ORIGINAL

No. 21-6606

IN THE

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

AKIL TYMES, – PETITIONER

vs.

RICKY DIXON, SECRETARY, FLORIDA DEPT. OF CORR.
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH DISTRICT COURT OF APPEALS

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AKIL TYMES, *pro se*
DC #N25670
Century Correctional Institution
400 Tedder Road
Century, Florida 32535

QUESTIONS PRESENTED

1) Does counsel perform deficiently in duties/responsibility, to fully inform a defendant during the plea bargaining process, per *Missouri v. Frye, 132 S.C.T. 1394 (2012),* in failing to communicate explicit advice or re-advise his client to accept or, reject a plea, on conditions that may be favorable or, dis favorable, to the accused; applying *Strickland v. Washington,* 466 U.S. 688 (1984)?

2) Does the final judgment/decision of the Eleventh Circuit Court of Appeals; "That a defense counsel has no obligation to advise or fully inform a defendant to accept a favorable plea, create an exception ,which is contrary or unreasonable application, to the general rule announced in *Frye,* that defense counsel has *a duty to communicate* formal offers from the prosecution *to accept a plea* on terms and *conditions that may be favorable to the accused*? (Emphasis added)

LIST OF PARTIES

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

RELATED CASES

None

TABLE OF CONTENTS

QUESTIONS PRESENTED	II
LIST OF PARTIES	Caption, cover page
TABLE OF CONTENTS	III
INDEX TO APPENDICES	*passim*
TABLE OF AUTHORITES CITED	VI,VII
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	*Passim*
CONCLUSION	19, 20
PROOF OF SERVICE	20, 21

INDEX TO APPENDICES

APPENDIX A Judgment mandate and written decision of the U.S. Court of Appeals for the 11th Circuit, affirming the District Court's order denying Tymes' Habeas relief. (Case number 20-12885-HH) (9 pages)

APPENDIX B Tymes' Initial brief to U.S. Court of Appeals for the 11th Circuit after granting COA. (Case number 20-12885-HH) (23 pages)

APPENDIX C Appellee brief to U.S. Court of Appeal for the 11th Circuit after granting COA for Tymes. (Case number 20-12885-HH) (41 pages)

APPENDIX D Order granting Tymes motion for a certificate of appeal ability by the U.S. Court of Appeals for the 11th Circuit. (Case number 20-12885-HH) (7 pages)

APPENDIX E Tymes' motion for issuance of a certificate of appeal-ability to the U.S. Court of appeals for the 11th Circuit. (Case number 20-12885-HH) (9 pages)

APPENDIX F Order denying Tymes' Habeas petition, a certificate of appealability, and judgment mandate, from the U.S. District Court for the Northern District of Florida,Tallahassee Division (Case number 4:19cv201-RH-EMT) (4 pages)

APPENDIX G Report and recommendation from Chief U.S. Magistrate Judge Elizabeth M. Timothy, U.S. District Court for the Northern District of Florida, Tallahassee Division. (Case number 4:19cv201-RH-EMT) (39 pages)

APPENDIX H Tymes' objections to the Magistrate's Judge report and Recommendation. (Case number 4:19cv201 -RH-EMT) (16 pages)

APPENDIX I Tymes' §2254 Petition for Writ of Habeas Corpus. (Case

number 4:19CV201-RH-EMT) (49 pages)

APPENDIX J Respondent's Answer to Tymes' §2254 Petition for Writ of Habeas Corpus. (Case number 4:19CV201-RH-EMT) (49 pages)

APPENDIX K Tymes' reply to State's Answer to petition for Writ of Habeas Corpus, §2254, (Case number 4:19cv201-RH-EMT) (15 pages)

APPENDIX L State appellate Court *per curiam* affirming lower second Judicial Circuit court order denying Tymes' motion for post conviction relief. (Case number 1D17-4928) (2 pages)

APPENDIX M Tymes' Initial Brief to the First District Court of Appeal, State of Florida (Case number 1D17-4928) (32 pages)

APPENDIX N Appellee's Answer Brief to the First District Court of Appeal, State of Florida (Case number 1D17- 4928) (37 pages)

APPENDIX O Second Judicial Circuit Court in and for Leon county, Florida; denial order for Motion for Post Conviction Relief by Circuit Judge Angela C. Dempsey, (Case number 2012-CF-3764) (2 pages)

APPENDIX P Transcript of evidentiary hearing held on October 27th, 2017, in the Circuit Court of the Second Judicial Circuit in Leon county, Florida. Before the Honorable Judge Angela C. Dempsey, (Pages 1-35, case number 2012-CF-3764) (35 pages)

APPENDIX Q Amended version for Post Conviction Relief in Leon County Circuit Court. (Case number 2012-CF-3764 on May 10th, 2013) (15 pages).

APPENDIX R Transcript of jury selection in Leon County Circuit Court case number, 2012-CF-3764 on May 10th, 2013. (88 pages)

APPENDIX S Transcript of trial in Leon County Circuit Court, case number 2012-CF-3764, on May 10th, 2013. (Pages 1-124, volume 1)

APPENDIX T Transcript of trial in Leon County Circuit Court, case number 2012-CF-3764 on May 10th, 2013. (Vol. 2, pages 125-256).

TABLE OF AUTHORITIES CITED

Cases

Boria v. Keane 99 F. 3d. 492 (2d Cir 1996) 15

Boria v. Keane 90 F. 3d 36 (2d Cir. 1996) 6

Collier v. Westbrook 2013 U.S. District Lexis 76981 (M.D. Tenn. 2013) 6

McNeill v. U.S. 2016 U.S. Lexis 27978 (District Court of N.J. 2016) 18

Missouri v. Frye 132 S.C.T. 1394 (2012) *18, 19*

Speed v. U.S. 2013 U.S. District Lexis 26798 (C.D. ILL. 2013) 18

Strickland v. Washington 466 U.S. 688 (1984) 6,11,17

Turner v. Calderon 281 F. 3d. 851,881 (9th Cir. 2001) 18

Tymes v. State 267 So. 3d. 359 (Fla. 1st DCA 2019) 6

Tymes v. State 151 So. 3d 1239 (Fla. 1st DCA 2014) 3

U.S. v. Cardenas 230 F. Appx. 933, 935 (11th Cir. 2007) 17

U.S. v. Medlock 12 F. 3d 185, 187 (11th Cir. 1994) 17

U.S. v. Rodriguez-Rodriguez 929 F. 2d 741, 753 n.1 (1st Cir. 1991) 18

Von Moltke v. Gillies 322 U.S, 708, 721 (1948) 15

Wilson v. Sellers 138 S.Ct. 1188,1192 (2018) 7

Statutes and rules

28 U.S.C. § 1254(1) 28

U.S.C § 2254 6,9

§ 944.275, Fla. Stat. (2012) 16

Florida Rules of Criminal Procedure 3.171(c)(2)(b) 14

Florida Rules of Criminal Procedure 3.850 7

Other

American Bar Association Standards § 4-5.1 16,17

Model Code of Professional Responsibility, Ethical Consideration 7-7 17

Rules Regulating the Florida Bar 4-1.4 14

Rules Rules Regulating the Florida Bar 4-2.1 14

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

COMES NOW, the Petitioner, AKIL TYMES, *pro se*, respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from the Federal Courts: The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix F to the petition and is unpublished.

JURISDICTION

For cases from Federal Courts: The date on which the United States Court of Appeals decided my case was September 10, 2021. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S. Constitution, Amendment 4

U.S. Constitution, Amendment 16

28 U.S.C.§ 1254(1)

28 U.S.C. § 2254 6, 9

STATEMENT OF THE CASE

The State of Florida ("State") charged by amended information, Akil Tymes ("Tymes" or "Petitioner") with Count one (Ct.1) Armed Robbery with a firearm, Count 2 (Ct.2) Possession of a firearm by a convicted felon, and Count 3 (Ct.3), Aggravated Battery with a firearm. The alleged victim was Jermaine Shaw ("Shaw"). On May 10th, 2013, a jury found Tymes guilty of Counts 1, 2 and 3 and thereafter he was sentenced to twenty-five (25) years imprisonment with a twenty (20) year minimum mandatory ("Mini/mand"), for Ct.1, five (5) years in prison for Ct.2 and twenty-five (25) mini/mand years in prison for Ct.3. prison for Count 3. All sentences were run concurrent as Tymes was represented at trial and sentencing by Mutagee Akbar ("Akbar" or "counsel"), his defense attorney for case number 2012CF3764, in the Second Judicial Circuit Leon County, Florida.

The trial and sentencing was presided over by the Honorable Angela C. Dempsey, Circuit Judge, State of Florida.

Tymes appealed his conviction/sentence to the first District Court of Appeal, Tallahassee, Florida (1st DCA), which subsequently issued an unwritten opinion *per curiam* affirming Tymes' judgment and sentence on November 10th, 2014. (*Tymes v. State* 151 So. 3d. 1239 (Fla. 1st DCA 2014) case number 1D13-3654). The 1st DCA issued it's mandate on *November 26th, 2014*. Thereafter Tymes filed his initial rule 3.850 motion for post conviction relief on *October 7th, 2016*. But subsequently filed an amended version motion for post conviction relief (R. 3.850) on *January 19th, 2012*. (APPX. Q) In pertinent part, Tymes raised in ground three (3) that:

"Counsel provided ineffective assistance of counsel when giving affirmative misadvice during the "critical stage" of plea negotiation causing Mr. Tymes to reject a favorable offer, which deprived Mr. Tymes of the benefit offered... A counsel's misadvice." (APPX. Q, p. 9-12). The State post conviction entered an order stating granting an evidentiary hearing ("EH") on Tymes' amended version motion for post conviction relief on *October 27th, 2017.* An EH was held before Second Judicial Circuit Judge Angela C. Dempsey

where Tyme testified that prior to the trial date, the State made a plea offer ten (10) years imprisonment to to dispose of his case, but Tymes' counsel Mutagee Akbar, advised him to reject that offer because Akbar didn't believe Shaw, (the alleged victim in a drug deal) would show up for trial. Tymes believed his rejection of the initial plea offer was in his best interest, based on Akbar's advice and professional standard that the case would be dismissed. Additionally, Tymes believed that once his case was dismissed he would be analyzed for a drug treatment program, in Ocala, Florida; at the Phoenix House. (APPX. P, p. 4-13). Tymes had only one discussion in which Akbar advised him to reject the plea offer of ten (10) years and after Akbar learned Shaw had shown up for trial, he never had another discussion with Tymes on whether to reject or accept the plea. Id.

Akbar testified at the EH that on the night prior to trial, he was notified by the State that Shaw had been found in Chicago, Illinois, given a plane ticket to come to court but the State did not know if he would get on the plane and come. Akbar stated on the morning of *May 10th, 2013*, he informed Tymes that Shaw was there for trial and discussed the plea again but did not tell Tymes whether he should reject or should not reject the plea. Prior to this, he told Tymes about the good and bad of the case but

later testified that the strength of the State's case was like, in the middle, as far as evidence because everything relied on what the victim Shaw was saying. Nonetheless, Akbar's practice was not to tell the Defendant what to do in accepting the plea, Akbar only let Tymes know what the stakes were and what the plea offer was. (APPX. P, p. 13-24). Akbar admitted that the court agreed to set a time for him to take the deposition of Shaw but it would be during the lunch break after the jury selection because he had subpoenaed Shaw four (4) months earlier in which Shaw called and said, he would not come from Illinois to be deposed. (Id. p. 17; APPX. R, p.4-5). There was no informed discussion with Tymes by Akbar after he had deposed Shaw during the lunch break after jury selection, about what facts Shaw had stated to him. Nonetheless Akbar had Tymes placed on the record *before* the lunch break and jury selection that he was rejecting the State's plea offer. (APPX. R, p. 5-7)

At the conclusion of the EH, the State trial Court made findings that both Akbar and Tymes knew Shaw was in town and available for trial. That provisions were made for Akbar to take a break or during the lunch break to speak with Shaw prior to him testifying. The State additionally kept the plea offer open and as to accepting the plea, the State Trial Court

questioning Tymes prior to jury selection who subsequently said, he was not interested in the offer. The State trial Court found, regarding the plea offer that there was no deficient performance and no prejudice. (APPX. P, p. 32-34). In the written order the State Trial Court denied Tymes' amended version motion for post conviction relief, applying *Strickland v. Washington* 466 U.S. 688 (1984), and found Tymes failed to demonstrate both deficient performance by trial counsel and prejudice on all grounds. (APPX. O). The State Appellate Court (1st DCA) *per curiam* affirmed Tymes appeal of the State Trial Court's decision without a written opinion. (APPX. L; *Tymes v. State* 267 So. 3d. 359 (Fla. 1st DCA 2019)

Tymes filed a timely petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on *April 29th, 2019*, in the U.S. District Court for the Northern District Court of Florida, Tallahassee Division. (Case number 4:19 cv. 201-RH-EMT). Chief U.S. Magistrate Judge Elizabeth M. Timothy issued a Report and Recommendation ("R/R"), denying Tymes petition for Writ of Habeas Corpus and for a certificate of appealability on *June 8th, 2020,* (APPX. G). In relevant part relating to issue three of Tymes' Rule 3.850 amended version motion for post conviction relief, Chief Magistrate Judge Timothy

applied, *Wilson v. Sellers* 138 S.C.T. 1188, 1192 (2018), "look through" presumption in the State Court's rejection of Tymes' claim as based on a reasonable determination of the facts and a reasonable application of *Strickland*. Tymes had not demonstrated that the State Court's denial of his ineffective assistance of trial counsel claim was contrary to or an unreasonable application of *Strickland*. (Id. at 8-19). Tymes then filed objections to the R/R on *June 29th, 2020*. (APPX. H), of which U.S. District Court Judge Robert L. Hinkle issued an order denying Tymes' Habeas Corpus petition and denied a certificate of appeal-ability on July 12th, 2020. This was accompanied with a judgment mandate on *July 13, 2020,* (APPX. F)

Tymes then filed a notice of appeal for the Eleventh (11th) Circuit (Case number 20-12885-H) on *July 27th, 2020*, along with a motion for the issuance of a certificate of appealability ("COA")(APPX. E) Tymes argued that the federal question of whether the U.S. District Court had erred in denying his petition for Writ of Habeas Corpus by finding that Tymes did not make the requisite showing of the denial of a constitutional right and that jurist of reason could not conclude the issues presented are accurate to deserve encouragement to proceed further. Id. The Eleventh Circuit

granted COA by the Honorable Beverly B. Martin, Circuit Judge of the Eleventh Circuit, on the single issue of: "Whether Mr. Tymes trial counsel provided ineffective assistance of counsel by failing to fully advise Tymes on the State's plea offer, including by failing to advise Tymes to accept the plea offer upon learning that the victim was present and able to testify at trial". (APPX. D)

Judge Martin in recounting the case history factually from the record, stated that the State of Florida offered Tymes a ten (10) year plea offer but Tymes counsel, Mutagee Akbar advised Tymes to reject that offer. Akbar did not believe Shaw, the victim in a drug deal, would show up to testify at trial which would result in the State dismissing the charges against Tymes. Relying on Akbar's advice, Tymes rejected the plea offer and proceeded to trial. However, Shaw showed up for trial and Akbar again discussed with Tymes the State's plea offer *but did not re advise Tymes on how Shaw's forthcoming testimony would impact Tymes' defense and whether Tymes should accept the plea offer in light of the testimony.* (emphasis added). Judge Martin added in relevant part, "...Mr. Akbar was ineffective because he failed to advise Tymes to accept the State's plea offer...the record .Mr. Akbar originally advised Mr. Tymes to reject the State's plea offer because

he wouldn't show up for trial. *But when Mr. Shaw did show up, Mr. Akbar failed to re advise Mr. Tymes on how to proceed and whether to accept the plea offer.* (emphasis added). This failure falls below the objective standard of reasonableness and shows deficiency. This deficiency also prejudiced Mr. Tymes. The record shows that Mr. Tymes relied on Mr. Akbar's advice in originally deciding to reject the plea offer, and Tymes said, he would have accepted the offer had Akbar advised him to do so. Therefore, but for Mr. Akbar's errors, the result of the proceeding would have been different." (Id. at p. 5).

Briefing was submitted by both Tymes and the State (APPX. B and C), and the 11th Circuit Court panel of Newsome, Anderson and Dubina, 11th Circuit Judges, *per curiam* affirmed, the District Court for the Northern District of Florida, Tallahassee Division, order denying Tymes' relief on his 28 U.S.C. § 2254 petition. The panels review of the record concluded that Tymes failed to show that the State post conviction Court's ruling was contrary to, or involved unreasonable application of, clearly established Federal law because Tymes failed to show that his counsel's performance was deficient under *Strickland.* Moreover, the panel concluded in relevant part that, "...Akbar acted reasonably and did not render constitutionally

deficient performance as to the plea negotiations. Akbar's failure to explicitly advise Tymes to accept the plea does not constitute deficient performance under clearly established Federal law, as there is no Supreme Court case holding that defense counsel has an obligation to advise defendants to accept a reasonable plea. Moreover, Akbar complied with *Frye* because, as the record shows, Akbar disclosed the State's plea offer and discussed it with Tymes. Because Tymes cannot demonstrate that the State Court unreasonably applied *Strickland* in denying his claim, the District Court properly denied Tymes Habeas relief." (APPX. A, p. 9-10).

REASONS FOR GRANTING THE PETITION

This Court is presented with the opportunity in relevant part to decide not one but two important questions of Federal law, with recourse on all fifty (50) States and the Eleven (11[t]) and D.C. Federal Judicial Circuits, that has not been but should be settled by this Court which left open in *Missouri v. Frye* 132 S.C.T. 1394 (2012) ("Frye"). The two questions presented by the petitioner in this case allows this Court to answer:

1) How to define duties/responsibilities in the plea bargaining process that a defense counsel is constitutionally required to be effective per *Strickland v. Washington* 466 U.S. 688 (1984) ("*Strickland*"), under *Frye* and;

2) What are the exceptions to the general rule announced in *Frye* that counsel has the duty to communicate formal offers from the prosecution *to accept* a plea on terms and *conditions that may be favorable to the accused, (emphasis added)*. The U.S. Court of Appeals for the Eleventh Circuit's decision in this case is of the opinion that with *Frye* applying *Strickland*, a defense counsel does not act unreasonable or render constitutionally deficient performance to plea negotiations where counsel does not explicitly advise a defendant to accept a favorable plea. Moreover, the 11th Circuit bases their rationale on, no Supreme Court case holding that defense counsel has an obligation to advise defendants to accept a favorable plea." (APPX. A p. 9-10). *Frye*, in relevant part, answered the initial question on whether the constitutional right to counsel extends to the *negotiations and considerations* of plea offers that lapse or are rejected while addressing the further question of what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. Here, the State Court ruling stated that Tymes failed to demonstrate both deficient performance by trial counsel and prejudice on all grounds. This decision was erroneously based on an unreasonable determination of the facts in light of the evidence in the

record of the State Court proceedings. Clear and convincing evidence in the record show counsel never informed his client before he allowed his client to go on record and reject the 10 year plea offer, without informing what evidence the victim Shaw would testify too, re advise Tymes on how Shaw's forthcoming testimony would impact Tymes' defense, and whether Tymes should accept the plea offer, in light of Shaw's upcoming testimony. This clear and convincing evidence was crucial in light of the State Trial Court questioning Tymes on record before jury selection about accepting the plea offer and Tymes rejecting the offer on record. Akbar ("Counsel"), never deposed Shaw before jury selection because months prior Shaw had refused to show up to repeated subpoena's to come to be deposed. The important substantive constitutional matters before this Court is whether Akbar had duty once Shaw had showed up for trial and he deposed him initially after Tymes rejected the State's plea offer on record and after jury selection but before the start of trial testimony, to inform his client of the forthcoming testimony he only knew about, the impact on the defense and whether his client Tymes should accept the plea offer, in light of Shaw's upcoming testimony. Shaw went on to testify at trial that:

1) Leonardo Wade (Wade) set up the deal for Shaw to sell drugs (3 ounces

of marijuana and 2 ziplock bags of "mollies") to Tymes.

2) Shaw had never met Tymes, thought drug deal was for Wade.

3) Upon arriving at scene of deal, Tymes approached car with a gun, leaned in pointing gun at Shaw.

4) A tussle ensued in the car window between Shaw and Tymes, Shaw tried to push the gun down but the gun was fired.

5) Bullet hit Shaw in his right leg, shattering his femur.

6) Shaw had to have immediate surgery the next morning, having a metal rod inserted through his knee to his right thigh.

7) After being shot, called Mom and girlfriend who suggested he call police.

8) Called 911 shortly after incident and told operator; A guy in Florida State hoodie, black skully and jacket had shot him with a nine (9) millimeter gun.

9) Identified Tymes in a photo lineup.

10) Identified Tymes as the person who had shot him with a gun. (APPX. S, p. 71-107)

Akbar had knowledge of these facts after jury selection but prior to the start of trial testimony of which he never informed Tymes about before Tymes rejected the State's plea offer.

Akbar knew Florida Rules of Criminal Procedure 3.171(c)(2)(b), mandates that the defense counsel advise defendants of all matters bearing on the choice of which plea to enter, "....And the likely results, as well as any possible alternatives that may be open to the defendant." This is in line with Rules Regulating the Florida Bar 4-2.1, in which Akbar, in representing a client, shall render candid advice and the scope of that advice "...should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client...at the same time, a lawyer's advice at it's best often consists of recommending a course of action in the face of conflicting recommendations of experts." Id. Rule 4-1.4 relates that Akbar has a duty to explain (all) matter to a client when it is in their best interest. (emphasis added). Here, Tymes counsel stated that it was his regular practice to inform the defendant of the plea offer, tell them of the strengths and weaknesses of the State's case but not to advise them to accept or reject a plea deal because either advice would likely lead to an ineffective assistance of counsel claim. (APPX. P). The 11th Circuit this rationale in it's decision even though this Court has made clear that an attorney must "make an independent examination of the facts, circumstances...and then...offer his informed opinions as to what plea

should be entered." (*VonMoltke v. Gillies,* 322 U.S. 708, 721 (1948).

In *Boria v. Keane*, 99 F. 3d. 492 (2nd Cir. 1996 *Boria* 1), clarified and reaffirmed on rehearing, 90 F. 3d. 36 (2nd Cir. 1996), (Boria 2). (*Boria* predates AEDPA and *Frye* and was initially filed on *May 3rd, 1996,* corrected on May 21st and *July 11th, 1996* and refiled and reissued on *October 25th, 1996)*; held a defense lawyer in a criminal case has a duty to advise his client whether a particular plea to a charge appears desirable. Failure to give advice concerning the acceptance of a plea bargain is below the standard of reasonable representation. Id. at 496-497. In *Boria* 1, the defendant had no prior criminal history (as Tymes had never been to prison before), rejected a plea bargain that would have resulted in a one to three year sentence, went to trial, was convicted and sentenced to twenty years to life. Here, Tymes rejected the ten year plea offer, went to trial, was convicted and sentenced to 25 years minimum/mandatory in prison, day for day. (There is a 15 year disparity or more from the 10 year plea offer because Tymes would have been eligible for gain time credits off the 10 years, Fla. Stat. 944.275). The Second Circuit, in evaluating the attorney who "allowed [The Defendant] to reject such offer without giving him any wisdom of so doing", declared that "it would be impossible to imagine a

clearer case of a lawyer depriving a client of constitutionally required advice." Id. at 494, 497. The Second Circuit also stated, "There seems to be no Second Circuit decision dealing with the precise question of a criminal defense lawyer duty when a defendant's best interests clearly require that a proffered plea bargain be accepted. This lack of specific decision undoubtedly arises from the circumstance that such a duty is so well understood by lawyers practicing in this circuit that the question has never been litigated." Id. *Boria 1* established that counsel must give reasonable advice to a defendant regarding whether he should accept a plea offer, not as a *per se* rule, but because the outcome is consistent with American Bar Association Standards ("ABA"), which states that "defense counsel should advise the accused with complete candor concerning all aspects of the case" and "[o]nce the lawyer has concluded that it is in the best interest of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision." (ABA standards § 4-5.1 and cmt). In *Boria 2*, the Second Circuit stated that it continued to hold that "a defendant's lawyer failed to meet the minimal requirement of constitutional competency when he failed to give his client any advice as to wisdom of accepting or rejecting the State's initial plea

offer." (*Boria 2* at 37).

Here, Akbar stated at the State evidentiary hearing that the plea offer was in Tymes best interest but refused, "...to use reasonable persuasion to guide the client..." in accepting the favorable plea. The American Bar Association's standard on the precise questions Tymes presents before this Court, is simply stated in it's model code of professional responsibility, ethical consideration 7-7, " A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." Moreover, *Strickland* pointed to prevailing norms of practice, as reflected in American Bar Association standards, as guides to determining what is reasonable.(*Strickland* 466 U.S. At 688). Nevertheless, in the 11th Circuit, there is a "(strong presumption) that statements made by the Defendant during his plea colloquy are true." (*U.S. v. Cardenas* 230 F. APPX. 933, 985 (11th Cir. 2007) (Citing *U.S. v. Medlock* 12 F. 3d. 185, 187 (11th Cir. 1994) but *Frye* announced a general rule now that defense counsel has *the duty to communicate* formal offers from the prosecution *to accept a plea* on terms and *conditions that may be favorable to the accused*. (emphasis added). There is a conflict between the Federal Judicial Circuits where the Seventh (7th) Circuit, *Speed v. U.S.*

2013 U.S. Dist. Lexis 26798 (C.D. ILL. 2013), the Ninth (9th) Circuit, *Turner v. Calderon* 281 F. 3d. 851, 881 (9th Cir. 2001), agree with the 11th Circuit's mindset against *Boria* but the First (1st) Circuit, *U.S. v. Rodriguez-Rodriguez* 929 F. 2d. 741, 753 n.1 (1st Cir. 1991), the Sixth (6th) Circuit, *Collier v. Westbrook* 2013 U.S. Dist. Lexis 76981 (M.D. Tenn. 2013), and the Third (3rd) Circuit, *McNeill v. U.S.* 2016 U.S. Lexis 27978 (Dist. Court of New Jersey 2016), agree with *Boria*.

Therefore, there is a conflict between the 2nd and 11th Circuits which is of National importance of having the Supreme Court decide the questions involved in this petition concerning defense counsel's obligation (duties/responsibilities), to advise a defendant to accept a favorable (or reject an unfavorable) plea offer, whether the 11th Circuit's decision has created an exception contrary to or unreasonable application of *Frye's* announced general rule and does failure to advise constitute deficient performance pursuant to *Strickland*.

CONCLUSION

The Eleventh Circuit Court of Appeals has erred in entering a decision which is contrary to, unreasonable application of, and an unreasonable determination of the facts to the general rule announced in

Missouri v. Frye applying *Strickland*). Moreover, the 11th Circuit decision is in conflict with the 1st, 2nd, 3rd and 6th Circuits on the two important Federal questions left open in *Frye* on a defense counsel's constitutional performance in having an obligation and/or duty to advise defendants to accept a favorable plea offer and are there any exceptions.

The questions presented in this petition by Akil Tymes are nationally important not only to Tymes but to others that are similarly situated. This Court has not but should settle the unanswered puzzle left open in *Frye*, as this case presents the necessity and occasion to explore how to define the duties and responsibilities of defense counsel in the plea bargain process and any exceptions allowed applying *Strickland*. Additionally, this Court would resolve conflicts around the Federal Judicial Circuits and provide guidance to all jurisdictions.

Wherefore, Akil Tymes requests the 11th Circuit Court's judgment and decision be vacated, Habeas Corpus relief be granted and the case remanded back to the lower State Circuit Court of Leon County, Florida; for re-offering of the ten (10) year plea offer to Tymes.

Respectfully submitted,
/s/_____
AKIL TYMES, *pro se*