

22-5882

ORIGINAL

No. _____

In The Supreme Court Of The United States

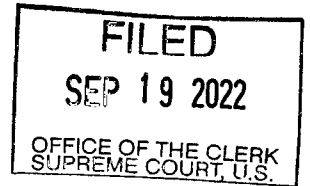
Allen L. Calligan, Jr.,

Petitioner,

-vs-

State of Indiana,

Respondent



ON PETITION FOR WRIT OF CERTIORARI TO
THE SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Allen L. Calligan Jr
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QUESTION PRESENTED

Mr. Calligan alleged that his trial counsel was ineffective for failing to inform him of an informal plea offer made by the prosecutor, which would have capped Mr. Calligan's sentence for the habitual offender charge to ten years. Mr. Calligan received a sentence of thirty years. While there seems to be universal agreement regarding formal plea offers, a **circuit split** exists regarding the extent of the Sixth Amendment's protections during plea negotiations.

Was Mr. Calligan's attorney ineffective for failing to inform him of the informal plea offer from the prosecutor, which prejudiced Mr. Calligan by causing him to receive a greater sentence.

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI TO
THE SEVENTH CIRCUIT COURT OF APPEALS

The Petitioner, Allen L. Calligan, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Seventh Circuit Court do Appeals, rendered in these proceedings.

OPINION BELOW

The decision of the Seventh Circuit Court of Appeals is unpublished and is listed in the appendix to this petition as Exhibit A.

The decision of the United States District Court is unpublished and is listed in the appendix to this petition as Exhibit B.

The decision of the Indiana Supreme Court is unpublished and is listed in the appendix to this petition as Exhibit C.

The decision of the Indiana Court of Appeals is unpublished and is listed in the appendix to this petition as Exhibit D.

JURISDICTION

The decision of the Seventh Circuit Court of Appeals was issued on August 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence

Amendment XIV

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Mr. Calligan sought *habeas corpus* relief, asserting that he was denied his constitutional right to the effective assistance of counsel during plea negotiations. The undisputed facts are that Mr. Calligan's attorney engaged in plea negotiations with the prosecutor. The prosecutor extended an offer. Mr. Calligan's attorney sent Mr. Calligan a letter, stating, "The prosecutor has suggested he would agree to =cap your exposure at 10 years on the habitual enhancement if you would agree to admit to that status rather than have a trial on that narrow issue." Mr. Calligan never received the letter and it was returned to his attorney's office.

A month later, Mr. Calligan's attorney withdrew from the case and a public defender entered an appearance. Mr. Calligan's original attorney did not contact Mr. Calligan after the letter had been returned and never communicated with the new attorney. Three weeks later, Mr. Calligan was convicted on the habitual offender enhancement and received 30 years. Mr. Calligan was never told about the

plea offer.

The Indiana Court of Appeals reasoned that Indiana law requires formal plea offers to be in writing. This is inaccurate. Indiana law requires that plea *agreements*, not plea offers, must be in writing and submitted to the court. The Indian Court of Appeal also found that there was no formal plea offer, only informal negotiations, and that counsel's mailing of a letter to MR. Calligan was a reasonable attempt to communicate since counsel did not know Mr. Calligan did not receive it.

Both the Indiana Court of Appeals and the District Court ruled that the existence of a formal plea offer must be established in order to obtain relief. A Certificate of Appealability was sought and denied.

REASONS FOR GRANTING THE WRIT

The District Court's opinion misapplied the *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984), test for prejudice in two important ways. First the Court flagrantly misstated the record. It stated that Mr. Calligan's attorney was unaware that Mr. Calligan had not received the letter. However, the letter had been returned to his office and was in Mr. Calligan's attorney-client file, which is where he obtained it. Second, the opinion ignores the prejudice that Mr. Calligan experienced while simultaneously ignoring the extent of counsel's obligations to a client during plea negotiations.

In *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), this Court held that "as a general rule, defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that my

be favorable to the accused.” *Id.* at 1404. The state and federal courts have honed in the wording of *Frye*, maintaining that this principle only extends to *formal* plea offers. However, such an interpretation fails to consider the rationale for the opinion.

In *Frye*, this Court stated: “In today’s criminal justice system, the negotiation of plea bargain, rather than the unfolding of a trial, is almost always a critical point for a defendant.” *Id.* at 1407. This Court went on to state that “criminal defendants require effective counsel during plea negotiations. Anything less... might delay a defendant effective representation by counsel at the only stage when legal aid and advice would help him.” For this reason, **“the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”** *Id.* at 1404.

Despite this Court’s clear acknowledgement of the importance of need for counsel during plea negotiations, federal and state courts provide no consensus regarding at what point the right to effective counsel is triggered.

A number of courts have stated that the existence of a formal plea offer is a vital factor in determining whether counsel is deemed to be ineffective because “mere informal plea discussions are not enough to trigger counsel’s duty to inform. See *Shnewer v. United States*, No. 13-3769, 2016 U.S. Dist. LEXIS 28891 (D.N.J. 2016); *United States v. McCall*, No. 00-0505, 2014 U.S. Dist. LEXIS 80325 (N.D. 2014); *Montgomery v. United States*, No. Crim. 07-00036, 2013 U.S. Dist. LEXIS

167932, (W.D. Ky. 2013); *Guerrero v. United States*, 383 F.3d 409, 417 (6th Cir. 2004).

However, other courts have determined that “[d]efendants are entitled to effective assistance at all stages of the plea negotiation, and ineffective assistance at an early stage would prevent a formal offer from being made.” *United States v. Polatis*, No. 2:10-CR-0364, 2013 U.S. Dist LEXIS 39064 (D. Utah 2013). *Polatis* is remarkably similar to this case, albeit less egregious. The *Polatis* Court reversed and remanded with instructions to extend the plea offer. Other Courts have ruled similarly. See e.g., *Carmichael v. United States*, 659 Fed. Appx. 103, 2016 U.S. App. LEXIS 15967 (11th Cir. 2016).

In *Overstreet v. Wilson*, 686 F.3d 404 (7th Cir. 2012), the Seventh Circuit Court of Appeals assumed without deciding “that counsel’s duty to communicate **potential** bargains to their clients covers **oral offers** before they are term complete.” *Id.* at 406-407 (emphasis added). The Seventh Circuit’s assumption in *Overstreet should be formally decided*. This issue should not be decided upon contract law principles but rather the Sixth Amendment right to effective counsel during a critical phase. In *Brock-Miller v. United States*, 887 F.3d 298, 307-308 (7th Cir. 2018), the Seventh Circuit found that “during plea **negotiations**, defendants are entitled to the ‘effective assistance of counsel.’”

Furthermore, in *Woods v. State*, 48 N.E.3d 374, the Indiana Court of Appeals reversed in similar circumstances. *Woods* contended that his attorney “was ineffective when he did not communicate to *Woods* introduced a letter from the

prosecutor to Woods' attorney proposing a plea deal." *Id.* at 348. The Indiana Court of Appeals reversed, relying upon *Frye, supra*.

This opinion demonstrates that the requirement of submitting plea agreements to a court is not the same as making an offer to opposing counsel. The undisputed fact that Mr. Calligan never received counsel's letter and that counsel never made contact with Mr. Calligan or his subsequent attorney once the letter had been returned to his office is significant. "An intelligent assessment of the relevant advantages of pleading guilty is frequently impossible without the assistance of an attorney." *Brady v. United States*, 397 U.S. 742, 748 n.5 (1970).

This Court has long recognized the layman's need for the guiding hand of counsel at every step of the proceedings against him. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Frye, supra*, stand for the proposition that counsel has an obligation to **advise** the client about the offer, not simply convey it. There is nothing in counsel's letter that could constitute advice; therefore, counsel has wholly failed in his obligation to Mr. Calligan. He did not communicate the offer to him. Counsel took no action when the letter he mailed to Mr. Calligan was returned. Even if the letter can be considered a reasonable attempt to communicate the offer, counsel still fails to advise Mr. Calligan regarding the plea offer. There is no excuse for failing to advise Mr. Calligan


These are but a few examples of the burgeoning caselaw related to this issue. This court should grant certiorari in order to examine the question of counsel's role during the plea bargaining process. When are the constitutional protections

triggered? Some courts have determined that a formal plea is necessary. What constitutes a "formal plea?" Since this Court has already determined that the plea bargaining process is a critical phase, shouldn't the right to counsel protect a criminal defendant throughout the entire phase?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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