No.

IN THE SUPREME COURT OF THE UNITED STATES

JOE NELSON DAVIS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the First District Court of Appeal
For the State of Florida

PETITION FOR A WRIT OF CERTIORARI

Dane K. Chase, Esquire
Florida Bar Number: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

* Counsel of Record

QUESTION PRESENTED

Whether the Sixth Amendment right to the effective assistance of counsel requires counsel to advise his client whether acceptance or rejection of a plea offer is in his best interest?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Joe Nelson Davis, Jr. (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), and Ashley Moody, Esquire (Attorney General, State of Florida).

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OPINION BELOW

The decision of the First District Court of Appeal, State of Florida, *infra*, is attached as Appendix A.

JURISDICTION

The Judgment of the First District Court of Appeal, State of Florida, was entered on March 18, 2022. A Motion for Written Opinion was timely filed and denied on May 3, 2022. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> 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 against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF FACTS

Mr. Davis was charged on August 5, 2015, by Second Amended Information, with Sexual Battery upon a Child under 12 (County I), Sexual Battery by a Person in Familial or Custodial Authority (County II), Lewd or Lascivious Molestation of a Child under 12 (Count III), Lewd or Lascivious Molestation of a Child 12 or older (Count IV), Sexual battery upon a Child under 12 years of age (Count V), and Lewd

or Lascivious Molestation of a Child under 12 (Count VI). Mr. Davis pled guilty to the lesser included offense of Aggravated Abuse of Child as to Counts I and II, for which he was sentenced to 5 years of Sex Offender Probation, and the remaining Counts were nolle prossed.

On November 10, 2015, an affidavit was filed asserting that Mr. Davis's urine had tested positive for cocaine, and he had therefore violated the terms of his probation. Mr. Davis admitted to violating his probation, and was sentenced to consecutive terms of 15 years imprisonment.

Thereafter, Mr. Davis filed a Motion for Post-Conviction Relief in which he argued he was deprived of his right to the effective assistance of counsel by his trial counsel's failure to advise him that acceptance of a plea offer of 20 years imprisonment extended to him by the state was in his best interest. Specifically, Mr. Davis argued trial counsel performed deficiently by failing to advise him that in light of his underlying offense conduct it was overwhelmingly likely that if he rejected the state's offer, which was essentially a bottom of the guidelines offer, he would ultimately receive a harsher sentence because sentencing statistics reveal that sentencing courts more harshly sentence sex offenses than any other offenses except murder. Mr. Davis further argued he would have accepted the state's plea offer had he been advised it was in his best interest to do so, that the state would not have withdrawn the offer, that the court would have accepted it, that the sentence imposed upon him would have been far less under the terms of the plea agreement, and that he was therefore prejudiced by his counsel's deficient

performance, and thus deprived of his right to the effective assistance of counsel.

A hearing was held on Mr. Davis's motion during which Mr. Davis testified in accordance with his motion. Specifically, Mr. Davis testified that prior to admitting his violation of probation he had been extended a plea offer of 20 years imprisonment by the state. According to Mr. Davis, his trial counsel advised him to reject the offer because he believed he would be able to get his probation reinstated. Mr. Davis ultimately rejected the offer on advice of counsel. Mr. Davis further testified that had trial counsel advised him that acceptance of the state's plea offer was in his best interest that he would have accepted the offer.

Mr. Davis's trial counsel, Ralph Deas, then testified that he did not remember the discussion he had with Mr. Davis concerning the state's plea offer. According to Mr. Deas, he did not believe Mr. Davis's probation would be reinstated if he admitted the violation. Mr. Deas did not offer Mr. Davis any advice one way or the other whether he should accept or reject the state's plea offer. Attorney Deas could not recall whether he believed acceptance of the plea offer to be in Mr. Davis's best interest at the time of his plea, but admitted looking back clearly it was.

The court denied relief, finding:

> Here, when considering Mr. Deas testimony, which this Court finds persuasive, Mr. Deas advised the Defendant of his full range of sentencing possibilities, and did not advise him to reject the State's 20-year plea offer or advise him it was likely his probation would be reinstated if he entered an open plea. Mr. Deas's assessment of the case and his advice was reasonable under prevailing professional norms. Thus, the Defendant cannot establish counsel's performance was deficient. See Allen, 261 So.3d at 1269 (citing Strickland, 466 U.S. at 688)(holding to

> establish deficiency, defendant must establish counsel's performance was unreasonable under prevailing professional norms.") Notably, during the plea colloquy, the Defendant testified he understood his lowest permissible sentence was 237.75 months, or "roughly 20 years," and the Judge did not have to reinstate his probation. *Plea Hearing Transcript, pp.* 5, 26-28. Because the Defendant failed to establish counsel's advice was deficient, it is unnecessary to address prejudice. See id., at 911 (Strickland, 466 U.S. at 697).

(Appendix C).

Mr. Davis appealed to the First District Court of Appeal, State of Florida, and argued trial counsel had a duty to advise him whether acceptance of the state's plea offer was in his best interest and had therefore performed deficiently by failing to do so. Mr. Davis further argued the record clearly reflected he was prejudiced by his trial counsel's performance and he was therefore deprived of his right to the effective assistance of counsel and entitled to relief. However, the First District affirmed without a written opinion.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT DEFENSE COUNSEL MUST OFFER A DEFENDANT HIS INFORMED OPINION AS TO WHETHER TO ACCEPT OR REJECT A PLEA OFFER.

At issue in this Petition is whether trial counsel performs deficiently by failing to offer his client any advice regarding whether to accept or reject a plea offer.

In *Missouri v. Frye,* 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), the Court explained that "criminal defendants require effective counsel during plea negotiations." *Frye*, 566 U.S. at 144, 132 S. Ct. at 1407–08. In *Lafler v. Cooper,* 566 U.S. 156, 162-63 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012), the Court explained that the two part test established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) governed ineffective assistance of counsel claims in the plea bargaining context. Under the *Strickland* standard, a defendant must establish "that his counsel provided deficient assistance and that there was prejudice as a result." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011)

Despite the fact that "[pleas account for nearly 95% of all criminal convictions," *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010) (footnotes omitted), this Court has not addressed the question of whether counsel is required to offer an informed opinion to his client whether to accept or reject a plea offer. As a consequence, some criminal defendants enjoy the right to counsel's professional advice whether to accept a plea offer, *see, e.g., Boria*

v. Keane, 99 F.3d 492, 497 (2d Cir.1996) (Observing that with respect to a plea offer, counsel must give the client the benefit of his professional advice whether to plead guilty); *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) ("If it is ineffective assistance to fail to inform a client of a plea bargain, it is equally ineffective to fail to advise a client to enter a plea bargain when it is clearly in the client's best interest.") (citing, *Boria*, 99 F.3d at 497); *Barlow v. Comm'r of Correction*, 150 Conn. App. 781, 800 (2014) ("Although the defendant ultimately must decide whether to accept a plea offer or proceed to trial, this critical decision, which in many instances will affect a defendant's liberty, should be made by a represented defendant with the *adequate professional assistance, advice, and input of his or her counsel.* Counsel should not make the decision for the defendant or in any way pressure the defendant to accept or reject the offer, but counsel should give the defendant his or her *professional advice* on the best course of action given the facts of the particular case and the potential total sentence exposure.")(Emphasis in original)(citations omitted), while others, like Mr. Davis, do not. Because, "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain," *In re Alvernaz* (1992) 2 Cal.4th 924, 933, this Court should resolve the question by finding that trial counsel has a duty to advise whether acceptance of a plea offer is in the client's best interest. *See, Boria,* 99 F.3d at 497; *Leonti*, 326 F.3d at 1117; *Barlow*, 150 Conn. App. at 800; *see also,* Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. Rev. 841, 894-907 (Explaining in depth why counsel should

be required to offer informed advice regarding which plea to enter) (available at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2103&context=bclr). The failure to do so renders the Sixth Amendment guarantee of the right to *counsel* meaningless in the plea bargaining context. *See, Id.* Accordingly, this Court should grant review to establish that all criminal defendants are entitled to counsel's advice whether to accept or reject a plea offer, so that the 6th Amendment carries the same guarantees regardless of the jurisdiction. *See, Id.* Furthermore, it is of the utmost importance that the Court do so now, as the State of Florida, which incarcerates more of its citizens than 172 of the 196 countries and "areas" in the world, does not afford its citizens this basic right despite their clear entitlement to it under the 6th Amendment, and will continue to deprive them of the right unless directed to do otherwise by this Court. https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All; http://www.dc.state.fl.us/pub/annual/2021/FDC_AR2020-21.pdf; https://www.state.gov/countries-areas/.

Furthermore, Mr. Davis's case is the ideal vehicle for addressing this issue, as the record is fully developed and presents a clean opportunity to address this important question, as it is undisputed trial counsel did not offer any advice as to which plea to enter. Accordingly, the question to be resolved by Mr. Davis's case is straightforward – did counsel have a duty to advise Mr. Davis whether acceptance or rejection of the state's plea offer was in his best interest?

Consequently, for the reasons set forth above, this Court should grant Mr. Davis's Petition, and establish that trial counsel has a duty under the Sixth Amendment to advise their client whether acceptance or rejection of a plea offer is in their best interest, and grant relief accordingly.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Davis's Petition for Writ of Certiorari, establish that trial counsel has a duty under the Sixth Amendment to advise their client whether acceptance or rejection of a plea offer is in their best interest, and grant relief accordingly.

Respectfully Submitted,

Dane K. Chase, Esq.
Florida Bar No. 0076448
Chase Law Florida, P.A.
111 2nd Ave Ne
Suite 334
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com
Counsel for Petitioner

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APPENDIX A

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-154

JOE DAVIS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Dixie County.
David W. Fina, Judge.

March 18, 2022

PER CURIAM.

AFFIRMED.

RAY, OSTERHAUS, and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Dane K. Chase, Chase Law, St. Petersburg, for Appellant.

Ashley Moody, Attorney General, Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850) 488-6151

May 03, 2022

CASE NO.: 1D21-0154
L.T. No.: 14-CF-00259

Joe Davis, Jr. v. State of Florida

Appellant / Petitioner(s), Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion docketed March 22, 2022, for issuance of a written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

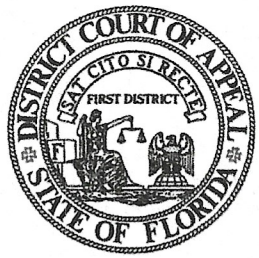
Served:

Hon. Ashley Moody, AG
Heather Flanagan Ross, AAG

Dane K. Chase

th

KRISTINA SAMUELS, CLERK



APPENDIX C

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IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR DIXIE COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 2014-259- CF

vs.

JOE DAVIS, JR.
Defendant.
_____/

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came on for an evidentiary hearing on June 8, 2020 to address the Defendant's "Motion for Postconviction Relief" filed on March 7, 2018. Upon consideration of the motion, the record, testimony presented at the evidentiary hearing, the applicable law, and arguments of counsel, the motion is DENIED for the reasons expressed below.

Procedural History

On August 5, 2015, the Defendant was charged with: Count I, Sexual Battery Upon a Child under 12 years of age; Count II, Sexual Battery by a Person in Familial or Custodial Authority; Count III, Lewd or Lascivious Molestation of a Child under 12 years of age; Count IV, Lewd or Lascivious Molestation of a Child 12 or older; Count V, Sexual Battery upon a Child under 12 years of age; and Count VI, Lewd or Lascivious Molestation of a Child under 12 years of age.

On August 12, 2015, the Defendant pled guilty to the lesser included offense of Aggravated Abuse of a Child as to Counts I and II, for which he was sentenced to five years of sex offender probation. *Judgment and Sentence*. The remaining counts were nolle prossed. On November 10, 2015, an affidavit of violation of probation was filed alleging the Defendant tested positive for cocaine. On February 10, 2016, the Defendant admitted to violating probation and was sentenced to consecutive terms of 15 years of imprisonment. *Plea Hearing Transcript, pp.* 3-5, 25-28.

Motion

The Defendant's Allegations

The Defendant requests his judgment and sentence be set aside on grounds that counsel was ineffective for advising him to reject the State's plea offer of 20 years, which was six months higher than the minimum guidelines sentence. He asserts counsel advised him to reject the offer, because the Defendant's probation officer would recommend probation be reinstated, and if the Defendant admitted violating probation and entered an open plea, it was likely that his probation would be reinstated. Based on counsel's advice, the Defendant rejected the offer, pled guilty, and was sentenced to two consecutive terms of 15 years in prison. The Defendant asserts counsel was ineffective for advising him to reject the plea offer, and by failing to advise him of the strengths and weaknesses of his case. The Defendant was on probation for sexually battering his 11-year-

old and 13-year-old daughters. Based on his underlying offenses, it was overwhelmingly likely that, if he entered an open plea, he would receive a sentence harsher than the State's plea offer. Counsel's advice to reject the plea offer was unreasonable under the circumstances of this case.

Evidentiary Hearing

The Defendant's testimony during the evidentiary hearing was consistent with the allegations contained in his sworn motion. He also testified he discussed his sentencing scoresheet with counsel, and the scoresheet provided for a minimum sentence of 15.9 years. His attorney told him he could only receive 20 years on a plea, and counsel would file a motion and request the court reinstate probation. Counsel informed him that if a motion was submitted, the court was permitted to go below the guidelines. Counsel did not tell him the court would sentence him below the guidelines, only that whether to do so was solely within the court's discretion. Counsel told the Defendant that if he rejected the plea offer, he would plead for mercy from the court. If counsel filed the motion, the Defendant's probation officer would testify on his behalf and the Defendant's probation would be reinstated. *Evid. Hearing, pp. 5-11.*

The Defendant's trial counsel, Robert Deas, testified he has been practicing criminal law for 17 years. He represented the Defendant in the sexual battery cases for which the Defendant was placed on probation. Although he did not recall the specific conversation with the Defendant, he always discusses the minimum and maximum sentence a defendant faced, what witnesses were likely to testify and what their testimony was likely to be. He would have informed the Defendant of the strengths and weaknesses of his case, and of the recommendation of his probation officer. He advised the Defendant he faced a maximum of 30 years in prison, that he could receive anything from reinstatement of probation to 30 years in prison, and counsel did not know what sentence the court was likely to impose. The Defendant expected the victim to testify on his behalf and ask for leniency. Counsel did not believe the Defendant's probation would be reinstated. That the Defendant was initially placed on probation for the underlying offenses was a "gift." Counsel did not advise the Defendant to reject the plea offer and did not tell the Defendant it was "very likely" his probation would be reinstated. *Evid. Hearing, pp. 11-18.*

Analysis

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." See Gordon v. State, 286 So. 3d 833, 834 (Fla. 1st DCA 2019) (quoting Lafler v. Cooper, 566 U.S. 156, 168 (2012)). To have a viable claim that counsel's advice caused a defendant to reject a favorable plea, the defendant must allege a specific deficiency that demonstrates counsel's advice or assessment was unreasonable. See Drakus v. State, 219 So. 3d 979, 982 (Fla. 1st DCA 2017).

To establish prejudice, a defendant must allege: (1) he would have accepted the offer had he been correctly advised, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the terms of the offer would have been less severe than the judgment and sentence imposed. See Alcorn v. State, 121 So. 3d 419, 430 (Fla. 2013) (citing Missouri v. Frye, 566 U.S. 134 (2012)). The Defendant must establish both deficient performance and prejudice to obtain postconviction relief. See Valle v. Moore, 837 So. 2d 905, 910-11 (Fla. 2002) (citing Strickland v. Washington, 466 U.S. 668, 697 (1984)). If the defendant fails to sufficiently establish one element, the reviewing court need not address the second element. See id. at 911 (citing Strickland, 466 U.S. at 697).

Here, when considering Mr. Deas testimony, which this Court finds persuasive, Mr. Deas advised the Defendant of his full range of sentencing possibilities, and did not advise him to reject the State's 20-year plea offer or advise him it was likely his probation would be reinstated if he entered an open plea. Mr. Deas's assessment of the case and his advice was reasonable under prevailing professional norms. Thus, the Defendant cannot establish counsel's performance was deficient. See Allen, 261 So. 3d at 1269 (citing Strickland, 466 U.S. at 688) (holding to establish deficiency, defendant must establish counsel's performance was unreasonable under "prevailing professional norms."). Notably, during the plea colloquy, the Defendant testified he understood his lowest permissible sentence was 237.75 months, or "roughly 20 years," and the Judge did not have to reinstate his probation. *Plea Hearing Transcript, pp. 5, 26-27.* Because the Defendant failed to establish counsel's advice was deficient, it is unnecessary to address prejudice. See id. at 911 (citing Strickland, 466 U.S. at 697).

Therefore, it is **ORDERED:**

The Motion for Postconviction Relief is **DENIED.** The Defendant may appeal this decision to the First District Court of Appeal within 30 days of the date of this Order.

DONE and ORDERED in Suwannee County, Florida, on the 2nd day of October, 2020.

DAVID W. FINA, CIRCUIT JUDGE

Attachments

- Violation of Probation Plea Hearing Transcript, pp. 1, 3-5, 25-28
- Evidentiary Hearing Transcript, pp. 1, 5-18
- Judgment and Sentence
- Sentencing Guidelines Scoresheet