No. 21-6074

IN THE

SUPREME COURT OF THE UNITED STATES

NIKOLAS GACHO — PETITIONER
(Your Name)

vs.

PEOPLE OF THE STATE OF ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Appellate Court of Illinois, First District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NIKOLAS GACHO, Register No. M-43072
(Your Name)
Hill Correctional Center
P.O. Box 1700
(Address)

Galesburg, Illinois 61402
(City, State, Zip Code)

(309) 343-4212
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

I. Does a plea admonishment cure all prejudice and preclude a defendant from challenging counsel's representation during the plea negotiations process ?

II. Did the Illinois Appellate Court err in its conclusion that the Sixth Amendment only applies to conduct that affects the reliability of the trial process, not plea negotiations ?

III. Did the Illinois Appellate Court err in finding Nikolas' counsel was not ineffective, and Nikolas could not show prejudice ?

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:

RELATED CASES

- PEOPLE V. GACHO, NO. 1-14-0896, APPELLATE COURT OF ILLINOIS. JUDGIEMENT ENTERED AUG. 23, 2016. (DIRECT APPEAL)
- PEOPLE V. GACHO, NO. 11-CR-987901, COOK COUNTY CIRCUIT COURT. JUDGIEMENT ENTERED JAN. 11, 2019 (POST-CONVICTION)
- PEOPLE V. GACHO, NO. 1-19-0597, APPELLATE COURT OF ILLINOIS. JUDGIEMENT ENTERED DEC. 22, 2020. (POST-CONVICTION)
- PEOPLE V. GACHO, NO. 127000, ILLINOIS SUPREME COURT. JUDGIEMENT ENTERED MAY. 26, 2021. (POST-CONVICTION)
- GACHO V. BRANNON-DORTCH, NO. 3:21-CV-03216-CSB, CENTRAL DISTRICT OF ILLINOIS (PENDING) (FEDERAL HABEAS PETITION)

TABLE OF AUTHORITIES CITED

TABLE OF CONTENTS

INDEX TO APPENDICES

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[ ] is unpublished.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 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.

[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 Cook County Circuit Court 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.

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 May 26, 2021. A copy of that decision appears at Appendix C.

[ ] 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 following constitutional and statutory provisions are involved in this case:

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the justice thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

On December 4, 2013, Petitioner, Nikolas Gacho -- 17 years old at the time of the instant offense -- was convicted in the Circuit Court For Cook County, Illinois, of Attempted First Degree Murder. On February 10, 2014, the Court sentenced Nikolas to 35 years imprisonment, which included a mandatory 25-year Firearm Sentencing Enhancement. Notice of Appeal was timely filed on March 7, 2014. Illinois' Appellate Court affirmed the conviction and sentence on August 23, 2016, unpublished at People v. Gacho, 2016 Il App (1st) 140896-U. A timely Petition For Leave To Appeal To The Illinois Supreme Court was filed on September 23, 2016. The Illinois Supreme Court denied review on January 18, 2018, at People v. Gacho, No. 121344, 94 N.E. 3d 630 (Table), 419 Ill. Dec. 761 (Ill. Jan. 18, 2018). No Petition For Writ of Certiorari was filed on direct review.

On October 17, 2018, Petitioner filed a timely pro-se Petition For Post-Conviction Relief (Appendix D), in the Circuit Court of Cook County, Illinois, arguing inter alia, that counsel provided ineffective assistance during the plea bargaining process.

In this petition, Nikolas presented factual evidence that, over the nearly 31 months of pretrial proceedings Nikolas' attorneys advised Nikolas of an incorrect sentencing range of 6-30 years, (Nikolas' actual sentencing range was 31-years-life, due to a 25-year-life firearm sentencing enhancement for personally discharging a firearm that caused great bodily harm.) and repeatedly

assured him and his family that, by him being only 17 years old at the time of the offense there was no way, even if we lost at trial a judge was going to give Nikolas anything near 30 years. Everything that was planned and considered in preparation for trial was done so, based on the incorrect sentencing information which was provided by counsel, and counsels' affirmative and misleading assurances.

On the day of trial, Nikolas' attorneys informed him the State was making a 20 year plea offer, and at the same time, informed Nikolas, the State enhanced his charges today. They are now seeking a 25 year-life firearm sentencing enhancement, making his sentencing range 31 years-life (the language preserving the State's right to seek the 25 year-life enhancement was in the charging of information, Counts 3-6, which counsel waived a formal reading of) prior to the day of trial Nikolas had not been informed by the Court, nor his attorneys, he was subject to this 25 year-life enhancement, and a sentencing range of 31 years-life.

When presented with the State's 20 year offer Nikolas asked his attorneys to try and get the offer down to 15 years. They returned and informed him the State remained at their 20 year offer. Nikolas again asked his attorneys to try and get the offer down to 15 years or as close to it as possible, they returned and informed Nikolas they had spoken to the judge, and the judge felt 20 years was a fair offer. Nikolas then asked his attorneys for advice, and they informed him -- they could not help him in making his decision. Based on them refusing to provide Nikolas with any advice as to what he should do, Nikolas informed his attorneys -- he would like a continuance to consider the offer -- in light

of the significant shift in the sentencing range -- and that everything that was planned and considered going into trial had been done so with Nikolas thinking his sentencing range was 6-30 years. He also would like to speak to his family about accepting the offer. Nikolas' attorney, Phillip Bartolementi, upon hearing Nikolas' request for a continuance, informed Nikolas;

> "There was no way he could ask for a continuance on the day we're to start trial, that is not an option."

Mr. Bartolementi went on to say;

> "He could not and would not ask for a continuance because it would undermine his credibility in front of the court."

Based on Nikolas' attorneys refusing to provide him any useful information or advice when he was considering whether to accept or reject the plea offer, and refusing to ask for a continuance so Nikolas could re-assess his options in light of the significant shift in the sentencing range, and to speak to his family about accepting the offer, Nikolas declined to accept the 20 year offer and proceeded to trial. (Appendix D, pg. 2-7, 31).

On January 11, 2019, the Circuit Court of Cook County, summarily dismissed Nikolas' pro-se Petition For Post-Conviction Relief as frivolous and patently without merit.

The circuit court's summary of the claim presented by Nikolas states;

"Gacho claims his lawyers were ineffective for (1) failing to inform him about the firearm enhancement until the day of trial, (2) providing him no reasonable professional advice as to what decision to make, and (3) refusing to ask for a continuance. He says those factors deprived him of making a knowing and informed decision. But for those errors, he would have accepted the 20-year plea offer."

The circuit court went on to cite the applicable precedents and standard of review;

"An ineffective assistance claim premised on a defendant's reliance on counsel's advice in deciding to reject a plea is governed by the two-part test established in Strickland v. Washington, 466 U.S. 668 (1984).***
The right to effective assistance of counsel does extend to the plea-bargaining process. Hill v. Lockhart, 474 U.S. 52, 57 (1985); People v. Hall, 217 Ill. 2d 324 (2005). That includes the right to be informed of the offer of a plea bargain (Missouri v. Frye, 566 U.S. 134 (2012)) and the right to competent advice about whether to accept or reject a plea offer (Lafler v. Cooper, 566 U.S. 156 (2012))."

The circuit court went on to reach the conclusion that;

"Here defense counsel did inform Gacho the State made a plea offer and did, ultimately, inform him of the accurate setencing range if convicted at trial. Judge Lacy also also admonished Gacho of the applicable sentencing range and Gacho indicated he still wished to proceed to trial.

> While counsel may have stated an incorrect sentencing at earlier stages, Gacho did have all the relevant information that is constitutionally required to decide whether to accept or reject the plea offer when he made his choice. His argument supposes counsel should have instructed him which decision to make or persuaded him to accept the plea. The constitution does not require that. Only Gacho could make the decision. Counsel could not make it for him. Therefore, there is no basis in law that Gacho's lawyers' performance was unreasonable. In addition, Gacho's own account belies the notion he would have accepted the 20-year offer. In his telling, Gacho asked his lawyers to counter with 15 years after being informed that the sentencing range was 31 years to life. Yet he still rejected the 20 year offer when the state held firm and he was told the judge thought it fair. Thus, he had a meaningful opportunity to consider the offer with correct information. Under those circumstances, his actual decision to go to trial contradicts his conclusory claim that he would have accepted the plea. Ultimately, Gacho was not arguably prejudiced." (Appendix B, pg. 6-9).

On December 22, 2020, the Illinois Appellate Court affirmed the trial court's first stage summary dismissal of Nikolas' Post-Conviction Petition. In the appellate court's reciting of background information it states; "The record reflects that on the day the case was set for trial, the following colloquy occured in court prior to the commencement of the bench trial:

MS. D'SOUZA [(ASSISTANT STATE'S ATTORNEY)]:

*** The State is making an offer covering this case only of 20 years Illinois Department of Corrections on the Attempt Murder, which I believe the Defendant is rejecting. He is looking at a minimum of 31 years to natural life

if he is convicted on this charge based on the fact that it is charged that the Defendant personally discharged a firearm that caused permanent disfigurement and permanent disability to the victim.

THE COURT: Mr. Gacho, do you understand what the State's offer is?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay, you understand they are offering you 20 years on the Attempt First Degree Murder, one of the lesser charges. If you are found guilty of one of the counts, count 4 in that you proximately caused - that you personally discharged a firearm that proximately caused great bodily harm to Mario Palomino or caused permanent disability to Mario Palomino, the absolute minimum you could get would be 31 years. You could get a maximum up to natural life. I just want to make sure you understand.

THE DEFENDANT: I understand, your Honor.

THE COURT: Understanding that, do you reject the offer of 20 years?

THE DEFENDANT: I reject it, your Honor.

(Appendix A, pg. 2-3)

The Appellate Court went on to recite the facts presented by Nikolas and summarized his claim as, "He claimed that his trial counsel provided him ineffective assistance by failing to inform him of the correct sentencing range until the day of trial, providing him with no assistance about whether to accept the plea offer, and then refusing to ask for a continuance to allow him to consider the offer and make an informed decision after full consultation with his defense counsel. He claimed that he would have accepted the state's 20-year offer, but for the ineffective assistance of his counsel."

(Appendix A, pg. 5-6)

The Appellate Court went on to affirm the summary dismissal and deny relief for the following reasons; First, "We note that it is well established that admonishments by the circuit court can cure prejudice to a defendant resulting from counsel's incorrect advice. People v. Valadez, 2016 Il 119860 ¶ 31 (Appendix A, pg. 14-15 ¶26) Given that trial court's admonishments can cure prejudice even where an attorney has given incorrect advice, we find nothing in Barghouti or Williams to suggest that a criminal defendant whose counsel has provided him or her with accurate sentencing information by the time he or she is considering and ultimately decides whether to accept or reject a guilty-plea offer has received ineffective assistance of counsel, merely because counsel had provided incorrect sentencing information at an earlier point in this case. We thus agree with the trial court's assessment that, with respect to information about the potential sentence he faced, petitioner's attorneys had provided him with 'all the relevant information that is constitutionally required to decide whether to accept of reject the plea offer when he made his choice'. (Appendix A, pg. 15 ¶27) *** Further, during the trial court's pretrial inquiry into petitioner's understanding of the plea offer and his desire to reject it, petitioner did not suggest to the trial court he wanted additional time to consider the state's offer or otherwise equivocate about his desire to reject the state's 20-year offer. See, People v. Mujica, 2016 Il App (2d) 140435, ¶19. These facts contradict petitioner's own "'subjective, self-serving' assertion after-the-fact that he would have accepted the state's offer of 20 years if only his attorneys had obtained more time for him to consider it. See, Hale, 2013 Il 113140, ¶18. Thus, petitioner has failed to show arguable prejudice." (Appendix A, pg. 18, ¶31)

Second, the Appellate Court found that; "Neither Barghouti nor Williams assists petitioner in demonstrating an arguable claim of ineffective assistance of counsel in this case. The key distinction is that in both of those cases, the petitioners alleged that, as of the time they were considering and ultimately rejected the state's guilty-plea offers, they were operating under a misunderstanding based on their attorneys having provided them with inaccurate information about the sentences they faced, which led them to reject the plea offer and proceed to trial. (Appendix A, pg. 14, ¶26) *** We find that none of the cases cited by petitioner support the conclusion that an attorney's refusal to request a continuance on the day of trial, solely to allow a client to have additional time to consider a plea offer, is arguably conduct that falls below an objective standard of reasonableness to the prejudice of the defendant... none of the cases suggest that an attorney is required to request a continuance of the trial for a purpose unrelated to the trial itself, such as allowing the client more time to consider a plea offer. See, united States v. Cronic, 466 U.S. 648, 658 (1984) ('absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated'). We believe that this is true regardless of whether the client was previously operating under a misunderstanding about the potential sentence he or she faced if convicted." (Appendix A, pg. 17, ¶30)

Last, the Appellate Court went on to, "agree with the trial court that petitioner has not shown that his decision to reject the guilty plea was caused by his attorneys' misinforming him of the sentencing range he faced prior to the day of trial and then refusing to request a continuance to allow him more time to consider the state's offer. His petition discloses that even after

being informed of the correct sentencing range on the day of trial, he directed his attorneys twice to attempt to obtain an offer from the state of 15 years or as close to it as possible, which they attempted to do. Thus, even after learning that the state was holding firm to its 20-year offer and that the trial judge thought it was fair, he neverthless decided to reject it and proceed to trial... for these reasons, we hold that the trial court correctly determined that the petitioner's claim that he was denied the constitutional right to effective assistance of trial counsel was frivolous or patently without merit. The trial court therefore did not err in summarily dismissing this claim." (Appendix A, pg. 17-18, ¶ 31,32)

On January 12, 2021, Nikolas filed a Petition For Rehearing asking the Appellate Court to grant rehearing because the court's distinction between deficient representation during plea negotiations and deficient representation related to trials has been expressly rejected by the U.S. Supreme Court; for the purpose of summary review under Illinois' Post-Conviction Act, a 20-year old's silence should not bar his claim of ineffective assistance of counsel, where the attorneys' improper representation induced Nikolas' silence; and the court failed to assume the truth of the allegations in Nikolas' Post-Conviction Petition.

On January 20, 2021, the Illinois Appellate Court denied the Petition For Rehearing.

On February 24, 2021, Nikolas filed a Petition for Leave To Appeal in the Illinois Supreme Court, presenting the following compelling reasons for granting review.

Nikolas Gacho's pro-se Post-Conviction Petition alleges that trial counsel was ineffective for, inter alia, failing to advise Nikolas of the 25-to-life mandatory firearm enhancement, prior to the day of trial, and then by refusing to request a continaunce so that Nikolas could consult his family about the state's 20-year plea offer. On appeal from the summary dismissal of the petition the appellate court has held that the claim is not arguable because: (1) the Sixth Amendment applies to conduct affecting the "reliability of the trial process", not plea negotiations; and (2) Nikolas failed to personally ask the trial court for a continuance, notwithstanding that counsel allegedly told Nikolas that a continuance was "not an option." People v. Gacho, 2020 Il App (1st) 190597-U, ¶¶ 30-31 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)).

This Court should grant leave to appeal to determine whether a defendant's silence - allegedly induced by counsel's erroneous statements during plea negotiations - can be used to insulate that deficient representation from review under the Post-Conviction Hearing Act.

On May 26, 2021, the Supreme Court of Illinois denied the Petition For Leave To Appeal.

On September 27, 2021, Nikolas mailed his Federal Habeas Petition to Illinois' Central District's Springfield Division, which was received on October 4, 2021, case number: 3:21-cv-03216-CSB. (Pending) This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The United States Supreme Court is needed to address whether a plea admonishment is a cure-all of prejudice and precludes a defendant from challenging counsel's representation during the plea bargaining process.

In Lee v. United States, 137 S. Ct. 1958, defendant had adequately demonstrated a reasonable probability that but for counsel's erroneous advice, he would have rejected a guilty plea where his plea colloquy and surrounding circumstances showed deportation was the determinative issue in his decision to accept the plea, and it was not irrational to reject the plea when there was some chance of avoiding deportation, however remote.

This Court went on to state, in a footnote, that, "several courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice. See, e.g., United States v. Newman, 805 F. 3d 1143, 1147, 420 U.S. App. D.C. 89 (CADC 2015); United States v. Kayode, 777 F. 3d 719, 728-729 (CA5 2014); United States v. Akinsade, 686 F. 3d 243, 253 (CA4 2012); Boyd v. Yukins, 99 Fed. Appx. 699, 705 (CA6 2004). The present case involves a claim of ineffectiveness of counsel extending advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of lee's counsel." Lee v. United States, 137 S. Ct. 1958, 1975 n. 4 (2017).

In the instant case, the Illinois Appellate Court states;

"It is well established that admonishments by the circuit court can cure prejudice to a defendant resulting from counsel's incorrect advice. People v. Valdez, 2016 IL 119860, ¶ 31." (Appendix A, pg. 15, ¶ 26).

The Court went on to say;

"Further, during the trial court's pretrial inquiry into petitioner's understanding of the plea offer and his desire to reject it, petitioner did not suggest to the trial court that he wanted addtional time to consider the state's offer or otherwise equivocate about his desire to reject the state's 20-year offer. See, People v. Mujica, 2016 Il App (2nd) 140435, ¶ 19. These facts contradict petitioner's own 'subjective, self-serving' assertion after-the-fact that he would have accepted the state's offer of 20-years if only his attorney had obtained more time to consider it. Hale, 2013 IL 113140, ¶ 18. Thus, petitioner has failed to show arguable prejudice." (Appendix A, pg. 18, ¶ 31).

A 20-year-old's failure to personally ask the trial court for a continuance should not bar his claim of ineffective assistance of counsel, where the attorney's improper representation induced the defendant's silence.

Nikolas' trial attorney told him that a defendant cannot ask for a continuance on the day of trial. (Appendix D, pg. 3), and even if they could, his attorney would not do so because he did not want to lose credibility with the trial court. (Ibid.)

On these facts, which are not rebutted by the record, Nikolas, who was 20-years-old at the time, had no reason to believe that he could ask for a continuance. That fact, coupled with counsel's failure to previously inform Nikolas of the 25-to-life mandatory firearm add-on, forced Nikolas to make an immediate decision on something that would affect the rest of his life without the advice or consultation from his counsel. His petition specifically avers that he asked his attorneys for advice on whether to accept or reject the plea offer, when they refused to provide any, he stated he wanted a continuance in order to re-assess his options and to speak to his family about what he should do. (Appendix D, pg. 3). Notwithstanding, the appellate court held that Nikolas' claim was not even arguable because he did not stand up in court and request a continuance, in direct conflict with his attorneys' erroneous statement - that holding is without basis.

The appellate court cited People v. Mujica, 2016 Il App (2nd) 140435, ¶ 19, to support the proposition that the record positively rebutted Nikolas' claim that counsel was ineffective for failing to request a continuance. People v. Gacho, 2020 IL App (1st) 190597-U, ¶ 31. Mujica, however did not support that holding. The question in Mujica was whether the trial attorney had failed to communicate the defendant's acceptance of the state's second plea offer. Mujica, 1404035, at ¶ 8. The court held that there had not been a second plea offer; and even if there had been, the fact that the defendant went to trial belied his claim that he intended to accept the state's offer. Id. at ¶ 17-19. Unlike Mujica, there is no question that the state made the offer to Nikolas.

Furthermore, here, unlike Mujica, Nikolas alleges that trial counsel told him that defendants cannot ask for a continuance on the day of trial; "That is not an option." (Appendix D, pg. 3). And, even if counsel could ask for a continuance, doing so would undermine his credibility (Ibid.) Critically, the record did not reflect that the trial court asked Nikolas whether he wanted a continuance to consider the state's offer. Consequently, there would have been no reason to presume that Nikolas knew that he could ask for the very thing his lawyer told him was not an option. The present facts are therefore incomparable to Mujica - a case in which the defendant never alleged that his attorneys told him he did not have the right to ask for a continuance. Thus, on these facts, where the appellate court used the product of trial counsel's deficient representation - Nikolas' silence - to preclude further review of his claim of ineffective assistance of counsel. This Court should address whether a plea admonishment precludes a defendant from challenging counsel's representation during plea proceedings and/or to hat extent the admonishment must inquire to ensure the rights of the defendant are protected.

II. The Illinois Appellate Court's distinction between a lawyer's conduct that bears on reliability of the trial, and conduct "unrelated to the trial itself," warrants this Court's attention.

In the instant case, the Illinois Appellate Court distinguished the cases relied on below, on the basis that those cases involved trial preparations and/or

proceedings, not guilty pleas. Gacho, 190597-U, ¶ 28-30 (discussing Minter, 2015 Il App (1st) 120958; Mota, 685 F. 3d 644; and Gunartt, 218 Ill App 3d 752). In support of that conlcusion, the appellate court quoted United States v. Cronic, 466 U.S. 648, 658 (1984); "absent some effect of the challenged conduct on the reliability of the trial process the Sixth Amendment guarantee is generally not implicated." Gacho, 190597-U, at ¶ 30. In the decades following Cronic, however, this United States Supreme Court has rejected this reasoning.

In Missouri v. Frye, 566 U.S. 134, 139 (2012), the Court emphasized that effective assistance of counsel is every bit as important during plea negotiations as during trial, if not more so. In Frye the question was whether trial counsel was ineffective for failing to inform the defendant of a plea offer. This U.S. Supreme Court recognized that the alleged deficient representation did not preclude "a full and fair trial" or perhaps a less favorable plea at a later date. id. at 143. However, the Court made clear that the Sixth Amendment applied with equal force. specifically, the Court began by acknowledging the "simple reality" that guilty pleas account for 97% of federal convictions and 94% of state convictions. Id. (citation omitted). The percentages are not without consequence 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." Lafler v. Cooper, 566 U.S. 156, 170 (2012). It is insufficient simply to point to the guarantee of a fair trial as a backstop

that inoculates any errors in the pretrial process - Frye, 566 U.S. at 143-144. Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." Id. at 144 (emphasis in original). Accordingly, where the appellate court relied on a distinction that is no longer controlling its analysis should be revisited.

III. The Illinois Appellate Court failed to properly apply Stickland v. Washington, 466 U.S. 668 (1984), Lafler v. Cooper, 566 U.S. 156 (2012), and Missouri v. Frye, 566 U.S. 134 (2012).

The United States Constitution guarantees criminal defendants the right to effective assistance of counsel. U.S. CONST., AMEND. XI, XIV; Strickland v. Washington, 466 U.S. 668, at 685-86 (1984). The Sixth Amendment right to effective assistance of counsel applies to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57 (1985); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1406-07 (2012).

"A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. 668, at 690.

The Illinois Appellate Court fails to apply the correct standard of review where - in its conclusion that;

> "We find that none of the cases cited by petitioner support the conclusion that an attorney's refusal to request a continuance on the day of trial, soley to allow a client to have additional time to consider a plea offer, is arguably conduct that falls below an objective standard of reasonableness to the prejudice of the defendant. *** None of these cases suggest that an attorney is required to request a continuance of the trial for a purpose unrelated to the trial itself, such as allowing the client more time to consider a plea offer." (Appendix A, pg. 17, ¶ 30).

The appellate court's error is that -- the question is not whether counsel is "required to request a continuance," -- the question is -- whether counsel's refusal to do so at that time was unreasonable.

The appellate court fails to consider the totality of the facts and circumstances surrounding this unreasonable decision. "The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. 668, at 690.

The Appellate Court fails to factor into its analysis, that at the time counsel refused to request a continuance, counsel was aware of the following facts;

(1) Over the nearly 31-months of pretrial proceedings they adviced Nikolas of an incorrect sentencing range, while also providing misleading assurances - which went uncorrected until the day of trial. By which time everything that was planned and considered was done so based on the incorrect sentencing information and misleading assusrances;

(2) At the time they presented the State's 20-year offer, and for the first time - informed Nikolas of the 25-year-life firearm enhancement, Nikolas made a close counter offer. First of 15 years, and a second last effort to get the offer any bit lower. Afterwhich, when they were unable to do so, Nikolas did not again attempt to counter offer, nor did he reject the offer at that time. Instead, he asked his attorneys for advice, when he was considering whether to accept or reject the offer -- which they refused to provide;

(3) After counsel refused to provide any advice or consultation, Nikolas informed his attorneys he would like a continuance to consider the offer and to speak to his family about accepting the offer -- based on the significant shift in the sentencing range and everything that was planned and considered up until that point had been done so with him thinking his sentencing range was 6-30 years.

Counsel has a fiduciary duty to do what is in the best interest of their client. In this case obtain Nikolas' requested continuance -- especially since the requested continuance was based on their unprofessional errors in advising Nikolas of an incorrect sentencing range and refusing to provide the advice and consultation Nikolas is constitutionally entitled to.

Based on the totality of the facts and circumstances surrounding counsels' refusal to request the continuance, counsel's decision was clearly unreasonable at that time. In addition, counsel's reason for refusing to request the continuance; "not wanting to undermine his credibility in front of the court, which he chose his personal interests over his fiduciary duty -- is just as unreasonable -- if not more so.

Therefore, counsel's challenged conduct should be found to be "outside the wide range of professionally competent assistance" -- and satisfy Strickland's first prong.

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Missouri v. Frye, 132 S. Ct. 1399, 1409.

First, the disparity between the 20-year plea offer and the sentence Nikolas received after trial -- 35-years -- is supportive of Nikolas' claim of prejudice. See, Glover v. United States, 531 U.S. 198, 203 (2001)(disparity of six months is enough to find prejudice).

Second, contrary to the appellate court's determination, Nikolas' close counter offers are demonstrative of his willingness to accept the plea. Where after his last effort to get the offer any bit lower, he asked his attorneys for advise -- which they refused to provide. Counsel refused to provide the advice and consultation Nikolas is constitutionally entitled to.

> "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of a plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." Lafler v. Cooper, 132 S. Ct. 1376, 1387 (citing Frye, ante, at 1386-1387, 132 S. Ct. 1399).

Third, after counsel refused to provide the advice and consultation Nikolas is entitled to, Nikolas informed his attorneys -- he would like a continuance to consider the offer and to speak to his family about accepting it. Counsel refused to request Nikolas' request for a continuance based on -- his own personal interests -- to avoid underming his credibility in front of the court.

Nikolas clearly stated in his Post-Conviction Petition, that;

> "Based on Mr. Bartolementi and Ms. Makowski providing Mr. Gacho with no useful information or advice and refusing to ask for a continuance Mr. Gacho refused the 20 year offer and proceeded to trial."
> (Appendix D, pg. 3)

Fourth, there was no reason for the State to withdraw the plea, where the offer was made on the day trial was set to start, surely after the State had reviewed all of the facts of the case.

Fifth, the trial court would have accepted the plea offer. Courts generally "defer to the parties' negotiated agreement in the vast majority of cases," given the parties' superior knowledge and the substantial judicial resources saved through plea bargaining. Green v. Attorney Gen., State of Fla., 193 F. Supp. 3d 1274, 1287 (M.D. 2016). The Illinois Supreme Court has encouraged plea bargaining based on its firmly "rooted view that the plea-bargaining process, and the negotiated plea agreements that result from that process, are vital to and highly desirable for our criminal justice system." People v. Henderson, 809 N.E. 2d1224, 1231 (Ill. 2004). Furthermore, in Illinois, while judges retain discretion to reject a proposed plea agreement, that discretion is limited. People v. Allen, 815 N.E. 2d 426, 430 (Ill App Ct. 2004)("Just because a court may reject a proposed plea agreement, it does not follow that a court may reject one for any reason at all.") People v. Hudson, 2017 Il App (3d) 160225 (finding trial court abused its discretion in rejecting plea). Additionally, at the time of the plea offer Nikolas was only 20 years old.

And, Nikolas was just 2 months past his 17th birthday when this offense was committed. Under the agreement, Nikolas would have been sentenced to serve a substantial sentence of 20-years. Therefore, there is a reasonable probability that an objective decision-maker would have accepted the plea agreement.

Based on these facts, Nikolas demonstrates a reasonable probability he would have accepted the plea had he been afforded effective assistance of counsel. The State would not have withdrawn their plea offer, and the Court would have accepted the plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nikolas Jacho

Date: OCTOBER 20, 2021