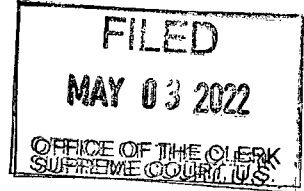


21-7838

No.

ORIGINAL

IN THE
SUPREME COURT
OF THE
UNITED STATES



LEONARDO LARCK
Petitioner,

Vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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[Acting Pro se]

QUESTION PRESENTED

Does the Sixth Amendment right to effective assistance of counsel require counsel to communicate a client's inquiry/response to a formal plea offer?

Does defense counsel provide ineffective assistance when he fails to communicate his client's inquiry/response to a formal plea offer where that failure causes the offer to lapse?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who is the Appellant-Petitioner in the lower court proceedings, is Leonardo Larck. Respondent, who is the Appelle-Respondent in the lower court proceedings, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Eleventh Circuit decided this case by order denying a certificate of appealability issued on February 10, 2022, in which it affirmed the judgment of U.S. District Court for the Southern District of Georgia which issued it's denial of Petitioner's 28 U.S.C. § 2255(f)(1) motion on August 27, 2021. A copy of both orders is included in the appendix of this petition.

STATEMENT OF JURISDICTION

This petition seeks review of an order denying Petitioner's ineffective assistance of counsel claim following a finding of guilt by a jury of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (count one); possession of controlled substances with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (counts two and three); and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c) (count five). This petition is filed within the time permitted by the Rules of this Court. This Court had jurisdiction to review the Eleventh Circuit's order pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

On February 5, 2015, Petitioner was charged by a grand jury seated in the Southern District of Georgia with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (count one); possession of a controlled substances with intent to distribute, in violation of 21 U.S.C. § 841(a) (counts two, three, and four)¹; and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (count five).

After the filing of said charges, Petitioner filed a number of motions complaining about his counsel, Joseph Turner. Among these motion were two hand written motions dated June 8th and 10th. The June 8th motion was to continue trial and the

¹ Count four was dismissed by the prosecution before trial.

June 10th motion was to dismiss counsel. Ultimately, the court found that Petitioner's complaints were unfounded and allowed counsel to continue representing him.

Relevant to this petition is the fact that prior to trial counsel visited Petitioner at the jail he was being held at to discuss a plea offer from the prosecution. In this plea offer the prosecution would recommend a 120-month term of imprisonment in exchange for a guilty plea. After hearing this offer, Petitioner ask counsel if the prosecution would allow for the 120-month term to be served concurrently with the state term that he faced which originated from the same conduct. Counsel refused to communicate this inquiry to the prosecution stating that such was not possible. At that point Petitioner informed counsel that his family had been in contact with a different attorney who confirmed that such was possible. At that point counsel became apprehensive and ended the visit. Shortly after this, counsel cancelled the change of plea hearing. Petitioner at no time during this meeting informed counsel that he wanted to refuse the offered term. Instead, Petitioner simply wanted to know if the offered term could be served concurrent with the state term.

After a jury trial Petitioner was convicted on each count. At sentencing Petitioner was found to be a career offender. That fact, along with the § 924(c) conviction resulted in a guideline range of 360 months to life imprisonment. The district court imposed a term of 240 months imprisonment.

On appeal to the Eleventh Circuit Petitioner challenged the authentication of a jailhouse phone call that was played at the trial. Because this allegation of error was not raised at the district court level it was reviewed based on the plain error standard by the Eleventh Circuit. There the Eleventh Circuit held that no plain error resulted from the admission of that jailhouse phone call because Petitioner had not shown that the error affected his substantial rights. **See United States v Larck, 703 F. App'x 793, 796 (11th Cir. 2017).**

Subsequent to the direct appeal being denied Petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255. Of relevance to this petition is the fact that Petitioner complained that he received ineffective assistance of counsel in connection with the plea process. Specifically, Petitioner took issue with the fact that counsel failed to communicate his response/inquiry to the initial 120-month plea offer. In connection to this complaint Petitioner filed an affidavit attesting to the events that occurred at the meeting where the initial plea offer was discussed. Ultimately, the magistrate judge assigned to this case recommended that the complaint be denied suggesting that prejudice from the alleged complaint was lacking. In an order dated August 27, 2021, the district court adopted the recommendation of the magistrate and denied the motion. **See Appendix 1.** Subsequent to the district court's denial, Petitioner sought a certificate of appealability from the Eleventh Circuit Court of Appeals on

the issue. On February 10, 2022, in a one paragraph order the Eleventh Circuit denied the application for a certificate of appealability. **See Appendix 2.**

**MANNER IN WHICH THE FEDERAL QUESTION WAS
RAISED AND DECIDED BELOW**

The questions presented were argued and reviewed in the lower courts because Petitioner argued in the 28 U.S.C. § 2255 motion that his counsel provided ineffective assistance when he failed to communicate his response to the formal offer of a ten year term. It was also argued that because of that failure, the plea offer lapsed and counsel was ineffective in that respect as well.

REASONS FOR GRANTING THE WRIT

Petitioner contends that there is a compelling reason to grant certiorari in this case because “a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.” **See S. Ct. R. 10(c).** Specifically, by affirming the decision of the district court the Eleventh Circuit has endorsed the notion that counsel does not have a duty to communicate his client’s response to a formal plea offer. This endorsement conflicts with the implied reasoning of this Court’s decision in **Missouri v Frye, 182 L Ed 2d 379, 390 (2012)** which anticipates that counsel will participate in plea *negotiations* on behalf of a client.

ARGUMENT

Defense counsel provided ineffective assistance where he refused to communicate to the prosecution his client's response to a formal plea offer and where said refusal was the sole cause of the plea offer lapsing.

"Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." **Missouri v Frye, 182 L. Ed 2d 379, 389 (2012)**. Because of these facts this Court has recognized that in today's criminal justice system "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." **Id at 390**. Almost inseparable from this reality is the fact that it is not unusual for a number of these criminal defendants to have additional terms of imprisonment to serve in addition to the term at the heart of a current negotiation. Consequently, it would not be strange for a defendant; in the face of a plea offer, to inquire as to whether the offered term could be served concurrent with a future or existing term. As this Court has yet to address an attorney's obligation in reference to a defendant's response to a formal plea offer, certiorari should be granted. Stated differently, this Court should grant certiorari to determine whether the Sixth Amendment requires a lawyer to communicate to the prosecution the inquiry of his or her client concerning a plea offer and whether such a failure, when it causes an offer to lapse, constitutes ineffective assistance. These questions will effect countless federal and state plea bargains across the country as they speak to a reality that is ubiquitous in the plea bargain process.

The case before this Court reflects that reality. In the section 2255 proceeding in the district court Petitioner outlined the series of events that led to the current complaint. These events were as follows: (1) counsel visited Petitioner to discuss a plea offer of 120-months imprisonment in exchange for a guilty plea; (2) when counsel presented the offer, Petitioner asked counsel to inquire as to whether the prosecution would agree to allow the offered term to be served concurrently with a state term arising out of the same conduct; (3) counsel refused to make the inquiry, believing that the prosecution would not agree to such; (4) after counsel stated his belief, Petitioner responded by telling counsel that a different attorney, whom his family was speaking with advised that such a possibility existed; and (5) upon hearing what the other attorney opined to Petitioner's family, counsel became apprehensive and ended the meeting. At no time during this meeting did Petitioner tell counsel that he did not want to accept the offer. Rather, he simply asked whether the prosecution would allow the term to be served concurrent to the state term that he also faced. Shortly after this meeting, the change of plea hearing that was scheduled was cancelled. On these facts Petitioner stated that he received ineffective assistance of counsel. The district court's opinion denying relief accepts that counsel failed to inform the prosecution of Petitioner's response/inquiry to the offer. **See Order of District court at 3 located in the appendix ("In the Court's opinion, [Petitioner] cannot demonstrate . . . prejudice based on his trial counsel's failure to present**

a counteroffer to the Government.”). Petitioner urges this Court to formally hold that the failure of counsel to communicate his client’s response/inquiry to the offer of the prosecution constitutes deficient performance. Petitioner urges this result for two reasons: (1) the logical extension of this Court’s reasoning in **Missouri v Frye** dictates that counsel actually participate in or assist his client in the negotiation or plea bargain process; and (2) it was counsel’s failure to communicate the response/inquiry that caused the offer to lapse.

The logic in Missouri v Frye dictates that counsel was deficient.

That counsel’s refusal to communicate Petitioner’s response/inquiry to the prosecution constitutes deficient performance is dictated by this Court’s reasoning in **Missouri v Frye**. To be sure, when observing the importance of the plea bargaining process, this Court noted that “criminal defendants require effective counsel during plea *negotiations*.” **Frye, 182 L. Ed 2d at 390 (emphasis added)** Notwithstanding the fact that the Court thought it not “prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process,” it is clear that effective representation in the process requires counsel to actually participate in negotiations. This much is clear from the Court’s employment of expressions that suggests as much. **See Frye, 182 L. Ed 2d at 390 (“criminal defendants require effective counsel during plea negotiations.”); (“Bargaining is, by its nature, defined to a substantial degree by**

personal style.”). Webster’s II New Riverside University Dictionary defines the term negotiate as follows: “To settle or arrange by *conferring* or *discussing*.” See **id** at page 789 (emphasis added). Thus, in order to negotiate, one must confer or discuss some type of proposition with the opposite party. As a consequence of this fact it can be said that when counsel in this case failed or refused to communicate Petitioner’s response/inquiry to the prosecution he failed to or refused to participate in the negotiation process. In so doing counsel neglected an implied duty articulated by this Court in **Frye**. Furthermore, if this Court in **Frye** imposed on counsel a duty “to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused,” **id** at 390, that duty naturally applies to the client’s response as well. This suggestion seems reasonable in light of the fact that communicating the response to an offer is as important as the communicating the offer. In essence the two are the opposite side of the same coin. Failure to communicate either one causes the same result, i.e., the lapse of a plea offer.

Counsel’s failure to communicate the offer caused the lapse.

In addition to holding that counsel renders deficient performance when he or she fails to communicate a client’s response to a plea offer because the logic in **Frye** dictates such, this Court should so hold also because that failure caused the plea offer to lapse. Without a doubt, had counsel simply asked the prosecution whether the

offered term could be served concurrent to the additional state term there would still have been opportunity to accept the offer. That is, had Petitioner's response/inquiry been communicated, the prosecution could have clarified yes or no to the inquiry and Petitioner would have still had opportunity to accept the plea. After all Petitioner did aver that had the inquiry been answered in the negative he would have still excepted the plea. However, because counsel refused to communicate the response/inquiry, the offered lapsed. In light of the fact that failing to communicate an offer to an accused and failing to communicate the accused's response to an offer has the same effect of causing the offer to lapse; the latter should be decried by this Court as deficient in the same manner as the former.

In regards to prejudice, the lower court opinion found that Petitioner could not "demonstrate that he suffered prejudice based on his trial counsel's failure to present a counteroffer to the Government" because "aside from his own affidavit Petitioner has offered no evidence that, had the Government rejected his counteroffer, he would have actually accepted the Government's original plea offer." **Doc 127 at 3.** The order further found that prejudice was lacking in Petitioner's claim since his "presentation of the sequence of events depends upon his speculation that the Government's original offer would have been maintained in response to Petitioner's counteroffer." **Id.** Petitioner contends that this finding by the lower court without holding a hearing was unreasonable. This is the case because (1) Petitioner's

affidavit was afforded no weight whatsoever and (2) the conclusion that Petitioner's sequence of events depends on his speculation that the original offer would have been maintained in the face of his response rests on a speculation that the offer would not have been maintained in the face of his response.

Petitioner's affidavit should have been afforded weight

In a habeas proceeding the allegation made in a petition should be taken as true unless the record conclusively proves otherwise. See **Ellis v United States, 313 F.3d 636, 641 (1st Cir. 2002)** and **Moore v United States, 571 F.2d 179, 184 (3rd Cir. 1978)**. In this case the lower court did not abide by this. Instead, it simply dismissed Petitioner's affidavit as if it was not to be afforded any weight at all. And this where there was nothing in the record that demonstrated that Petitioner would not have accepted the offer had his response/inquiry been communicated and answered in the negative. In fact, the very fact that there was a change of plea hearing scheduled shows that Petitioner was not adverse to accepting a plea. Moreover, the fact that Petitioner inquired about having the terms run concurrently shows a reasonable probability that he would have accepted the plea had his response/inquiry been communicated. At the very least the lower court should have held a hearing on this matter. But since it failed to do so, this court should remand.

The district court's prejudice conclusion depends on speculation.

As stated, the district court accuses that Petitioner's logic as to the prejudice the alleged error caused is flawed because it speculates that if counsel would have communicated Petitioner's response the prosecution would not have rescinded the offer. However, to arrive at this conclusion the court's opinion had to speculate that the prosecution would have rescinded the offer had counsel communicated Petitioner's response. In other words, the lower court, to reach its conclusion, engaged in the same speculative analysis that says makes Petitioner's claim fail. The harm in this is simple. The speculation the court engaged in to arrive at its conclusion is much more of a stretch than the speculation Petitioner is accused of engaging in. It is far more likely that the prosecution would maintain the same offer in the face of being asked if the term could be served concurrent to a state term than it is that it would rescind the offer. To conclude otherwise would be to assign to the prosecution an unreasonable temperament that finds no evidence in the record. After all, even after the offer in question was not acted on, another offer was made. Beyond the unreasonableness of the lower court's conclusion is the fact that it was counsel's refusal to participate in the plea bargaining process that allow the offer to lapse. This means that despite how one resolves the speculation issue, it cannot be avoided that it was counsel's actions alone that caused the breach in this case. Because of this

fact, this Court is asked to vacate the lower court's decision and remand the case so that a proper prejudice analysis can be conducted.

Conclusion

For the reasons stated in this petition this Honorable Court is asked to grant certiorari to resolve the questions presented by this case.

Respectfully submitted

/s/ Leonardo Lark