed a Motion for Appointment of Appellate Counsel.

On March 28, 2019, the Thirteenth Judicial Circuit docketed the Petitioner's timely Notice of Appeal (Appendix K).

On October 25, 2019, the Petitioner filed an Initial Brief of the lower court's denial of her Motion for Post Conviction, to the Second District Court of Appeals of Florida.

On September 16, 2020, the Second District Court of Appeals per curiam affirmed the Petitioner's appeal (Appendix A).

The Petitioner filed a Motion for Rehearing and Request for Written Opinion, which was subsequently denied on October 28, 2020 by the Second District Court of Appeals (Appendix B).

REASONS FOR GRANTING THE PETITION

The Petitioner was denied her constitutional right to effective counsel, fair and impartial proceedings, and due process of law as this Honorable Court held in **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674. The state courts have failed to grant relief. This Honorable Court should issue a Writ of Certiorari where her questions concern matters in which the district courts, state and federal, are in conflict and which are violations of the U.S. Constitution especially where the conviction and sentence were administered to someone who was actually mentally ill. The questions are asserted as follows:

> **I. WAS COUNSEL'S ASSISTANCE RENDERED INEFFECTIVE BY HIM ALLOWING PETITIONER TO REJECT A FAVORABLE PLEA OFFER WHERE COUNSEL POSSESSED KNOWLEDGE THAT PETITIONER SUFFERED FROM SEVERE MENTAL ILLNESS, AND WAS IT SO PREJUDICIAL AS TO HAVE RENDERED THE PETITIONER'S TRIAL A VIOLATION OF THE U.S. CONSTITUTION?**

The Sixth Amendment right to counsel equates to the right to effective assistance of counsel and requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect trial, even though counsel's absence in these stages may deviate from the accused's right to a fair trial. The constitutional guarantee applies to pre-trial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which

defendant cannot be relied upon to make critical decisions without the advice of counsel. This is commensurate with the rule that defendants have a constitutional right to effective assistance of counsel on appeal, even though that cannot in anyway be compared as a part of the trial. There exists a right to counsel during sentencing in both non-capital and capital cases. Even though sentencing does not concern a defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in prejudice because any amount of additional jail time has Sixth Amendment significance.

The standard for determining any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a reliable and just result. The intended outcome of a just result is not divorced from the reliability of a conviction. See **Lafler v. Cooper**, 566 U.S. 156, 132 S. Ct. 1376, 182 L.Ed. 2d 398 (2012).

Moreover, the State Courts have held that:

> **"The reviewing court must determine counsel's performance was so deficient that it fell below the standard guaranteed by the Sixth Amendment. This is an objective test that asks the Court to consider whether counsel was unreasonable under prevailing professional norms. Second, the Court must determine whether deficient performance prejudiced the defendant."**

See **Romero v. State**, 2019 Fla. App. LEXIS 12059, 55 Fla.L.Weekly 01997 (Fla. 2019); **Bradley v. State**, 33 So. 3d 664, 671 (Fla. 2010); **Ray v. State**, 176 So. 3d 1010, 1011 (Fla. 5th DCA 2015).

In the instant case, the Petitioner, upon the misadvice of counsel and the inadequate, improper conveyance of the actual punishment she was facing under a First Degree Premeditated Murder charge, rejected a favorable plea offer of thirty-five (35) years in the Florida State Prison followed by probation. Instead, the Petitioner proceeded to trial for First Degree Premeditated Murder with a firearm where she was found guilty and sentenced to natural life with a twenty-five (25) year minimum mandatory.

The Petitioner asserts that counsel failed to correctly inform her of the maximum penalty she faced. Counsel advised Petitioner to reject the plea offer because even if she proceeded to trial and lost, there was a possibility she could still receive a lesser sentence because of her mental illness, on appeal to the district court. Therefore, on the assurance and persuasive argument of trial counsel, the Petitioner went to trial and was sentenced to a term of imprisonment longer than what she would have served had she accepted the plea agreement.

The Petitioner's mental illness comes into play where it is evident she lacked the capacity to rationally weigh the risk of going to trial versus the acceptance of the plea. Counsel was

fully aware of the Petitioner's lifelong history of severe mental illness. In fact, the Petitioner is presently diagnosed with a mental illness and is being treated by the Department of Corrections for Depressive Disorder, Borderline Personality Disorder and Borderline Intellectual Functioning. The Petitioner also had a history of suicide attempts and emotional instabilities that possibly contributed to the crime that was committed.

The record reflects medical reports to support that the Petitioner was: 1) mentally ill (see Dr. Gamache's report - Exhibit 65 of State's exhibit from evidentiary hearing held on February 8, 2019), and 2) suffering from Depressive Disorder (see Dr. Northrup's report - Exhibit 57 of State's exhibit from evidentiary hearing held on February 8, 2019). Therefore, it cannot be concluded that the Petitioner's decision to proceed to trial and reject a favorable plea was knowingly and intelligently made and potential prejudice cannot be excluded as counsel, knowing the Petitioner's diagnosis and vulnerability and reliability upon him, failed to provide the Petitioner's with an informed understanding of her legal rights and obligations and to explain their practical implications.

The record clearly demonstrates counsel's deficient performance.

Plea bargains have become integral to the administration of the criminal justice system that defense counsel has a responsibility, pursuant to the Sixth Amendment, especially during the plea bargain process, to render adequate and effective representation. See **Missouri v. Frye**, 566 U.S. 134, 132 S. Ct. 1399, 182 L.Ed. 2d 379, 2012 U.S. LEXIS 2321 (2012).

On February 8, 2019, an evidentiary hearing was conducted on this claim before the Honorable Mark D. Kiser of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida. The Assistant State Attorney, Sidney Scott Harmon, was present, as well as Mr. Julian A. Hayes, Jr., the Petitioner's attorney.

Mr. Bryant Camareno, the Petitioner's trial counsel, testified extensively as to the representation he provided the Petitioner. When Mr. Camareno was asked by Mr. Hayes how much time he spent discussing the offer he replied:

> **A:** I do know - I know that we spoke about it, obviously, leading up to the pre-trial because we were preparing for trial in the event she was going to reject the offer. But I think we already knew, I already knew that she was not going to accept anything like that. I think we had a bar, so to speak, I want to say - I don't have it in writing, but I want to say it was maybe 10 or less, so anything above that we knew she was not going to accept, so my mindset was I needed to be ready for trial to finish the depositions, talk to these doctors, try to establish a defense.
>
> **[T23 (lines 23-25); T24 (lines 1-8)]**

Mr. Camareno goes on to further state, on record, references to what he and the Petitioner referred to as a "ten year bar" or "cap" as to what the Petitioner would be open to negotiate with the State:

> **A:** ...But again, because of the gun discharge that kind of complicates things. So even if she's found guilty of a lesser and she's found in possession and discharged the gun, I kind of had to remind her that it would go back to the mandatory 25.
>
> So by the way, that was the offer by Mr. Harmon, was a 35 years offer with a 25 years minimum mandatory, so that was discussed as by way of offer and possible lesser as well, what could happen as well.
>
> **Q:** Understanding that there is 25 year min/man, do you recall what her reaction was?
>
> **A:** Yeah, she wasn't happy with, I, a 35 years offer, if that's what you're referring to. She wasn't happy with that at all. It was one of disappointment, I guess, is the best way to describe it, so she was not happy with it at all, and she gave me authority to go back. I want to say the cap - our bar was, like ten years and nothing more. I tried to convey that to Mr. Harmon personally and by correspondence, and that was rejected by Mr. Harmon.
>
> ...
>
> **A:** Again, I thought it was ten...the bar was ten...
>
> **[T35 (lines 6-25); T51 (lines 14-15)]**

Clearly, counsel never, at any time fully explained the practical implications of the offenses charged.

Primarily, this offense was committed with a firearm. Under the 10/20/Life Statute, because a firearm was used to take the life of the victim, there was no remote possibility that the

Petitioner could be sentenced to anything less than twenty-five (25) years due to the minimum mandatory provisions outlined in the statute. Therefore, counsel's continued agreement with the Petitioner's apparent misunderstanding demonstrates that he did not adequately and correctly convey the punishment this charge carried (although he avers that he did). Counsel had a responsibility to provide effective representation and this includes but is not limited to correctly, and ethically advising the Petitioner of her legal rights and obligations.

The Petitioner admits during evidentiary hearing how she felt counsel did not do everything reasonably possible to convey to her what would happen if she accepted the plea offer:

> **Q:** And what do you feel he could have done more?
> **A:** I believe he could have explained it into more depths so I could really understand the depths of what I was facing.
> **[T104 (line 25); T105 (lines 1-3)]**

The Petitioner also testified she did not recall being advised of a twenty-five (25) year minimum mandatory:

> **Q:** Did he tell you that that had a minimum/mandatory portion of 25 years?
> **A:** I don't recall that.
> **[T100 (lines 7-9)]**

This Honorable Court held in **Lafler** that:

> **"Where a defendant rejects a plea bargain upon erroneous advice of counsel and is convicted at trial, the defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer could**

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 offers terms would have been less severe than under the judgment and sentence that in fact was imposed."

In the instant case, the Petitioner was not adequately informed of the consequences of not taking the plea agreement as counsel repeatedly, persuasively influenced the Petitioner, in essence, that going to trial was the better option when in fact, the Petitioner faced a more severe penalty by doing so:

> **A:** ...My philosophy when I go to trial - this why I'm always in trial - if there's any doubt with a client, especially if there's any doubt and, again, its not in any way influencing them then, I ***always say its better to err on the side of jury trial because once you sign that piece of paper, that's it, you give up everything***.
> **[Emphasis Added; T82 (lines 17-24)]**

This is evidence by the record of Petitioner's testimony revealing that:

> **Q:** What did he tell you about that plea agreement?
> **A:** He told me that if I take the plea, I'm not able to fight my case anymore and that I have to do the time. And also that he say that if I go to trial and even if I lose I can come back and fight my case and get less time.
> **Q:** And did he tell you that before or after you decided not to accept the plea agreement?
> **A:** Can you repeat that again?
> **Q:** Did he tell you that you could come back and file an appeal before or after you rejected the plea agreement?
> **A:** Before.
> ...

Q: Yes. How, in your mind, were you going to come back and fight for less time after you are convicted by a jury?

A: Well, after he say that to me, I wasn't - I didn't really even know how, but with what he said, I guess these was a way to come back and fight my case. I wasn't sure that were the proceedings because I was not aware of the ways to fight back a case. I find out as I went along.

...

Q: But never told you what to do. He told you it was up to you. You've sat here and testified through Direct Examination, and up to the point, you've told us because he told you that if you were convicted, you could come back and fight for less time, that's why you decided to go to trial?

A: Yes, what he advised me -

Q: All right. So he never told you to reject it. That was a decision you made?

A: He never told me to reject it, but he advised me that if I go to trial, I would get less time.

[T100 (lines 10-25); T101 (lines 1-3)]
[T110 (lines 13-21); T118 (lines 5-15)]

Florida State Courts, primarily the Fourth Judicial Circuit of Appeals, held in **Jackson v. State**, 987 So. 2d 233 (Fla. 4th DCA 2008) that:

> **"A claim that misinformation supplied by counsel induced a defendant to reject a favorable plea offer can constitute actionable ineffective assistance of counsel."**

In **Steel v. State**, 684 So. 2d 290, 291 (Fla. 4th DCA 1996) held that,

> **"A prima facie case of ineffective assistance of counsel based on rejection of a plea offer is made is a defendant proves: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate advice, and (3) acceptance of the**

state's plea offer would have resulted in a lesser sentence."

Counsel's deficient performance in providing misadvise to the Petitioner prejudiced the Petitioner and undermined confidence in the outcome of the Petitioner's proceeding.

Counsel knew Petitioner was not mentally competent when she rejected the State's plea offer and counsel should have, in the least, motioned the trial court for a competency hearing, as the plea offer was presented before trial and therefore necessary pre-trial motions should have been filed to assist in establishing Petitioner's competency.

Florida Courts have held in **Reynolds v. State**, 177 So. 3d 296 (Fla. 1st DCA 2015):

> **"The rules of criminal procedure require the trial court to hold a hearing when the court has reasonable grounds to question the defendant's competency. If the trial court failed to hold a competency hearing or enter a written order of competency, reversal is required, a new trial...is required."**

The Florida Supreme Court in **Alcorn v. State**, 121 So. 3d 419 (Fla. 2013) and the U.S. Supreme Court in **Missouri**, supra, and **Lafler**, supra, pertaining to ineffective assistance of counsel claims where a plea is not accepted based on counsel's misadvise or because of counsel's failure to convey the plea to the Petitioner. It was concluded that"

> **"...to establish prejudice the defendant must allege and prove a reasonable probability that he**

would have accepted plea offer, the prosecutor would not have withdrawn the offer, the court would have accepted the offer, and the conviction or sentence would have been less severe."

According to State law and provisions set forth in **Alcorn**, supra, the Petitioner has met all the elements based upon the following:

1. The Petitioner would have accepted the plea;
2. The State would not have withdrawn the plea as it would have been accepted under its terms;
3. The Court would have accepted the offer because it was fair and reasonable; and,
4. The sentence under the terms of the offer would have been less severe than the natural life and twenty-five (25) year minimum mandatory sentence imposed following trial.
5. Counsel's performance fell below a reasonable objective standard.

Had Counsel adequately conveyed to the Petitioner this plea offer in a way that she could understand in lieu of her mental illness and not misadvised her that it was better for her to go to trial and lose because she would receive a lesser sentence on appeal, there is a reasonable probability that the outcome of the Petitioner's proceedings would have differed where she would have taken a plea and not proceeded to trial.

The Petitioner has satisfied both prongs of **Strickland**; demonstrating that her Fifth, Sixth and Fourteenth Amendment rights were violated. This Honorable Court should issue a Wirt of Certiorari on this claim.

II/III/IV. COULD COUNSEL HAVE PROTECTED THE PETITIONER'S CONSTITUTIONAL RIGHTS BY MOVING THE COURT TO CONDUCT A HEARING TO RULE ON THE QUESTION OF PETITIONER'S COMPETENCY?

This Honorable Court in **Washington v. Glucksberg**, 521 U.S. 702, 138 L.Ed. 2d 772, 117 S. Ct. 2258 (1997), outlines the analysis observed for due process guarantees:

> **"The United States Supreme Court begins its analysis in all due process cases by examining the nation's history, legal traditions and practices, such examination provides crucial guidepost for responsible decision making that direct and restrain the Supreme Court's exposition of the Due Process Clause of the Federal Constitution's Fourteenth Amendment. The Due Process Clause of the Federal Constitution's Fourteenth Amendment guarantees more than fair process and the liberty it protects included more than the absence of physical restraint, the Due Process Clause provided heightened protection against government interference with certain fundamental rights and liberty interests."**

The due process right guarantees a fair determination of the criminal proceedings of a defendant in the light of mental competence and if a defendant is mentally competent to proceed to trial.

Florida State Courts have held in **Presley v. State**, 199 So. 3d 1014 (Fla. 4th DCA 2016) that:

> **"The State may not proceed against a person at any material stage of a criminal proceeding while the person is mentally incompetent, Fla.R.Crim.P. 3.210(a). Fla.R.Crim.P. 3.210 through 3.212 establish the required competency hearing, procedures for determining whether a defendant is**

competent to proceed or has been restored to competency."

A defendant's due process right is substantially violated when a defendant is denied the opportunity to have a court finding of her competence by conducting a hearing in accordance with Florida law and United States constitutional provisions.

In the instant case, defense counsel for the Petitioner attempted to develop a case in chief that the Petitioner was legally insane at the time she committed the offense. In order to develop that theory, two (2) mental health experts were engaged to evaluate the Petitioner. Neither of the experts rendered a report that supposed the insanity defense; however, they both agreed that the Petitioner suffers from serious mental illness. Because the Petitioner was six (6) months pregnant at the time of the crime, Counsel moved to appoint a third expert forensic psychologist, Eldra Solomon, Ph.D. Dr. Solomon specializes in the effects of pregnancy in a human's state of mind. The Court granted the request but for reasons unknown, the evaluation was not performed.

The pre-trial record manifestly indicates that defense counsel questioned the Petitioner competence to proceed. The Petitioner's mental status did not rise to the level of criminal insanity; nevertheless, her mental illness impaired her ability to rationally understand the facts or the proceedings against her.

At evidentiary hearing held on February 8, 2019, testimony presented by trial court Bryant Camereno that he was aware Dr. Gamache's report revealed the Petitioner met the first prong of insanity, "...that she was mentally ill at the time..." [T10 (lines 10-13)] and Dr. Northrup's report revealed that the Petitioner suffered from "depressive disorder" [T10 (lines 17-20)], but because no doctor said she was "completely insane" he basically neglected to request a competency hearing when in fact, a competency hearing was necessary as Dr. Gamache's and Dr. Northrup's reports were in obvious conflict over competency.

Mr. Camareno, when asked on direct examination by defense counsel Hayes, had he ever considered having a competency hearing before the Court, he answered, "No and only because, again what Dr. Gamache and Dr. Northrup had indicated in their reports, I didn't think I had a good faith basis to do that" [T14 (lines 25); T15 (lines 1-2)].

However, Mr. Camereno was mistake as he had good faith basis to request such a competency hearing as to protect the Petitioner's Fifth and Fourteenth Amendment rights which guarantees a fair and impartial proceeding and due process of law. Counsel's failure to request a competency hearing severely prejudiced the Petitioner and deprived her of an outcome that was reliable.

Florida law dictates that once a trial court enters an order appointing experts, a competency hearing must be held, **Cuenan v. State**, 925 So. 2d 370 (Fla. 5th DCA 2006), and the Florida Supreme Court held in **Daughtety v. State**, 149 So. 3d 672, 677 (Fla. 2014), that "...rules of criminal procedure require that trial courts hold a hearing when the Court has reasonable grounds to question defendant's competency."

"Competence to stand trial is rudimentary, for upon it depends the main part of these rights deems essential to a fair trial, including the right to effective assistance of counsel" **Drope v. Missouri**, 420 U.S. 162, 171-172, 43 L.Ed. 2d 103, 95 S. Ct. 896 (1975).

This Honorable Court held in **Cooper v. Oklahoma**, 186 S. Ct. 1373, 134 L.Ed. 2d 498, 517 U.S. 348 (1996), that:

> **"The test for incompetence is also well settled. A defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...[and] a rational as well as a factual understanding of the proceedings against him."**

In the instant case, the Petitioner's mental incompetence, law intelligence and mental deficiency obviously affected her rationality to understand that a natural life sentence is a more severe sentence that a thirty-five (35) year term in which the State was initially offering; she did not have the rationale to understand that a ten (10) year sentence was never possible

given the fact that a firearm was used in this offense. Counsel had a constitutional duty, once he could not adequately convey the penalties in a way the Petitioner could ascertain, to request a competency hearing.

The standards for mental competence does not have any requirements that a defendant have a clear understanding; however, in an effort to preserve fundamental fairness and the integrity of the proceedings and Petitioner's trial, a competency hearing was required so that the Petitioner's defense would not be substantially disadvantaged or denied her Fifth and Fourteenth Amendment right. It is very likely the Petitioner would not have rejected a favorable plea had she been mentally competent.

Counsel's performance fell below a reasonable objective standard and he failed to act as the counsel guaranteed under the Sixth Amendment of the U.S. Constitution.

Had counsel requested a competency hearing, there is a reasonable probability that the outcome of the Petitioner's trial would have been different. This Honorable Court should issue a Writ of Certiorari on this claim.

V. DID COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DISCLOSED PRIVILEGED COMMUNICATION TO THE STATE TRIAL COURT ABSENT A VALID WAIVER?

The **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674, tests the ineffective assistance of counsel claim by a two (2) prong requirement: 1) deficient performance, and 2) the resulting prejudice.

In the instant case, Counsel, not acting as counsel guaranteed by the Sixth Amendment, erred in disclosing Dr. Gamache's privileged competency evaluation that was protected by attorney-client privilege where the Petitioner did not waive confidentiality. The rule of criminal procedure pertaining to appointment of experts to assist in making insanity determinations shall be deemed to fall under the lawyers-client privilege and as such, it was a material error for counsel to disclose the report without the express permission of the client.

Florida law outlined in Florida Statutes, Section 90.503(2) provides that the patient of a psychotherapist has a privilege to refuse to disclose and to present any records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition.

Moreover, the Petitioner was not competent to proceed in this matter; and, therefore, even if counsel had sought for a

waiver of privilege and it was given, it would have been involuntary.

Florida Courts have held in **Cunningham v. State**, 831 So. 2d 214 (Fla. 5th DCA 2002) that:

> **"Florida Statute, ch. 90.502(2) provides that a client has a privilege to refuse to disclose and to prevent any other person from disclosing the contents of confidential communications when that other person learned of the communications created during the rendition of legal services to a client. A communication between an attorney and client is deemed confidential if it is not intended to be disclosed to third persons, other than those to whom disclosure is necessary in furtherance of rendition of legal services."**

Counsel's deficient performance prejudiced the Petitioner and deprived her of an outcome that was reliable.

Had counsel not disclosed this confidential, privileged information, in the form of her competency evaluation, there is a reasonable probability that the outcome would have been different because it is clear that a competency hearing was never requested by counsel; therefore, any references to her "competency" should not have been referenced at trial before the jury in light of the fact it was not adequately presented in pre-trial hearings. Petitioner's substantive rights were violated and this Honorable Court should issue a Writ of Certiorari on this claim.

VI. WAS COUNSEL RENDERING INEFFECTIVE ASSISTANCE WHEN HE CONCEDED THAT THE PETITIONER ACTUALLY CREATED/WROTE THE TEXT MESSAGES ORIGINATING FROM THE PHONE REGISTERED TO HER?

It is the responsibility of the reviewing court to determine whether counsel's performance was so deficient that it fell below the standard which is guaranteed by the Sixth Amendment. This objective test asks the court to consider whether counsel's performance was unreasonable under prevailing professional norms. Secondly, the court must determine whether this deficient performance prejudiced the Petitioner. See **Strickland**, supra.

In the instant case, during the Petitioner's trial, the State sought to introduce text messages from the phone numbers registered to the Petitioner and the victim. The goal was to help prove premeditation by using the text messages to prove a motive. A witness from MetroPCS was going to testify to the phone numbers and whom they were registered to, but there is no way to prove the identity of who wrote an unsigned text message. Therefore, the State could not authenticate several test messages, despite that they originated from a phone reportedly belonging to the Petitioner. The Petitioner's counsel conceded that the Petitioner wrote the text message. Otherwise, the incriminating evidence would have been inadmissible; and without

that evidence, the jury would have found her not guilty or guilty of a lesser included offense.

Instead of counsel conceding and negatively contributing to the Petitioner's adversarial process already before her, counsel should have filed a Motion in Limine to exclude and/or suppress these incriminating text messages with no apparent "author or creator."

Counsel's deficient performance prejudiced the Petitioner and fell below prevailing professional norms guaranteed under the Sixth Amendment. Counsel's performance fell <u>well</u> below a reasonable objective standard; robbing her or a result that was reliable.

Had counsel not conceded to the Petitioner being the author of the text messages but filed a Motion in Limine or a Motion to Suppress this incriminating evidence, there is a reasonable probability that the outcome of the Petitioner's trial would have been different. This Honorable Court should grant a Writ of Certiorari on this claim.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Venecia Depaula

VENECIA DEPAULA, DC#155466