

No. _____

In The
Supreme Court of the United States

TIMOTHY BING, JR.,

Petitioner,

vs.

MARK S. INCH,
Secretary, Florida Department of Corrections,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a policy by the State Attorney's Office which punished the petitioner for engaging in a pretrial investigation of his case as well as filing pretrial motions to defend his case, which resulted in the State withdrawing his plea offer based on those actions, violated the petitioner's due process rights as well petitioner's Sixth Amendment right to effective assistance counsel.

RELATED CASES

Bing, Jr. v. Secretary, Fla. Dep't of Corrections,
No. 23-11345, United States Court of Appeals
for the Eleventh Circuit, Judgment Entered
September 6, 2023.

Bing, Jr. v. Secretary, Fla. Dep't of Corrections,
No. 9:21-cv-81268-DMM, United States Dis-
trict Court for the Southern District of Florida,
Judgment Entered March 28, 2023.

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Petitioner, Timothy Bing, Jr., respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals, filed on September 6, 2023.



OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals, which was unpublished, was issued on September 6, 2023, and is attached as Appendix 1.



JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Eleventh Circuit Court of Appeals for which petitioner seeks review was issued on September 6, 2023. This petition is filed within 90 days of the denial of petitioner's motion for rehearing before the Eleventh Circuit Court of Appeals.



CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14

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.

United States Constitution, Amendment 5

No one will be deprived of liberty without “due process of law”

United States Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to have the Assistance of Counsel for his defence.



STATEMENT OF THE CASE

Petitioner was charged in Palm Beach County, State of Florida, by way of a second Amended Information with trafficking in heroin 28 grams to 30 kilograms while in possession of a firearm, trafficking in cocaine while in possession of a firearm, felon in possession of a firearm or ammunition, possession of marijuana with intent to sell while in possession of a firearm, possession of paraphernalia, and felon in possession of firearm.

Pretrial, petitioner took depositions which are allowed in the state of Florida in criminal cases, of the officers in the case, and filed a motion to suppress the physical evidence as well as petitioner’s post arrest statements to law enforcement by attacking the issuance of

the search warrant of the residence from which all of the contraband he was charged with possessing was located. The motion was denied by the court.

Petitioner then filed a second pretrial motion, a motion to dismiss. This motion was based upon a violation of petitioner's due process rights as well as his Sixth Amendment right to be effectively represented by counsel as guaranteed under both the Florida and United States Constitutions. The motion was based upon the prosecutor withdrawing a 15 year plea with a 7 year mandatory minimum sentence, punishing petitioner for having engaged in the discovery process by taking depositions, and filing pretrial motions. The prosecutor informed the petitioner that if he took depositions or filed pretrial motions, the plea would be withdrawn and there would be no further pleas.

Petitioner argued that punishing him for engaging in discovery and for thoroughly investigating his charges and defenses thereto, and punishing petitioner and his attorney for what would be considered effectively defending his client, amounted to outrageous government misconduct on the part of the State by violating petitioner's due process rights as well as interfering with and violating petitioner's Sixth Amendment right to counsel. The sanction sought by petitioner was dismissal of the charges or as an alternative sanction, that the court Order the State to re-offer the plea to petitioner. At the hearing on petitioner's motion to dismiss, the petitioner's expert testified that The Florida Bar Rules 4-2.1, 1.2, 2.4, as well as the ABA standards require an attorney to offer

candid, thorough and full advice about whether a client should plead guilty or go to trial, and that this requires the attorney to go take part in discovery. Regarding motion practice, not allowing a defendant's attorney to engage in motion practice interferes with the client's right to do thorough discovery and with allowing the defense attorney to properly represent the client. Interfering with the defense counsel's discovery and motion practice could also lead to these same issues being raised post-conviction with a defendant alleging that the defense counsel did not do enough discovery or thorough discovery which would include taking depositions and filing pretrial motions. The motion was denied.

The petitioner proceeded to trial and was convicted. Post-trial the petitioner re-raised this motion again with trial court, with petitioner testifying that he would have accepted the plea had the State not withdrawn it for taking depositions and filing motions, and that he would now accept the plea. The trial court again denied the motion.

The petitioner timely filed a 2254 petition to the United States District Court of the Southern District of Florida arguing the same grounds as noted above. That petition was denied as well as petitioner's motion for a certificate of appealability. The petitioner then timely filed an appeal to the United States Court of Appeals, Eleventh Circuit, for a certificate of appealability. The Eleventh Circuit denied the petitioner's relief as well. This petition follows.



REASONS FOR GRANTING THE PETITION

In punishing petitioner for engaging in defensive pretrial activities, the State violated appellant's due process rights, as well as his right to effective assistance of counsel under both the Florida and United States Constitutions. See U.S.C.A. Const. Amend. 14; Florida Constitution, Article I, Section 9. Const. Amend. 6; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Florida Bar Rules 4-2.1, 1.2, 2.4, as well as the ABA standards require an attorney to offer candid, thorough and full advice about whether a client should plead guilty or go to trial, and that this requires the attorney to take part in discovery. Making it a consequence that if counsel engages in the investigation of his client's case and or motion practice, that there will be no plea or the plea offer made will be withdrawn, the State interferes with the client's right have his attorney provide effective assistance of counsel. Interfering with the defense counsel's discovery and motion practice could also lead to these same issues being raised post-conviction with a defendant alleging that the defense counsel did not do enough discovery or thorough discovery to investigate his case so that proper representation occurs to counsel the defendant on whether to proceed with trial or accept a plea. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012) ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye*, post, at 1407-1408, 132 S.Ct. 1399; see also *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473, 1486, 176 L.Ed.2d

284 (2010); *Hill*, supra, at 57, 106 S.Ct. 366. During plea negotiations defendants are “entitled to the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).”). The United States Magistrate Judge noted in the report and recommendation that was appealed and denied at both the District Court and the Eleventh Circuit that “Neither Petitioner nor the State has cited a case directly on point for the issue of whether the State’s policy of withdrawing plea offers if a defendant engages in discovery or motion practice violates the defendant’s due process rights and the right to effective assistance of counsel. Rather, both have extrapolated their arguments from other settled areas of the law. *Nor can the Court find any cases directly on point through its independent research.*” (Emphasis added)

Because the State’s position is arguably contrary to language from this Court’s *Lafler* opinion, and because the federal Circuit has held there is no clearly established authority of this Court or any lower court on the issue raised, petitioner asks this Court to grant review to resolve the division and ensure there is clearly established authority. Petitioner presented argument sufficient to show that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, at 327, 123 S.Ct. 1029 154 L.Ed.2d 931 (2003). Petitioner has made a substantial showing of the denial

of a constitutional right, section 2253(c)(2), by showing that his due process right and right to effective assistance of counsel pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and Florida Constitution was violated by the state's policy of punishing petitioner by way of withdrawing all plea offers if petitioner engaged in discovery or motion practice specifically allowed under Florida law, and required for an attorney to provide effective assistance of counsel to his client both at the plea and trial levels in a criminal proceeding.



CONCLUSION

For all of the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: November 21, 2023

Respectfully submitted,

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