No._____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ALBERT ENRIQUE NARVAEZ,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

_____

On Petition for a Writ of Certiorari to the
District Court of Appeal for the
Fourth District of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does *Missouri v. Frye*, 566 U.S. 134 (2012), place an unreasonable burden upon defendants by requiring them to produce evidence to prove the counterfactual inquiries relating to prosecutorial withdrawal and judicial nonacceptance of a forgone plea offer?

In resolving claims of ineffective assistance of counsel under *Frye*, is it more practical for courts to presume, in the typical case, that state-sponsored plea offers are acceptable to the prosecutor (who extended the offer in the first place) and the trial judge, absent some identifiable indication to the contrary?

LIST OF PARTIES AND RELATED CASES

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

- *State v. Narvaez*, No. 18011191CF10A, Circuit Court for the Seventeenth Judicial Circuit of Florida. Judgment entered March 8, 2019.
- *Narvaez v. State*, App.No. 4D20-0245, Fourth District Court of Appeal of Florida. Judgment entered March 16, 2022.
- *Narvaez v. State*, App.No. 4D23-1089, Fourth District Court of Appeal of Florida. Judgment entered January 4, 2024.

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OPINION AND ORDER BELOW

The judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida (Case No. 18011191CF10A) appears at Appendix B to this petition. The opinion of the District Court of Appeal for the Fourth District of Florida affirming the judgment (Case No. 4D2023-1089) appears at Appendix A to this petition and is cited as *Narvaez v. State*, 2024 WL 45138 (Fla. 4th DCA January 4, 2024).

JURISDICTION

The Fourth District Court of Appeal of Florida (Case No. 4D2023-1089) issued its opinion on January 4, 2023. (App. A). This petition is filed within 90 days of that opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides "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 defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides "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." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

After a jury trial, Petitioner was convicted as charged of Count I: attempted murder in the first degree, in violation of §§ 777.04(1), 777.04(4), 782.04(1)(a), 775.087(1)(a), and 775.087(2)(a)(2), *Fla. Stat.* (2017); Count II: aggravated assault with a deadly weapon/firearm, in violation of §§ 784.011, 784.021(1)(a) and 784.021(2), *Fla. Stat.* (2017); Count III: false imprisonment, in violation of § 787.02, *Fla. Stat.* (2017); Count IV: discharging a firearm from a vehicle, in violation of § 790.15(2), *Fla. Stat.* (2017); and Count V: domestic battery, in violation of §§ 784.03(1) and 741.283, *Fla. Stat.* (2017). (R.32).[1]

On March 8, 2019, was sentenced to 25 years in prison with a 20-year mandatory minimum term, followed by 4 years of probation for Count I, 5 years concurrent for Counts II and III, 15 years concurrent for Count IV, and 364 days of county jail concurrent for Count V. (R.33). Petitioner was awarded 934 days of credit for time served. (R.33).

Petitioner appealed. The Fourth District Court of Appeal affirmed the judgments for Counts I through IV, but reversed and remanded for resentencing as to Count V. *Narvaez v. State*, 335 So. 3d 721 (Fla. 4th DCA 2022). (R.23-27).

On September 19, 2022, Petitioner through counsel filed a motion to vacate, set-aside or correct sentence pursuant to Rule 3.850, *Fla. R. Crim. P.* (R.31-93). The

[1] Reference to the record on appeal in *Narvaez v. State*, App.No. 4D23-1089, will be by the symbol "R." followed by page number.

motion raised a single ground alleging ineffective assistance of trial counsel during plea negotiations which caused Petitioner to reject a favorable plea offer. (R.35). Specifically, the motion alleged the State was unable to locate the victim for trial and expressed it was considering a nolle prosequi. (R.34). The prosecutor approached counsel with a plea offer consisting of a single reduced charge to felony battery and 364 days of county jail time. (R.34). Petitioner asked counsel what the benefit of entering a plea would be if the victim was unavailable for trial and counsel responded simply "to resolve the matter." (R.34). Counsel did not inform Petitioner that, in the event of a nolle pros, the State could re-file charges if the victim became available for trial within the statute of limitations period. (R.34). Petitioner ultimately rejected the plea. The State entered a nolle prossequi. The charges were subsequently reinstated because the victim became available. Petitioner was brought to trial and convicted and sentenced for all counts. (R.34-35).

Attached to the Rule 3.850 motion was an affidavit from Petitioner's trial counsel, Ms. Ramona L. Tolley, Esq. (R.44). In the affidavit, Ms. Tolley attests she does not recall advising Petitioner that, in the event he rejected the plea and a nolle pross was entered, the State would not be foreclosed from re-filing charges if, at any time within the applicable limitations period, the victim again became available for trial. (R.44).

The State filed a response to the Rule 3.850 motion on December 27, 2022. (R.95). The State argued the claim should be summarily denied because Petitioner

"failed to allege any deficiency or prejudice" because Petitioner did not allege that trial counsel "either provided misadvise or failed to relay an offer." (R.99).

Petitioner filed a reply to the State's response on January 4, 2023. (R.162).

An evidentiary hearing was held on April 5, 2023 (R.372). The parties agreed that the claim is governed by the standard announced by the Florida Supreme Court in *Alcorn v. State*, 121 So. 3d 419 (Fla. 2013).[2] (R.391; 394). The parties further agreed that prong four of the *Alcorn* analysis had been indisputably satisfied and the State stood silent as to prong three. (R.396-97). The State expressly agreed with the lower court that it was primarily challenging prong one and prong two under *Alcorn*. (R.397).

Petitioner testified that he was represented at the trial stage of the proceedings by Ramona Tolley, Esq. (R.399). There was an issue with the victim not appearing for trial. (R.399). Petitioner was present for the calendar call held on August 30, 2018. (R.399). At that time, Petitioner heard the State indicate they had not been in touch with the victim for several months. (R.399). He also heard the State assert that the case could not be proved without the victim. (R.399). Petitioner additionally heard the trial judge express that this was the oldest case on the docket. (R.400) The judge did not want to continue the case and specially set it for trial. (R.400).

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[2] In *Alcorn*, the Florida Supreme Court acknowledged that this Court modified the prejudice analysis for claims involving a forgone plea due to ineffective assistance of counsel in *Lafler v. Cooper*, 566 U.S. 156 (2012) and *Missouri v. Frye*, 566 U.S. 134 (2012). Bringing Florida law into conformity with those decisions, the court held that to show prejudice resulting from such claims, a defendant must establish a reasonable probability that (1) she would have accepted the plea offer; (2) the prosecution would not have withdrawn the plea offer; (4) the court would have accepted the plea offer; and (4) the sentence contemplated by the plea offer would have been less severe than the sentence imposed. *Alcorn*,121 So. 3d at 422.

Petitioner testified that he and Ms. Tolley had a brief discussion while he was sitting in the jury box during the busy court docket. (R.400; 405-06). Ms. Tolley informed Petitioner that the State may nolle pross the case because they were having trouble locating the victim and she conveyed a plea offer consisting of a single, reduced charge with a sentence of 364 days in the county jail. (R.400; 406-07). At that time, Petitioner had already accumulated 364 days of credit for time served and would not have to serve any more time in custody if he accepted the plea offer. (R.400; 406). When Ms. Tolley relayed the plea offer, Petitioner asked her what benefit he would receive by taking the plea if the State could not locate the victim, to which Ms. Tolley responded "to resolve the matter." (R.400–01; 437-38).

Ms. Tolley did not advise Petitioner of any other pertinent matters in relation to the plea. (R.401). She never informed Petitioner the specially set trial date was essentially meaningless because the State could avoid it by filing a nolle pross and then re-filing the charges at later date. (R.438). Petitioner testified that, at the time Ms. Tolley conveyed the plea, he understood a nolle pross as a meaning "case dismissed." (R.401). He was not aware the State could re-file charges after a nolle pross. (R.401). Petitioner believed that if the victim did not appear for trial, the case would be dismissed permanently (R.401; 438).

Neither did Ms. Tolley advise Petitioner there was no statute of limitations for Count I (attempted first degree murder with a firearm)—meaning he would be subject to prosecution for the rest of his life—but if he would take the plea then jeopardy would attach and the prosecution would come to an end. (R.438–39). Petitioner

testified he would have accepted the plea offer had he known that the State could re-file and continue the prosecution at any time, because he would not want the matter to linger over him for the rest of his life. (R.402; 439).

Ms. Tolley testified that she was retained to represent Petitioner in April of 2018. (R.441). Her understanding of the charges was such that the victim was necessary for the State to prove its case. (R.441). Ms. Tolley attempted to depose the victim, but was unable to serve her with the subpoena due not having a proper or permanent address. (R.441). Ms. Tolley recalled the judge saying he was not inclined to grant a State-charged continuance during the calendar call on August 30, 2018. (R.442). The prosecutor stated that he did not have contact with the victim and was considering a nolle pross. (R.442). The prosecutor made a plea offer for a single, reduced charge of felony battery with 364 days in The Broward County Jail with credit for time served. (R.442–43; 445). When she conveyed that plea offer to Petitioner, his question to her was "don't they have to have the victim for felony battery too?" to which she answered "yes". (R.443). Ms. Tolley recalled Petitioner then asking what the point of would be of taking the plea and she answered "to get the case resolved." (R.443–44).

Ms. Tolley admitted she did not go over the pros and cons of accepting or rejecting the plea offer with Petitioner; neither did she talk about the statute of limitations or the concept of jeopardy. (R.444). Ms. Tolley further admitted she did not know what the statute of limitations was for Count I at the time the plea offer was conveyed. (R.455–56). Whether she knew it or not, it wasn't something that she

discussed with Petitioner. (R.456). Ms. Tolley believed the statute of limitations was four years. (R.456). She did not know what the statute of limitations is for a life felony. (R.457). Ms. Tolley did not look the limitations period up on August 30, 2018, and was unable to inform Petitioner that if the State could not locate the victim, he would still be subject to prosecution for the remainder of his life. (R.458). Ms. Tolley did not inform Petitioner that, notwithstanding the special set court date, the State could still avoid trial by simply entering a nolle pross. (R.444). Ms. Tolley did not personally believe the case was going to be nolle prossed due to the seriousness of the allegations and other factors, but she did not relay this to Petitioner when the plea was offered. (R.448–49). Ms. Tolley stated she did not go over the pros and cons of her recommendation as to the plea because a calendar call was not a good opportunity to do so. (R.461).

Ms. Tolley testified the Petitioner specifically stated he was not going to take a plea without the victim. (R.451–52). After Petitioner rejected the plea offer, the case was special set for trial on September 24, 2018. (R.444). The State ultimately entered a nolle pross and then re-filed the charges. (R.444–45).

Assistant State Attorney Andrew Newman testified that he was the prosecutor assigned to Petitioner's case. (R.474). There was a nolle pross and then a re-file. (R.475). At the calendar call on August 30, 2018, Mr. Newman was not ready for trial because he was having trouble locating the victim. (R.479). He moved for a continuance because he did not have the victim, despite his efforts for many months to obtain her cooperation. (R.480–81). When he asked the court for more time to find

the victim, it was in open court, on the record and within earshot of Petitioner. (R.481).

Mr. Newman testified that he extended a plea offer to Petitioner to resolve the case because he was having trouble locating the victim. (R.481-82). The plea offer was for a single count of felony battery and 364 days in the county jail. (R.482). It was not the kind of offer he would normally extend for that type of case, but it was getting near the end and was at the point he believed he would have no case. (R.482). Mr. Newman recalled Ms. Tolley coming back with a counteroffer requesting a misdemeanor battery, which he declined. (R.483). Mr. Newman testified the plea offer was valid for that day only. (R.483). Mr. Newman subsequently entered a nolle pross. (R.485). He re-filed the case almost immediately when he had the victim. (R.486).

On May 1, 2023, the state postconviction court entered its "Final Order Denying Defendant's Motion to Vacate, Set-Aside or Correct Sentence." (App.B; R.361). As to the first prong of the *Strickland* analysis, the court concluded trial counsel's performance with respect to the plea offer was deficient:

> Defense counsel testified […] that she conveyed the offer to the Defendant. She testified the Defendant asked her what would be the point of taking the plea offer? Her response was to get the case resolved. Counsel did not go over the pros and cons of rejecting the state's offer. She did not talk about the statute of limitations. She did not talk about jeopardy and what could happen on a refile. See Fla. R. Crim. P. 3.171(c). Furthermore, defense counsel did not know what the statute of limitations was on count I at the time and was unable to provide said information to the Defendant during the plea negotiations. The Court takes note that during calendar calls Defense counsel's time with the Defendant is limited, in part, due to efficient docket management. There is a strong presumption that any counsel's conduct will fall within the wide range of reasonable professional assistance. Regardless, in this

> case defense counsel's performance was deficient on August 30, 2018, during the plea negotiation.

(App.B; R.364).

Insofar as prejudice, the state postconviction court found that only the fourth *Alcorn* prong was uncontested by the parties. (App.B; R.364). Turning to the remaining three *Alcorn* prongs, the court concluded as to prong one that Petitioner would not have accepted the plea offer even if he had been properly advised by trial counsel. (App.B; R.365). The court found Ms. Tolley credible and noted her testimony that Petitioner "was aware of the seriousness of the crime and that he knew he could get life in prison." (App.B; R.365). The court further determined Petitioner appeared mostly concerned with the availability of the victim. (App.B; R.365). The court acknowledged that Petitioner "wanted to know why should he accept the State's offer if they don't have a victim", but concluded that "through his language and actions he made it clear, he shouldn't." (App.B; R.365).

The state postconviction court found Petitioner to be incredible "based on his testimony." (App.B; R.365). The court observed, "The old ancient proverb says hindsight is 20/20. In hindsight things are obvious that were not obvious from the outset; one is able to evaluate past choices more clearly than at the time of the choice. In this case, the defendant did not meet his burden in establishing prejudice." (App.B; R.365).

As to the second *Alcorn* prong (despite the State's concession to same), the state postconviction court concluded Petitioner "failed to meet his burden that the State would not have withdrawn the offer." (App.B; R.365). The court reasoned:

> Here, the record is saturated with conversations that the State was willing to proceed to trial. Albeit, they were requesting a continuance on August 30, 2018. The Defendant did not show where the State would not have withdrawn their offer. In fact, the contrary appears when the Court granted the State's continuance and the State was prepared to proceed with trial preparation. Here, the Defendant makes mere general allegations. ASA Newman testified, whom the Court finds credible. The State had an independent witness to the incident. The victim appeared fearful throughout the process and ASA Newman was diligent in trying to gain her cooperation. The defendant was present on August 30, 2018, when the Court gave the State 25 days to locate the victim and reset the trial date.

(App.B; R.365-66).

Finally, as to the third *Alcorn* prong (again despite the State's concession to same), the state postconviction court concluded Petitioner failed to show the trial judge would have accepted the plea offer. (App.B; R.366). The court observed:

> The record is absent of any conversation the State and defense had with the court as to plea negotiations. Furthermore, the court exercising its right to limit the number of continuances does not prove with any reasonable probability that it would have accepted the plea. The trial court has authority to reject a negotiated plea between parties before it is formally accepted by the court. Here, the Defendant failed to meet his burden and prove a reasonable probability that an acceptance would have taken place.

(App.B; R.366) (citations omitted).

Petitioner appealed the order denying his postconviction motion to the Fourth District Court of Appeal. *Narvaez v. State*, App.No. 4D23-1089. In his brief, Petitioner argued that the lower court reversibly erred in its misapplication of the prejudice analysis for claims involving foregone pleas due to ineffective assistance of counsel.

The Fourth District Court of Appeal affirmed the appeal, without opinion, on January 4, 2024. *Narvaez v. State*, 2024 WL 45138 (Fla. 4th DCA January 4, 2024). (App.A).

This petition timely follows.

REASON FOR GRANTING THE PETITION

> The primary reason why this Court should grant the petition is to bring clarity to the prejudice analysis announced in *Missouri v. Frye*, 566 U.S. 134 (2012). State and federal courts across the nation differ in their application of *Frye*, resulting in similarly situated defendants having to overcome differing burdens of proof. Some courts interpret *Frye* as imposing upon defendants the near impossible burden of providing evidence that both the prosecutor and the judge would have approved the plea. Other courts take a presumption approach which assumes the normal course of action would be acceptance of the plea by all parties, absent some identifiable, intervening circumstance that would cause prosecutorial withdrawal or judicial non-acceptance.
>
> In this case, the state court held Petitioner to the more stringent evidentiary burden of actually proving the counterfactual questions relating to prosecutorial and judicial acceptance of the plea. Had the court taken the presumption approach, an objective review of the record would reveal nothing indicating prosecutorial withdrawal or judicial non-acceptance of the plea.
>
> This Court should grant certiorari to clarify the proper approach courts should follow when determining prejudice resulting from such claims.

ARGUMENT

In *Missouri v. Frye*, 566 U.S. 134 (2012), this Court addressed claims involving ineffective assistance of counsel in the context of forgone plea agreements. Generally, claims of ineffective assistance of counsel are guided by the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove a claim under

Strickland, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Id.* at 687. The deficiency prong requires the defendant to establish conduct on the part of counsel that is outside the broad range of reasonableness under prevailing professional standards. *Id.* at 688. The prejudice prong requires the defendant to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Where it is alleged that counsel's deficient performance resulted in a forgone plea offer, the prejudice prong is slightly modified. The defendant must show a reasonable probability that (1) he or she would have accepted the plea offer with proper advice; (2) the prosecution would not have withdrawn the plea offer; (3) the court would have approved of the plea offer; and (4) the sentence under the plea offer would have been more lenient than the sentence ultimately imposed. *Frye*, 566 U.S. at 134 (2012).

Prongs (1) and (4) are reasonably within a defendant's ability to prove through evidence presented to the postconviction court. With respect to prong (1), a defendant may provide testimony regarding his or her willingness to accept the forgone plea. Other witnesses (such as trial counsel) could testify regarding same. Record transcripts of previous proceedings in the case where resolutions may have been discussed, recorded jail calls, or other evidence could provide insight into the defendant's amenability to accept a plea.

Prong (4) may be satisfied simply by comparing the sentence ultimately imposed with the terms of the foregone plea agreement.

Prongs (2) and (3), however, present substantially greater obstacles for defendants to overcome. This is because the questions involved for those prongs are entirely counterfactual. In prong (3), the defendant is asked to demonstrate a reasonable probability that the prosecutor—who extended the plea offer in the first instance—would not have withdrawn the offer before it was accepted by the defendant and ratified by the court. Similarly, in prong (4) the defendant is asked to show that the judge would have accepted the plea agreement and not rejected it.

In an attempt to provide guidance on how to actually answer these counterfactual questions, this Court in *Frye* explained that:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

Frye, 566 U.S. at 149.

Unfortunately, this effort has resulted in a greater disparity amongst lower courts in applying *Frye*. For example, one interpretation of the aforementioned language suggests that most plea offers which are extended by the State are acceptable to the court and the prosecutor. This Court begins by noting that actors in jurisdictions are likely to understand "the boundaries of acceptable plea bargains."

Frye, 566 U.S. at 149. Moreover, the focal point of the inquiry—*i.e.* searching for facts that would "suffice . . . to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain" *id.*—appears to imply a *presumption* of prosecutorial and judicial acceptance. Notably, this Court also framed its analysis of the case at hand by observing that, given the fact of Frye's intervening additional offense prior to the hearing at which the plea would have been accepted, "there is reason to doubt" that the prosecutor and trial court would have maintained the plea agreement. *Id.* at 151. The Court's language seems to suggest that in the typical case, an absence of contrary facts might imply approval by a court and offering prosecutor.

On the other hand, *Frye* can also be read as placing an affirmative evidentiary burden upon defendants. Prongs (2) and (3) are framed within the existing language of *Strickland*, stating that a defendant must show "a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." *Id.* at 148. Because these counterfactual questions are woven into the existing *Strickland* fabric in which defendants must bear the affirmative evidentiary burden, *Frye* arguably implies that defendants are required to bear a similar burden in these novel contexts as well.

These two contrasting applications *Frye* are manifesting in lower courts across the country. Some jurisdictions follow the presumption approach, assuming prosecutorial and judicial acceptance of the plea offer as a starting point and making an objective assessment of the record to determine whether any factors exist which would be cause for non-approval of the plea. *See e.g.*, *State v. Lexie*, 331 Ga.App. 400,

404, 771 S.E.2d 97 (2015) (performing *Frye* analysis and concluding there was "no reason evident from the record that the State's offer in this case would not [have] been acceptable to the Court" and "no indication that the State would have not adhered to the agreement."); *Rodriguez v. State*, 470 S.W.3d 823, 828-29 (Tex.Crim.App. 2015) ("The State likely would not have withdrawn the plea because the record shows that there may have been difficulties getting the victims to testify at the time of trial…. there is nothing in the record to indicate that the trial judge would have rejected the agreement had it been presented to her prior to the trial."); *Ebron v. Comm'r of Corr.*, 307 Conn. 342, 360-61, 53 A.3d 983 (2012) (concluding prejudice under *Frye* was satisfied "in the absence of any evidence that the particular judge's practice deviated significantly from the normal practice or that the particular sentence would have been an outlier.").

Other jurisdictions take the more stringent approach of placing the burden squarely upon the defendant to provide some form of evidentiary support for the assertion that the prosecutor and judge would have accepted the plea. *See e.g.*, *Decker v. State*, 2023 WL 2566048 (Minn. App. 2023) ("The state contends that Decker introduced no evidence that the district court would have accepted the plea agreement. Our review of the record indicates that the state is correct: Decker did not introduce any evidence or make any argument as to whether the district court would have accepted the plea agreement."); *Benton v. State*, 2021 WL 3400644 (S.C. App. 2021) (explaining that pursuant to *Frye* "the burden of showing prejudice—in this case, the burden of showing a reasonable chance the judge would have accepted the

plea—is Benton's to carry. Benton did not offer any evidence on this point.") (citations omitted); *Laster v. Russell*, 286 Va. 17, 26-27, 743 S.E.2d 272 (2013) ("Laster has offered no evidence to prove that this particular plea offer was within the boundaries of acceptable plea agreements and sentences in the jurisdiction, or that Judge Doherty had ever accepted similar plea agreements and sentences in other cases involving similar facts and charges.").

The above examples are by no means exhaustive of the various approaches taken by different state court systems. By now, courts in all 50 states have resolved claims of ineffective assistance of counsel which require application of the prejudice analysis outlined in *Frye*. Their varied and contrasting interpretations of *Frye* suggest that defendants in different jurisdictions are being offered inconsistent protections for their right to effective counsel during plea negotiations. Those defendants in jurisdictions which employ the harsher, evidentiary burden approach, face an almost insurmountable task of providing some form of evidence to prove the counterfactual inquiries outlined in *Frye*—oftentimes where no evidence exists and the record is silent. This is particularly burdensome for *pro se* defendants who are incarcerated and who lack the necessary means and resources to even begin to search for such evidence.

This Court should level the field. A more workable solution may be to assign a rebuttable presumption to the counterfactual inquiries of prosecutorial withdrawal or judicial non-acceptance of the plea offers. In the typical case, once it is established that trial counsel performed deficiently in relation to a forgone, state-sponsored plea

offer, prosecutorial and judicial acceptance should be presumed *as a starting point* for the inquiry. The State in responding to the inquiry would be in a much better position to rebut the presumption with evidence of prosecutorial withdrawal or judicial non-acceptance, thereby foreclosing the claim. The defendant, of course, would still be required to prove he or she would have accepted the plea offer and that the sentence would have been more lenient under the offer.

If this Court grants the petition to provide clarity to the *Frye* prejudice analysis and determines the presumption approach reasonably satisfies the constitutional inquiry as to prongs (2) and (3), it will easily conclude the judgment below should be quashed and the case remanded for reconsideration. The prosecutor in this case testified at the evidentiary hearing on the claim that the plea offer remained available for the day it was extended. (R.483). The state postconviction court found the prosecutor's testimony to be credible (R.365-66), but appears to have completely disregarded this crucial admission. Evaluating the circumstances at the time the offer was extended and what Petitioner would have done with proper advice, there is nothing in the record to indicate the prosecutor would have withdrawn the plea offer that day.

As to prong (3), the state postconviction court found that the Petitioner failed to prove the trial judge would have accepted the plea offer because the record is devoid of any evidence indicating otherwise. (R.366). However, a brief assessment of the facts shows the judge was reluctant to grant the State any more time to locate the victim and specially set the case for trial. It was time to clear the docket. Surely the learned

and experienced trial judge would have understood the State's difficulty in obtaining a conviction without the victim in this case—the prosecutor even lamented as much when he told the court that the case would likely result in a nolle pross. (R.479-81). It is objectively reasonable that a judge would have accepted the agreed resolution of the parties at that point. Nothing in the record indicates the judge would not have accepted it.

Insofar as the state postconviction court additionally concluded Petitioner failed to establish prong (1), this finding is also erroneous. The court acknowledged that Petitioner "wanted to know why he should accept the State's offer if they don't have a victim" but concluded that "through his language and actions he made it clear, he shouldn't." (R.365).

It is true that Petitioner's sole reason for not accepting the plea offer was because the victim was unavailable. But that is only due to Petitioner being sorely misinformed as to the pertinent legal concepts which were in play. Without dispute, the State's entire case against Petitioner was contingent upon the victim's availability for trial. Ms. Tolley testified the State was considering a nolle pross because the victim could not be located. (R.442). Mr. Newman admitted the reason he offered such a generous plea deal is because he believed there was a high likelihood he would have no case without the victim. (R.482). Narvaez's questions regarding the plea offer logically centered around the strength of the State's case without the victim: "Doesn't the State need to have the victim to prove the reduced charge of felony

battery too? What's the benefit of taking the plea if the State has to nolle pross the case because they have no victim?"

A simple explanation by Ms. Tolley would have provided Petitioner with the information he needed to make an informed and intelligent decision regarding the plea:

"Count I is a life felony for which there is no limitations period. The fact that the victim is unavailable at the present moment is meaningless. If she becomes available 10 years, 20 years or 50 years down the road, the State may recommence prosecution. The only way this definitively ends is by taking this plea offer today."

Contrary to the state postconviction court's conclusion, this was much more than a mere instance of hindsight being 20/20. (R.365). This case involves a critical decision being made without all the information necessary to make that decision. Petitioner sought answers by asking reasonable questions one would expect from a layperson, but his attorney failed him. Without an understanding about the legal effect of a nolle pross, jeopardy and the statute of limitations, and how those concepts interact and apply to the particular circumstances of his case, Petitioner was unable to make an informed decision whether to accept the plea.

Petitioner himself testified at the evidentiary hearing that he would have accepted the plea offer had he been properly advised of these matters by counsel. (R.402). His reasoning was finality -- he would not want potential prosecution for a life felony hanging over his head for the rest of his life. (R.401). While the lower court found Petitioner to be an incredible witness, his answer on this point was certainly

not unreasonable and went unrebutted by the State. Moreover, the fact that Petitioner sought to understand the pros and cons of accepting the plea offer by inquiring with counsel first—as opposed to outright rejecting it—supports that Petitioner was indeed giving the offer due consideration and would have been amenable to accepting the offer upon proper advice.

CONCLUSION

For the reasons stated herein, this Court should grant certiorari, quash the judgment below and clarify the proper approach to evaluating prejudice under *Frye*.

Respectfully submitted,

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