No. 21-6346

IN THE
SUPREME COURT OF THE UNITED STATES

Jason W. Reed—Petitioner

vs.

Secretary, Florida
Department of Corrections — Respondent







ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATE COURT OF APPEALS, ELEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## Question

Two plea offers were made available by the State : 1) twenty years prison with a [negotiable] term of probation and sex offender designation; or 2) twenty-five years prison with no probation and sex offender designation. Contrary to the above offers, a first degree felony conviction to sexual battery in violation of F.S. 794.011(4); requires, mandatory designation as a sexual predator pursuant to F.S. 775.21(5)(a)2, at the time of sentencing.

**Question One**: Whether, counsel's admitted misadvice with respect to Petitioner's designation, its direct result of a life time imposition of "specialized supervision by probation officers" pursuant to Florida Sexual Predator Act, F.S. 775.21(3)(b)2&(e)1, and the designations triggering of the maximum level of supervision by Fla. Conditional Release F.S. 947.1405(c); amounts, to gross misinformation by counsel, considering the prejudicial aspect of losing the lesser more favorable of the two available plea offers, and acceptance of the lengthier plea, strongly suggests – the determinative issue – was to avoid all post prison supervision when released from prison?

**Question Two**: If so, as case in point, the deliberate exclusion in all below court rulings and reports, of the existence of two available plea offers, whereby, allowing the courts to analyze prejudice using the Strickland/Hill test, infra; rather than the correct analysis defined in Strickland/Frye and Lafler infra; what remedy does the public have in addressing Due Process violations when courts, by questionable tactics, refuse to follow Supreme Court precedent?

## List of Parties

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

Secretary, Florida Department of Corrections, 501 South Calhoun St., Tallahassee, FL 32399-2500

Office of the State Attorney, First Judicial Circuit, Walton County Florida, 1B 9th Ave. Shalimar, Fl. 32579.

Office of the Attorney General, State of Florida PL01, the Capitol, Tallahassee, Fl. 32399-1050.

## Related Cases

*Jason W. Reed v. State of Florida*, No's: 2011-CF-494; 2011-CF-506 First Judicial Circuit, Walton County. Order rendered June 26, 2017.

*Jason W. Reed v. State of Florida*, No: 1D17-2790; 278 So. 3d 583, 1st District Court of Appeals, Florida. Judgment entered May 21, 2019, mandate issued July 9, 2019.

*Jason W. Reed v. Secretary, Florida Department of Corrections*, No.: 4:19 cv 436-WS / MAF. United States District Court, Tallahassee Division. Judgment entered Dec. 22, 2019.

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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

Federal Courts:
The opinion of the United States Court of appeals appears at Appendix A. to the petition and is reported at *Reed v. State*, FDOC 2021 U.S. App. Lexis 13701.

The opinion of the United States district court appears at Appendix B. to the petition and is reported at *Reed v. Secretary*, FDOC 2020 U.S. Dist. Lexis 242379.

State Courts:
The opinion of the highest state court to review the merits appears at Appendix C. to the petition and is reported at *Reed v. State*, 278 So. 3d 583.

The opinion of the Walton County Florida Circuit Court appears at Appendix D. to the petition and is unpublished.

## JURISDICTION

Federal Courts:
The date on which the United States Court of Appeals decided my case was May 7, 2021. A timely petition for rehearing was denied June 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and Ordered by this Court Extending deadline to file a Writ of Certiorari to 150 days from the date of the lower court judgment.

State Courts:
The date on which the highest state court decided my case was May 21, 2019. A copy of the per curiam decision appears at Appendix C.

A timely petition for rehearing was denied June 18, 2019, and a copy of the order denying rehearing appears at Appendix C.
The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## Constitutional and Statutory Provisions Involved

V Amendment: No person shall be deprived of life, liberty, or property, without due process of the law. (App. F. page 21f)

VI Amendment: In all criminal prosecutions, the accused shall enjoy the right to have the assistance of [effective] counsel for his defense. (App. F. page 21f)

XIV Amendment: 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 protection of the laws. (App. F. page 21f)

§ 775.21(3)(b)2 & (e)1, Legislative intent, providing for specialized supervision of sexual predators who are in the community by specially trained probation officers with low case loads, or described in ss. 947.1405(7) (App. F. page 3f)

§ 775.21(4)1a, Sexual predator criteria, for a current offense committed on or after October 1 1993, upon conviction, an offender shall be designated as a sexual predator under subsection (5), if: The felony is a capital, life, or '**first degree felony**' violation, or any attempt thereof, of s. 794.011. (App. F. page 4f)

§ 775.21(5)(a)2, An offender who meets the sexual predator criteria described in paragraph (4)(a) who is before the court for sentencing for a current offense committed on or after October 1, 1993, is a sexual predator, and the sentencing court must make a written finding at the time of sentencing that the offender is a sexual predator. (App. F. page 5f)

§ 775.21(5)(c), If the Department of Correction, obtains information which indicates that an offender meets the sexual predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a), the Department of Corrections shall notify the state attorney, the state attorney shall bring the matter to the courts attention in order to establish that the offender meets the sexual predator criteria. (App. F. page 6f)

§ 775.24(1)&(2),The laws relating to sexual predators are substantive law. If a person meets the criteria in this chapter for designation as a sexual predator, the court may not enter an order, for the purpose of approving a plea agreement. (App. F. page 7f)

§ 947.1405 (2)(c), Any inmate who, is found to be a sexual predator under s. 775.21, shall be released under supervision, subject to specified terms and conditions. (App. F. page 9e)

§ 947.1405 (10) Effective for a releasee whose crime was committed on or after Sept. 1, 2005 in violation of chapter 794.011 who is designated as a sexual predator pursuant to s. 775.21, in addition to any other provision of this section, the commission must order electronic monitoring for the duration of the releases supervision. (App. F. page 14f)

Fla. Rules Crim. P. 3.172 (C)(9), Guilty pleas to, sexually violent or sexually motivated offense, determination of voluntariness, shall be given to all defendant's in all cases.(App. F. page 17f-18f)

Fla. Rules Crim. P. 3.172 (J), Prejudice, failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice. (App. F. page 19f)

## Statement of the Case

### A. Legal Background

July 3rd 2012, Petitioner entered a no contest written plea agreement in Walton County, Florida Circuit Court, on two counts of Burglary and two counts of sexual battery, to run concurrent, stipulated with the conditions sex offender and no probation to follow. Case No's: 11-494cf and 11-506cf. (App E. page 1e)

The two sexual battery counts to which petitioner pled are first degree felonies in violation of Fla. Stat. 794.011 (4). Pursuant to the plain language in Florida Sexual Predators Act Fla. Stat. §775.21(4)1a, (App. F page 4f) Petitioner is to be designated a sexual predator due to the first degree felony sexual battery conviction; and the sentencing court must make a written finding at the time of sentencing that the offender meets the criteria as sexual predator, see Fla. Stat. 775.21(5)(a)2. (App. F page 5f) The courts do not have discretion to deviate from the designation for purposes of securing a plea bargain. This is a substantive law, see Fla. Stat. 775.24(1)&(2). (App. F. page 7f)

The state court at plea colloquy and sentencing has a duty to follow and apply Fla, R. Crim. P. 3.172(C)(9), when accepting a defendant's plea. The Rule states:

> If the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading, is a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as this admonition shall be given to all defendants in all cases. (App F. page 17f)

Sexual predator is a lifelong designation, with the imposition of [specialized supervision by probation officers], as described in Fla. Stat. 775.21(3)(b)2 & (e)1. (App F. page 2f–3f)

Moreover, pursuant to the plain language within Fla. Stat. 947.1405(2)(c), any inmate who...is found to be a sexual predator [not sex offender] under stat. 775.21, shall upon reaching the tentative release date...be released under the maximum level of supervision, subject to specified terms and conditions, including payment of the cost of supervision. (App. F. page 9f–14f)

B. Factual Background:

June 21st 2012, in a circuit court status conference defense counsel explained for the record,

> ("the state offer for both cases would either be 25 years Department of Corrections with credit for all time served concurrent in both cases all four counts, and designation as a sex offender," "or 20 years DOC followed by a period of probation. We haven't discussed a specific number," "It suggest that if a sure number could be agreed upon, we might get to that point.") (quoting transcript, App. E page 2e)

Ultimately, Petitioner accepted the states [lengthier] twenty–five year prison plea offer, which stipulated on front page sex offender designation and no probation to follow. Noting, although incorrect–both plea offers were explained to be sex offender designation – the lengthier plea of five additional years was for the condition of avoiding all post-prison supervision, per counsel's representation.

At the July 3rd, 2012 plea colloquy and sentencing, the court questioned the [defense counsel and prosecutor] whether the [petitioner] understands he will be designated as a sexual predator, and both parties stated – on the record – Petitioner would be designated only a sex offender.

> **The Court**: He understands he will be designated as a sexual predator?"
>
> **Mr. Plattaborze** [defense counsel]: Offender
>
> **Ms. Mason** [the prosecutor]: Offender
>
> **The Court**: Mr. Reed, do you understand the meaning of being designated a sexual offender?
>
> **The Defendant**: I do. (App. E. page 16e)

August 23rd 2016, evidentiary hearing Petitioner explained:

> "I did not want to take a plea that would subject me to probation or any kind of supervision when I got out of prison. That was because of my concern of my age, lack of money, lack of places to live and concern with if there was any kind of violation.:."(App. E. page 23e & 24e)

Petitioner testified that defense counsel was aware he did not want to be subject to supervision after prison, or the more onerous sexual predator designation if he were to accept a plea; that counsel presented the states twenty-five year offer

and said this plea **meets your requirements** of no supervision, and further offering Petitioner would only have to serve 85%. (App. E. page 28e & 29e)

Petitioner also testified that before signing the plea offer, Petitioner with counsel present, reviewed the offer. Petitioner questioned sections 4.15 and 4.16 [the sections referencing "sexual predator and Jimmy Ryce] and counsel affirmatively misadvised that those sections did not apply to Petitioner's plea, that only section 4.17 [the section dealing with sex offender] applied to his plea. (App. E. page 24e & 27e)

Petitioner noting, counsel's assurance was in accord with the stipulated conditions on the front page of plea agreement, there was no cause to question counsel's advice further.

Defense Counsel: Mr. Platteborze, Petitioner's former public defender, at the time of this evidentiary hearing testimony, was an inmate in the Florida DOC due to convictions resulting [in the same Walton County Court], from drug offenses following the representation of Petitioner. (App. E. page 30e & 31e)

Counsel conceded that he explained sexual predator versus sex offender to Petitioner; and he had told Petitioner he would only be designated a sex offender; and that he [counsel] had spoken to the prosecutor before "writing up" the offer of plea and she had confirmed that. (App. E. page 32e)

Prosecutor : Ms. Mason acknowledged that it was defense counsels and the states understanding the Petitioner would be classified as a "sex offender not a sexual predator," and at Petitioner's sentencing "we actually corrected the court

together that he [Petitioner] should be an offender not a Predator." (App. E page 33e & 34e)

C. Below Court Proceedings:

The Supreme Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

The United States Court of Appeals for the Eleventh Circuit, denied Petitioners motion for reconsideration, June 25, 2021; on May 7, 2021 United States Circuit Judge Jill Pryor denied Petitioner's pro se request for Certificate of Appealability, filed February 23, 2021. Case no: 21-10276–A; 2021 U.S. App. Lexis 13701.

The two page dismissal letter gives no explanation why the Eleventh Circuit's own opinions in the matters of attorney's affirmative misadvise regarding a collateral consequence would not apply to Petitioner's extensively argued Ground One, or any reference to the prejudicial aspect of the loss of a more favorable second offer of five less years in prison with essentially the same terms. (App. A. page 1a)

Rather, the letter set forth an alleged discussion between counsel and Petitioner about Jimmy Ryce Act.

Petitioner notes, considering the undisputed record that counsel admits to incorrectly advising Petitioner, would be designated a sex offender, and that sex offender is not a qualifying criteria for Jimmy Ryce Act, it is unreasonable for the Eleventh Circuit to give any credibility to the alleged conversation, or its relevancy to counsel's misadvice.

The dismissal letter also asserts "the record is devoid of any evidence Petitioner is designated a sexual predator." Contrary to the letters position; the

plain language in the Florida sexual predator act Fla. Stat. 775.21 (5)(c), (App. F. page 6f) prior to the Petitioner's release from prison, Florida DOC will notify and request the court to properly designate Petitioner. This is a substantive law pursuant to Fla. Stat. 775.24(1) & (2). (App F. page 7f)

Postconviction counsel for the Petitioner raised this question as ground one in a timely filed 28 U.S.C. 2254 petition. Case no: 4:19-CV-00436-WS-MAF. December 22, 2020 the United States District Court, Judge William Stafford denied the 2254 petition, adopting the magistrate Judge Report and Recommendation. (App. B. page 1b-3b)

The report ultimately conceded counsel did incorrectly advise Petitioner regarding his designation, although argued it wasn't outside professionally competent assistance since the prosecutor was also involved in the misadvise. The report continues by failing to apply the proper prejudice analysis as defined in *Frye* 132 S. Ct. 1399, involving the loss of a second more favorable plea. In fact, the report failed to acknowledge a second plea offer existed, and applied the *Strickland/Hill* test to analyze the prejudice. (App. B. page 16b & 17b)

**State Court Proceedings:**

Postconviction counsel timely appealed to the First District Court of Appeals which promptly affirmed the postconviction courts order [per curiam] without a written opinion.

Following a motion for rehearing, that focused on the unique aspect of Petitioner accepting the lengthier of two available plea offers due to the undisputed

misadvise from counsel; the 1st DCA denied rehearing and a mandate was issued July 9th , 2019. (App. C)

May 24, 2013, Petitioner as pro se, filed a motion for Postconviction relief in the state circuit court for Walton County Florida. Subsequently, by order of the court, Petitioner filed two additional amended 3.850 motions. May 29, 2014 the court accepted the second amended motion, asserting six ineffective assistance of counsel claims. Claim 4 and claim 5 are the subject of the instant petition. Arguing Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment by counsel's affirmative misadvice that plea offer would not subject Petitioner to post-prison supervision, and by counsel's affirmative misadvice that Petitioner would not be designated a sexual predator, only a sex offender.

Following an evidentiary hearing, Petitioner's newly hired counsel filed a post evidentiary hearing memorandum of law. The postconviction court entered a order June 27, 2017 denying relief to all Petitioner's IAC claims. (App. D)

The court's denial opinion, just as every following court, fails to consider, and omits, the prejudicial record evidence that Petitioner had two available plea offers. Nevertheless, the court asserts it cured any misadvice and prejudice that counsel may have caused by,

> "raising such issue at the defendant's plea and sentencing hearing. Considering such information, the defendant does not show a reasonable probability that undermines confidence in the outcome." (App. D page 14d)

As previously outlined above in the Legal Background; had the plea colloquy court followed the Rules of Court, pursuant to 3.172(c)(9), the court may have been

able to cure counsel's misadvice, and the invalid stipulated conditions written into the accepted lengthier plea offer. However, the exchange the court is referencing, does not evoke the need for Petitioner to question the court, or counsel's advice. In fact, it did nothing more than validate counsel's advice that Petitioner's requirements had been met in the lengthier twenty five year plea offer.

> **The Court**: He understands he will be designated as a sexual predator?
>
> **Mr. Platteborze** [defense counsel]: offender
>
> **Ms. Mason** [the prosecutor]: offender
>
> **The Court**: Mr. Reed, do you understand the meaning of being designated a sexual offender?
>
> **The Defendant**: I do (App. E. page 16e)

The above exchange falls prejudicially short of § 775.21(5)(a)2, the sentencing court must make a written finding at the time of sentencing that the offender is a sexual predator. (App. F. page 5f). As well as the Fla. Rules of Court 3.172 (c) (9) intent... "as this admonition shall be given to all defendants in all cases". (App. F. page 17f–18f)

## Argument

In the critical stage of plea bargaining, the sphere of counsel's duty to correctly advise in pertinent direct and collateral consequences of a defendant's plea, has instead become an art in word play for the express purpose of securing a defendant's acceptance of a plea, and subsequently, justification for a court denying relief.

Take the case in point, where the record strongly suggests the petitioner's determinative issue in agreeing to accept the lengthier of two available plea offers was to avoid any and all post prison supervision when released from prison, including the more onerous designation of sexual predator and its inherent supervision consequences.

Subsequently, the Petitioner learns the lengthier plea that counsel advised to accept as meeting Petitioner's requirements of sex offender designation only and no supervision after prison, actually subjects the petitioner to lifetime supervision as a sexual predator, and its designation is the triggering criteria for releasing the petitioner from prison under the maximum level of supervision per Florida Conditional Release Act. All tantamount, to the lesser available twenty year plea offer.

In petitioner's pursuit of relief, every court failed to recognize the claims merit or the impact of counsel's misinformation in avoiding all supervision consequences when accepting the lengthier plea. Rather, the courts circumvent the actual claim by holding such quotes as,

> "Counsel has no obligation to inform an offender of his eligibility for conditional release, counsel cannot be ineffective and defendant's plea cannot be involuntary based solely on a lack of notice",

thereby, denying relief to a legitimate Sixth Amendment claim.

The case in point has United State Constitutional Fifth and Sixth Amendment Significance, and far more reaching implications than just the petitioner's case. The plea bargaining process must benefit both the defendant and Judicial System as a whole; Therefore, every defendant when considering his or her options (especially when two plea offers are available), should be able to reasonably expect their attorney's advice to be accurate, and with a more favorable interest than the immediate alternatives.

In the petitioners request for a certificate of appealability, the Eleventh Circuit was offered its own opinion, see Bauder, 333 Fed. Appx. 422

> "the Eleventh Circuit has distinguished between trial counsel's failure to inform a defendant of potential collateral consequences and counsel's affirmative misadvice to a defendant regarding potential collateral consequences", "the impact of the alleged affirmative misadvice should also have been considered in terms of ineffective assistance of counsel."

The Eleventh Circuit dismissed the significance of their own opinion as it relates to the merit of this claim. The published COA dismissal letter, as well as the report and recommendation are an inaccurate representation of the merits, and fall short of the public's best interest. The record should be corrected by this Courts granting Certiorari.

Most significantly, is the blatant disregard by all the below Courts for Supreme Court precedent regarding the prejudice inquiry, by excluding the

existence of Petitioner having a more favorable second available plea offer. See *Missouri vs. Frye*, 566 U.S. 134, 132 S. Ct 1399:

> ("In a case where a defendant pleads guilty to less favorable terms", due to counsel's ineffective assistance, "to establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a [second] plea to a lesser charge or a sentence of less prison time").

The instant case is synonymous with Supreme Court precedent defined in Frye, it questions why the below courts failed to apply the correct prejudice analysis test.

## CONCLUSION

To partially quote from Frye, Petitioner prays this case presents "the necessity and the occasion" to define the duties of defense counsel and courts at the critical plea stage, when effective assistance in pertinent matters weigh heavily on the decision maker.

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

/s/ Jason W. Reed

Date: Nov. 16, 2021

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