ORIGINAL

21-5051

No._____

IN THE SUPREME COURT OF THE UNTED STATES

BRIAN DUNKLEY,

PETITIONER,

V.

SHAWN PHILLIPS, WARDEN,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Submitted by,
Brian Dunkley, 487273
BCCX, Site 2, Unit 5
1045 Horsehead Rd.
Pikeville, TN. 37367

QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals has entered a decision in conflict with decisions of another United States court of Appeals on the same important matter as to call for an exercise of this Court's supervisory power; whereby, the Sixth Circuit Court of Appeals used what is known as the "burden" approach, which is in conflict with the "presumption" approach used by some Circuits, to determine that even though Dunkley's counsel provided deficient performance for not advising him of her belief that he should accept an offered plea, that he didn't meet the prejudice prong of Strickland because he did not prove with reasonable probability that the prosecutor would have maintained the offered plea and that the trial court would have accepted it, which Dunkley contends violates his right to due-process in that the "burden" approach is an unfair process based on retrospective predictions of what others might of done, not an a legal analysis.

TABLE OF CONTENTS

TABLE OF AUTHORITY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Brian Dunkley, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the Sixth Circuit of Appeals, who rendered the final decision in these proceedings on April 22, 2021.

OPINION BELOW

The Sixth Circuit of Appeals affirmed Petitioner's conviction in its case No. 20-6221. The opinion is enclosed in the appendix herein. The order of the Sixth Circuit Court of Appeal's denying the Motion for Reconsideration en banc was dated June 17. 2021 .

JURISDICTION

The decision of the Sixth Circuit of Appeals was entered on April 22, 2021. A timely Motion for Reconsideration en banc was denied on 06/17/2021 (enclosed in the Appendix herein).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case:

U.S.Const., Amend. VI:

In all criminal prosecutions, the accussed shall enjoy the right to a speedy and public trial, by an impartial jury of the state..., and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witness in his

favor, and to have assistance of counsel for his defense.

U.S.Const., Amend. XIV:

Section 1. All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the U.S. wherein they reside. no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the U.S.; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. 28 U.S.C. 2254.

STATEMENT OF CASE

In 2011, a jury convicted Dunkley of conspiracy to commit first-degree murder, in violation of Tennessee Code Annotated sections 39-12-103 and 39-13-202. The conviction stemmed from Dunkley's efforts to arrange the murder of his then-wife. The trial court sentenced Dunkley to 25-years of imprisonment and denied his Motion for a new trial. The Tennessee Court of Criminal Appeals affirmed, State v. Dunkley, No. M2012-00548-CCA-R3-CD, 2014 WL 2902257 (Tenn.Crim.App. June 25, 2014), and Tennessee Supreme Court denied him permission to appeal, on November 16, 2017.

In 2017, Dunkley filed a section 2254 petition claiming that:

1. His right to due process and a fair trial were violated in various ways;
2. Insufficient evidence supported his conviction;
3. Trial counsel performed ineffectively by failing to:
   * recommended that he accept a plea deal,
   * Adequately argue a motion to dismiss based on lost or destroyed evidence,
   * File a motion to suppress phones data from a co-conspirator's cellphones,
   * File motion to exclude phone data obtained through judicial subpoenas, and
   * Rebut the prosecution's assertion that he was "hovering" in his vehicle near a meeting of his

co-conspirations.

4. Cumulative error entitled him to relief.

After a response from the state, the district court denied Dunkley's petition on the merits and denied him a COA.

Thereafter, Dunkley applied for a COA from the Sixth Circuit Court ao Appeals. Dunkley seeked COA only on his claim, of ineffective assistance of counsel.

To show that counsel performed ineffectively, a petitioner must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

In sum, Dunkley seeks COA on his claim that trial counsel performed ineffectively by failing to advice him to accept a plea offer from the prosecution that includes a fifteen-year sentence, which is more favorable that the twenty-five years he was ultimately sentenced to. In the plea context, the prejudice inquiry asks whether there is "a reasonable probability that the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 566 U.S. 156, 163 (2012). The prejudice inquiry also asks "whether... there is 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)." Id. at 164.

The Tennessee Court of Criminal Appeals evaluated this claim in Dunkley's postconviction appeal, noting that there was conflicting testimony from the evdientiary hearing regarding

whether a plea offer had been made by the prosecution. Nonetheless, the Tennessee Court of Criminal Appeals determined that trial counsel had performed deficiently by informing Dunkley of the potential offer without also advising him of her belief that he should accept the plea. Despite this deficient performance, the Tennessee Court of Criminal Appeals concluded that Dunkley could not show that he had been prejudiced because the prosecutor's testimony at the evidentiary hearing indicated that any plea would have been contingent on the approval of the victim and his co-defendant's agreement to plead guilty as well, and thus he had not shown a reasonable probability that the plea agreement, even if he had accepted it, would have been presented to the trial court. Dunkley, 2017 WL 2859008, at *6-7. Then, the Sixth Circuit Court of Appeals found that reasonable jurists could not debate the district court's conclusion and it's determination was not contrary to, or an unreasonable application of federal law, or unreasonable determination of the facts in light of the evidence (the state's self-serving testimony) presented at the evidentiary hearing. Accordingly, Dunkley's application for a COA was denied on April 22, 2021.

Dunkley filed a Motion for Reconsideration En Banc on May 4, 2021, challenging that the proceedings involved an issue of exceptional importance, in that as part of the Strickland prejudice prong test, in the context of deficient counsel that leads a defendant to forgo a beneficial plea offer, were this court requires a defendant, like Mr. Dunkley to prove with reasonable probability that the prosecutor would have

maintained an offered plea and that the trial court would have accepted it, this is known as the "burden" approach, which is an unfair process, due process violation, based on retrospective predictions of what others might of done posing as a leagl analysis. In other words, Dunkley argued that the Sixth Circuit Court of Appeals "burden" approach is unfair, a more accurate approach that is better at protecting a defendant's Constitutional right to effective counsel is the "presumption" approach, which is used in some Circuits. However, the Sixth Circuit Court of Appeals disargeed with Dunkley and denied his Motion for Reconsideration En Banc on

REASONS FOR GRANTING THE WRIT

"According to trial counsel's testimony, on the morning of April 4, 2011 of trial, she asked the Assistant District Attorney General about any offers to settle the case. Trial counsel stated that the prosecutor responded with an offer to recommend a sentence that was either at the bottom of the range for a class A felony (15-years) or the top of the range for a class B felony (12-years) in exchange for a guilty plea. Trial counsel spoke to the Petitioner about the offer for approximately five (5) minutes. During this time, she did not discuss the strength of the state's case the Petitioner's potential range of punishment or, why trial counsel believed that entering a plea would be in Petitioner's best interest. She did not share her opinion with him, make any recommendations regarding a plea, or ask for additional time to consider the offer in order to have a thorough discussion with the Petitioner. The Petitioner, with no guidance from trial counsel, responded he would consider serving a six (6) year sentence. The state promptly rejected this offer, and trial commenced." Dunkley v. State, 2017 WL 2859008, at *2-5.

The Tennessee Court of Criminal Appeals determined that trial counsel had performed deficiently by informing Dunkley of the potential offer without also advising him of her belief that he should accept the plea. Despite this deficient performance, the Tennessee Court of Criminal Appeals concluded that Dunkley could not show that he had been prejudiced... Dunkley v. Phillips, No. 20-6221 (6th Cir. Apri. 22, 2021).

THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Whether the 6th Circuit's "burden" approach, in the context of a deficient counsel leads a defendant, like in this case, to forgo a beneficial plea offer, that requires a defendant to prove with reasonable probability that the prosecutor would have maintained an offered plea and that the trial court would have accepted it is unfair and inadequate to protect a defendant's constitutional right to effective representation? Hence the proceedings involve a question of exceptional importance.

Since this court has already ruled that trial counsel had performed deficiently by informing Dunkley of the potential offer without also advising him of her belief that he should accept the plea, hence he has met the ineffective prong of Strickland, which means he will proceed herein to showhow Mr. Dunkley's case, if evaluated fairly, meets the prejudice prong of Strickland as well.

Plea bargaining dominates the modern crinimal justice system. For instance, stats show that more than 97% of convicted defendants in federal district courts in 2010 entered a plea, and 94% of state felony convictions were the result of plea bargains. See http://www.albany.edu/soucebook/pdf/t5462006.pdf[http://perma.cc/P57A-46MT]; and http://www.albany.edu/sourcebook/pdf/t5222010.pdf[http://perma.cc/LbKK-48MX]. Constitutional safeguards, however, have only slowly followed this fundamental shift in criminal adjudication. In Missouri v. Frye and Lafler v. Cooper, the Supreme Court extended the Sixth Amendment's right to counsel to situations in which deficient counsel leads a defendant to forgo a beneficial plea agreement.

In Lafler, the court decided how to apply Strickland's prejudice test where ineffective assistance led to rejection of a plea offer and the defendant was convicted at the resulting trial. See Lafler

v. Cooper, 566 U.S. 156, 163 (2012). The Court rejected the Solicitor-General's argument that no prejudice sufficient to satisfy Strickland could exist when a defendant was subsequently convicted at a fair trial. Id. at 164. Instead, the court held that a defendant, denied effective cousnel while considering an offered plea agreement, can show prejudice "if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence. Id. at 168.

In Frye, the Court looked instead at a situation in which a defendant rejected better terms before later pleading guilty and found that the circumstances offered "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." Missouri v. Frye, 566 U.S. 134, 150 (2012). Noting that a prosecutor can withdrawl an accepted plea in Missouri, the court held that given Frye's new offense for driving without a license...[,] there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it... Id. at 151. The court remanded the question back down to the Missiuri courts to decide in the first instance. Id.

By applying Strickland v. Washington's prejudice prong in this new context, the court decisions in Frye and Lafler's cases posed new counterfactual questions regarding the hypothetical actions of courts and prosecutors, creating in turn new challenges for courts. The courts have interpreted the malleable instructions left by the Supreme Court in Lafler and Frye creating two (2) distinctly different fundamental approaches. The first approach, in

which courts require a defendant to affirmatively prove that the prosecutor would have maintained an offered plea and that the trial court would have accepted it, is referred to as the "burden" approach. By contrast, courts using the "presumption" approach rely on the fact that most plea offers are neither revoked by offering prosecutors nor rejected by trial courts absent unusual circumstances and presume that the defendant would have successfully obtained an accepted plea agreeement.

In his dissent in Frye, Justice Scalia noted what he saw as the underlying accuracy and fairness of the pleadings that led to Mr. Frye's conviction and focused particular attention on the challenges that the court's instructions on prejudice left behind. Frye, 566 U.S. at 152-53. He decried the court's test as " a process of retrospective crystal-ball gazing posing as a legal analysis." Id. at 154. He concentrated criticism on the two new questions, wherein courts "must estimate whether the prosecution would have withdrawn the plea offer [,] (a)nd...estimate whether the trial court would have approved the plea agreement. Id. He argued, "[v]irtually no cases deal with the standards for a prosecutor's withdrawl from a plea agreement beyond stating the general rule that a prosecutor may withdrawl anytime prior to, but not alter, the entry of guilty plea" and cases addressing trial courts' authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion. Id at 154.

As a result, in Justice Scalia's view, even after the development of more substantial standards, significant discretion

would remain and thus "make a defendant's constitutional rights depend upon a series of retrospective mind-reading as to how that discretion, in prosecutors and trial judges, would have been exercised. Id.

Other Circuits agree with Justice Scalia's view: for example, in Wanatee v. Ault, 259 F.3d 700 (8th Cir. 2001) the court held, a defendant who rejects a plea offer due to improper advice from counsel may show prejudice sufficient to support ineffective assitance of counsel claim even though he ultimately received a fair trial; to establish prejudice under such circumstances, defendant must show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lessor sentence. Another example, in Arnold v. Thaler, 630 F.3d 367 (5th Cir. 2010) the court held, "we...refuse to engraft onto [the prejudice prong of] Strickland the requirement that, in addition to demonstrating a reasonable probability that he would have changed his plea, a petitioner must demonstrate a reasonable probability that the judge, in turn, would have accepted his plea. A number of our sister circuits have similarly rejected such a rule. Id.; and, also U.S. v. Rodriguez, 929 F.2d 747, 753 N.1 (1st Cir. 1991).

In particular, one must examine Frye and Lafler more closely to see which approach "presumption" or "Burden" has vindicated (or failed to vindicate) the court's attempt to protect a defendant's right to effective counsel at the pleading stage.

The court's decision in Frye and Lafler left significant uncertainty in their wake. The court defined two new counterfactual

questions to be used in the prejudice prong for forgon pleas: first, whether a prosecutor would have revoked an offered and accepted plea prior to entry, and second, whether a trial court would approve an accepted and entered plea. In asking these new questions, however, the court left sparse guidance for courts below on how to actually answer these questions. The Court noted in Frye that "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains...[i]t should not be difficult to make an objective assessment as to whether or not a particular fact... would suffice...to cause prosecutorial withdrawl or judicial nonapproval..." Frye, 566 U.S. at 149-51. According to the Court, the determination of a "reasonable probability that the outcome of the proceedings would have been different absent counsel's errors" should proceed through this framework. Id. at 149.

Now, one reading of the court's language suggests that the Court's approach might find most offered pleas to be acceptable to the court and the prosecutor. The court begins by noting the actors in jurisdictions are likely to understand "the boundaries of acceptable plea bargains." Id. at 149-51. Moreover, the court's outline of the inquiry, searching for facts that would "suffice... to cause prosecutorial withdrawl or judicial nonapproval of a plea bargain," appears to imply a starting point of prosecutional and judicial acceptance. The court also framed its analysis of the case at hand by noting that, given the fact of Frye's intervening

additional offense prior to the hearing at which the plea would have been accepted, "there is reason to doubt" that the Prosecutor and trial court would have maintained the plea agreement. Id. at 151. Using this langauge, the court seems to suggest that in the typical case, an absence of contrary facts might imply approval by a court and offering prosecutor.

On the other hand, the court's langauge, can also be read as placing an affirmative evdientiary burden on the defendant. Foremost, the court does so by placing new showings of the prejudice prong within the existing langauge of Strickland, stating that a defendant must show " a reasonable probability neither the prosecution not the trial court would have prevented the offer from being accepted or implemented." Id. at 148. The court even emphasized that such showing was of "particular importance" because defendants have no right to be offered a plea agreement. Id. By choosing to situate the new counterfactual questions within the existing Strickland context in which defendants must bear the affirmative evidentiary burden, the court arguably implied that defendants would be required to bear a similar burden in these novel contexts as well.

Hence, Mr. Dunkley argues that the 6th Circuit's "burden" approach as applied to his case is unfair, and the "presumption" approach best engenders the fundamentally fair proceedings that Frye and Lafler decisions aspire to facilitate.

Specifically, a presumption in favor of relief for the defendant, rather than an affirmative evidentiary burden, is better for several distinct reasons. First, on a pragmatic level,

information and resource asymmetrics between defendants and state prosecutors mean that prosecutors will generally be far more able to prove that a given plea offer would have been revoked or rejected by the court than a defendant will be able to prove that it would have been accepted. A rebuttable presumption would not provide an automatic guarantee of relief for defendants but would instead only demand information from prosecutors rather than defendants. Second, the effects of trial and conviction, when viewed by an adjudicating court through hindsight, produce prejudice against the defendant and warrants a presumption in the defendant's favor. Third, the right to effective assistance of counsel is a fundamental right, and its protections is critical for our system of justice. Protecting this right is especially key in the increasingly central arena of negotiated plea agreements.

In sum, in Frye and Lafler, the Supreme Court emphasized that our criminal justice system is one predominated by guilty pleas. The statistics bear out this conclusion. In crafting protections for defendants at the pleading stage, however, the court left substantial leeway for lower federal courts to decide how functional such protections would be in practice. Whereby, we now need to examine the effects of Frye and Lafler in practice, interpretation of the counterfactual prejudice questions, between a presumption approach favoring defendants in the absence of countervailing evidence, and a burden approach that creates substantial hurdles for defendants. Courts that place an affirmative evdientiary

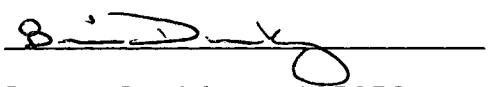
burden on defendants to prove the counterfactual acts of judges and prosecutors, though following a reasonable interpretation of the court's text in both decisions, erect a system that makes relief for even meritorious claims so difficult that it fails to fulfill the spirit of the two decisions.

Thus, the decision of the Sixth Curcuit,in this case, is in conflict with the decision of other circuits, and violates the Petitioer's constitutional right to due-process. Further, the Sixth Circuit should adapt the other Circuits presumption approach that recognizes the importance of counsel in the central arena of plea bargaining.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted by,



Brian Dunkley, 487273
BCCX, Site 2, Unit 5
1045 Horsehead Rd.
Pikeville, TN. 37367