NO: 24-7003

IN THE UNITED STATES SUPREME COURT

HALE R. HARRIS,
Petitioner,
Vs.

STATE OF FLORIDA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Hale R. Harris
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P.O. Box 1000
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QUESTION(S) PRESENTED

1) DOES THE FINDING THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CONVEY A PLEA ALLOW THE TRIAL COURT TO DO NOTHING TO CORRECT OR REMEDY THE CONSTITUTIONAL VIOLATION?

2) DOES A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL REQUIRE A REMEDY TO THE CONSTITUTIONAL VIOLATION?

3) WHAT IS THE REMEDY FOR A FINDING THAT COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN FAILING TO CONVEY A FAVORABLE PLEA?

4) DOES THE FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL QUALIFY AS "MAKING A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT" FOR THE PURPOSES OF A CERTIFICATE OF APPEALABILITY?

LIST OF PARTIES

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

RELATED CASES

Harris v. State,
190 So.3d 88 (Fla 4th DCA 2015)

Harris v. State,
246 So.3d 1246 (Fla. 4th DCA 2018).

Harris v. State,
321 So.3d 222 (Fla. 4th DCA 2021)

Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant United States Supreme Court Rules 14.1(b)(ii) and 29.6, the Petitioner, Hale R. Harris, pro se, hereby files with the Court his Certificate of Interested Persons and Corporate Disclosure Statement (CIP).

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* Moore, Michael K, United States District Judge, U.S. District Court, Southern District of Florida;

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* Tapia, Pablo I., Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401;

* Wells, James, Assistant Public Defender, Office of the Public Defender, 201 S.E. 6th Street, Ft. Lauderdale, FL 33301.

TABLE OF CONTENTS

OPINIONS BELOW.....8-9

JURISDICTION.....9

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....10

STATEMENT OF THE CASE.....11-21

REASONS FOR GRANTING THE WRIT.....22-29

CONCLUSION.....29

INDEX TO APPENDICES

APPENDIX A - Opinion of the United States Court of Appeals

APPENDIX B - Opinion of the United States District Court

APPENDIX C - Opinion of the Highest State Court

APPENDIX D - Opinion of the Broward County Circuit Court (Trial Court)

APPENDIX E - United States Court of Appeals Motion for Reconsideration

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Alcorn v. State,
121 So.3d 419 (Fla, 2013).....18

Hill v. Lockhart,
474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).....25

Lafler v Cooper,
566 U.S 156,132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).....22-27

McMann v. Richardson,
397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).....27

Missouri v. Frye,
566 U.S. 134,132 S. Ct. 1399, 182 L Ed 2d 379 (2012).....22-27

Offutt v United States,
348 US 11, 14, 99 L Ed 11, 75 S Ct 11 (1954).....28

Padilla v. Kentucky,
559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).....27

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....25

United States v. Morrison,
449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981).....23

STATUTES AND RULES

28 U.S.C. §1254(1).....9

28 U.S.C. §2254.....21

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

FEDERAL COURTS:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

Reported at Unknown, or,

Has been designated for publication but is not yet reported; or, is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

Reported at Unknown, or,

Has been designated for publication but is not yet reported; or, is unpublished.

STATE COURTS:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

Reported at *Harris v. State*, 246 So.3d 1246 (Fla. 4th DCA 2018)

The opinion of the Broward County Circuit Court (Trial Court) appears at Appendix D to the petition and is

Reported at "Unknown" or,

Has been designated for publication but is not yet reported; or, is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 18, 2024.

A timely motion for reconsideration was denied by the United States Court of Appeals on the following date, December 20, 2024, and a copy of the order denying reconsideration appears at Appendix E.

An extension of time to file the petition for writ of certiorari was granted to and including April 19, 2025 in application No: 24A873

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment United States Constitution

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.

Fourteenth Amendment United States Constitution

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.

STATEMENT OF THE CASE

On March 19, 2012, the State charged Appellant by information with Burglary of a Dwelling with a Battery (Count one), Strong Arm Robbery (Count two), and Felony Battery (prior conviction) (Count three). On May 21st, 2012, The State filed its Notice to Habitualize Appellant and its Notice to impose Prison Release Reoffender status on Appellant as enhanced sentences.

On August 20th, 2013, Appellant proceeded to trial by jury and after the trial concluded was found guilty as charged on all three counts. On September 17th, 2013, Appellant was sentenced as follows: Life imprisonment on count one with credit for 536 days' time served, 30 years in prison on Count two as a Habitual Offender with a 15-year minimum mandatory as a Prison Releasee Reoffender and no sentence was imposed at that time as to Count Three (felony battery) due to the belief that the Felony Battery charge constituted double jeopardy because of the sentence imposed for Count one.

Appellant appealed his conviction and sentence to the Fourth District Court of Appeal. After all the briefs were filed, the Fourth DCA affirmed the convictions and sentences, however, remanding to the trial court to impose a sentence as to the Felony Battery (finding no double jeopardy on dual

convictions for Burglary/Battery and Felony Battery because the Felony Battery was due to prior battery convictions. *Harris v. State*, 190 So.3d 88 (Fla 4th DCA 2015). Thereafter, on July 15th, 2015, the trial court imposed a sentence of 100.875 months in prison as to Count three with credit for 538 days' time served.

On or about November 19th, 2015, Appellant filed a Motion for Postconviction relief pursuant to Fla. R. Crim. P. rule 3.850 which raised three claims for relief: ineffective assistance of counsel for counsel's failure to convey/inform Appellant of the State's favorable plea offer; ineffective assistance of counsel for failing to object to the State bolstering witness' credibility; and ineffective assistance of counsel for failing to object after a witness gave opinion testimony about the victim's credibility. The State filed a response to Appellant's rule 3.850 motion and agreed to an evidentiary hearing as to Claim One pertaining to counsel's failure to convey the State's 15-year plea offer.

On December 5th, 2016, an evidentiary hearing was held during which the Trial Court *granted* Appellant's 3.850 motion, *vacated* Appellants' sentence and set a rehearing on the plea for January 17th, 2017. Upon hearing further arguments on January 17th, the Court decided to reinstate and not change Appellants' original sentence.

Appellant appealed the Trial Courts decision to reinstate the original sentence to the Fourth DCA. The Fourth DCA *per curiam* affirmed the state trial court's ruling. *Harris v. State*, 246 So.3d 1246 (Fla. 4th DCA 2018). Appellant moved for rehearing, which was denied. Mandate issued on July 6th, 2018. On March 5th, 2019, Appellant then filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court. On April 15th, 2019, the Florida Supreme Court denied the petition, ruling that the petition for writ of habeas corpus was procedurally barred.

On January 14th, 2019, Appellant filled a motion for postconviction relief and on May 17th, 2019, a supplemental motion for postconviction relief. The trial court denied the motions. On June 17th, 2021, the Fourth DCA *per curiam* affirmed the state court ruling. *Harris v. State*, 321 So.3d 222 (Fla. 4th DCA 2021). Mandate issued on July 16th, 2021.

On June 28th, 2021, appellant filed his Petition for Writ of Habeas Corpus pursuant to Title 28 U.S.C. Section 2254 in the Southern District of Florida. The petition raised the following claims of ineffective assistance of counsel:

> 1. The postconviction court erred in re-imposing the original life and thirty-year sentences after granting postconviction relief rather than the fifteen years that the

petitioner was originally offered and in doing so abused its discretion after stating that the court always ensures there's a plea offer prior to a defendant's trial.

2. The petitioner was denied the effective assistance when counsel failed to object or move for a mistrial after the prosecutor improperly bolstered the credibility of state witnesses during closing arguments, depriving the petitioner of a fair trial.

3. The petitioner was denied effective assistance when counsel failed to object or move for mistrial after the supervising police officer gave opinion testimony concerning the credibility of the victim.

On July 9th, 2021, the District Court entered an order for the Respondent to file a response to petitioner's petition and on August 23rd, 2021, the State submitted their response. Petitioner filed a Reply on October 19th, 2021. The District Court on June 13th, 2023, entered its final order denying the Petition and stating that no Certificate of Appealability shall issue.

On July 7th, 2023, Appellant filed a Motion for Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. On July 21st, 2023, the Respondent filed a Response in Opposition to Petitioner's Motion

for Reconsideration and on August 3rd, 2023, Appellant submitted a Reply to the Respondent's Response. The District Court subsequently denied the motion.

STATEMENT OF MATERIAL FACTS

On or about November 19th, 2015, Appellant filed a Motion for Postconviction relief pursuant to Fla. R. Crim. P. Rule 3.850 which raised three claims for relief: ineffective assistance of counsel for counsel's failure to convey/inform appellant the States favorable plea offer; ineffective assistance of counsel for failing to object to the State bolstering witness' credibility; and ineffective assistance of counsel for failing to object after a witness gave opinion testimony about the victim's credibility. The State filed a response to appellants rule 3.850 motion and agreed to an evidentiary hearing as to Claim One pertaining to counsel's failure to convey the State's 15-year plea offer.

On December 5th, 2016, an evidentiary hearing was held during which the Trial Court *granted* Appellant's 3.850 motion, *vacated* appellants' sentence and set a rehearing on the plea for January 17th, 2017. Upon hearing further arguments on January 17th, the Court decided to reinstate and not change appellant's original sentence. (Appendix-F).

At the beginning of the evidentiary hearing held on December 5th, the State conceded error as the attorney(s) failure to convey the 15-year plea. (Evidentiary Hearing Transcript, page 2). After a brief colloquy the following exchange took place in pertinent part between counsel and the Court:

> The Court: I can tell you where the plea offer is. It is on the transcript that nobody ever bothers to call, to look at. It would be on the day before the trial, because I always (December 5th hearing, page 4).
>
> Ms. Roberts: Not ever have done a trial with you before, I didn't know you did a status before. I would ask you consider to give me leeway to get that particular transcript... (December 5th hearing, page 5).
>
> The Court: If in fact there is a claim a plea offer was not made –
>
> Mr. Heiss: Not conveyed.
>
> The Court: Subsequently, they find there is and the defendant claims he would have taken it that just vacates the sentence. It doesn't put anything back on the record, in terms of a plea offer. That's up to the prosecutor. (December 5th Hearing, Transcript, page 6).

The Court went on to vacate the defendant's sentence. (Evidentiary Hearing Transcript, page 7). Another hearing was set for January 17th, 2017.

At the January 17th hearing there was a lengthy discussion as to whether or not a plea was ever offered by the two lawyers assigned to the case and if so where it could be found in the record. During this colloquy the following exchange took place:

The Court: Where is the transcript of either the day before trial began or the day trial began?

Mr. Heiss: We have that. The two hearings before that was August 12th and July 1st, the two hearings ordered. And both of those hearings, because the Court indicated last time, when the State investigated the 3.850 claim, talked to Mr. Wells and Mr. Wells talked to Kelly Murdock, her file reflected no plea offer was conveyed. The Court indicated at that hearing that it was common practice for the Court to address the plea offer at the hearing before the trial.

After further discussion, in regards to the plea offer of 15 years never being conveyed, the Court, counsel for the defendant and the state discussed what the proper remedy should be. The defendant's position was that had the plea been conveyed the defendant would have accepted it and the Court would have gone along with it. (Sentencing Hearing, page 7). The Court also reiterated the fact that it vacated the sentence previously.

The parties then went on to discuss the case of *Lafler v. Cooper*, 566 U.S 156,132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), how and what remedies were appropriate and how after determining that there was a plea that was never conveyed and counsel was ineffective for failing to convey the plea, the question remained on whether or not the Court would have accepted the plea, the third prong of *Lafler*. (Sentencing Hearing, pages 7- 12).

The defense pointed out that had the Court considered the 15-year plea offer before trial it would have gone along and accepted it. Counsel for the defendant rightfully pointed out that in the Repeat Offender Court (ROC) division there are experienced attorneys assigned to represent the defendants because of the difficulty of the cases and defendants. The Court relies on those attorneys and their research and "Quite commonly does accept negotiated pleas" (Sentencing Hearing, pages 8, lines 12-20). It should be noted that the sentencing guidelines called for 8.3 years in prison.

The State presented arguments based on both *Lafler* and *Alcorn v. State*, 121 So.3d 419 (Fla, 2013), and took the position that the Court should leave the sentence undisturbed. The State went on to rely on the fact that the defendant went to trial and the jury found him guilty as charged, the defendants' criminal history was extensive, and that the Court should

exercise their discretion and sentence the defendant to what was originally imposed. (Sentencing Hearing, pages 9-10).

Appellant's counsel, in rebuttal argument, pointed out that the U.S. Supreme Court in *Lafler* said when it comes to remedies for the constitutional violation; it gave wide latitude for the judge's discretion. Counsel then went on to outline the reasons for the wide latitude and the reason the only adequate remedy would be to go back in time and make the plea offer. (Sentencing Hearing, pages 10-12).

The Court, when making its decision to reinstate the sentence that was originally imposed stated the following:

The Court: Whether there was a plea offer or there wasn't, certainly, the record doesn't seem, it seems silent on that issue, going all the way back.

It seems, I'll take that as given.

And yes, Ms. Henrickson, at the hearing, indicated that she did make a 15-year offer, which, of course, would have required a waiver of PRR.

Again, I have no independent recollection whatsoever.

However, when prosecutors make offers, the Court takes into consideration a number of items before determining whether or not to accept them.

One, in a case like this, the nature of the charges and position of the victims.

The victims, as we know, under Florida Constitution, have a right to be heard.

Secondly, when it is presented, the Court is always then made aware of what an individual's criminal history is for purposes of determination.

According to my count - - of course the count has not changed since trial - - other than the fact that you have the three new convictions, if I include those, I think we're talking 19 priors.

I think there are 15 or 16 that existed at the time, many of which are considered violent felonies.

I would not, under any of those circumstances, have accepted the plea.

Now, to go back and consider it, which is what the Court has to do, the Court, if I would have accepted it then, was totally unaware of the facts of the case.

Being aware of the facts of the case, also going back on 33 years of history, I would not have accepted that plea.

So, I'm going to reinstate the sentence and judgment that was imposed by this Court on 9-17-2013 and return the defendant from once he came. (Sentencing Hearing, pages 13-14).

At the end of this hearing there was an exchange between the Court and the State Attorney in regards to the filing of the appropriate documentation:

Ms. Chippone: I ask you take judicial notice of the certified and Department of Corrections packets previously filed on September 17, 2013.

The Court: I'm not sure reinstating what was previously vacated - -

Ms. Cippone: I can refile them.

The Court: I don't think you have to. I may be wrong.

While this was set for rehearing, resentencing, that was predicated on the Court's order or I should say the concession by the State as to Count I, on the first claim on the plea offer.

That's what brings us back here today.

The Court having made the determination that it would not have accepted the plea at the time, reinstating it, puts us back

to where we were on September 17, 2013.

The Postconviction Court subsequently reinstated the previously imposed life sentence without ever following the dictates of Lafler or Alcorn, and never held a de novo sentencing hearing.

REASONS FOR GRANTING THE PETITION

Petitioners' constitutional claim is substantial and affects numerous similarly situated defendants. The consequences of error in these cases are too severe to leave petitioners' challenges unanswered, therefore the certiorari should be granted.

This petition raises the question on whether or not a criminal defendant is entitled to any type of relief when there has been a finding by the trial court of ineffective assistance of counsel where counsel failed to convey a favorable plea which resulted in defendant receiving a mandatory life sentence? And if so, what is the appropriate relief?

This Court is free to address "subsidiary questions" in deciding "any question presented." Stated another way, the subsidiary questions must be "inextricably linked" to the question under review and necessarily contribute to that question's resolution.

The question presented and subsidiary questions in this petition are inextricably linked and rise from the facts of this case where petitioner raised

in the State Court an issue of Ineffective Assistance of Counsel for counsel's failure to convey a favorable plea of 15 years. Petitioner proceeded to trial where he was subsequently found guilty and sentenced to a mandatory life sentence.

The State Postconviction Court *granted* petitioners' 3.850 postconviction motion *finding that counsel was in fact ineffective*. (emphasis added). The court went on to vacate the sentence and judgment at the evidentiary hearing and set the case off for resentencing at a later date. (See Appendix-D). Once the Court granted the Rule 3.850 postconviction motion the Court was agreeing to all four prongs of *Frye*. Had the Court truly not been willing to accept the plea, the Court would have denied the motion at the first instance, or at the evidentiary hearing and would not have granted the motion and ordered resentencing.

At the subsequent hearing the postconviction court, after hearing from both the State and counsel for the defendant reinstated the original sentence stating that "the court would not have ever excepted the plea under any circumstances"

The District Court for the Southern District of Florida denied the petitioners' Petition for Writ of Habeas Corpus filed under 28 U.S.C. §2254 based on the postconviction court's determination that it would not have ever

accepted the plea under any circumstances. (See Appendix-B) Petitioner moved for a Certificate of Appealability with the Eleventh Circuit who denied COA stating "he has failed to make a substantial showing of the denial of a constitutional right" (See Appendix-A). On November 1, 2024, Petitioner filed a Motion for Reconsideration pursuant to 11th Cir. Rule 27-2, which the Eleventh Circuit subsequently denied December 20, 2024. (Appendix-E).

Thus, the question arises, does the finding of ineffective assistance of counsel qualify as "making a substantial showing of the denial of a constitutional right?

The District Court and the Eleventh Circuit both failed to follow this Courts' dictates in *Lafler v. Cooper*, 566 U.S 156, 132 S. Ct. 1376, 182 L Ed 2d 398 (2012) and *Missouri v. Frye*, 566 U.S. 134,132 S. Ct. 1399, 182 L Ed 2d 379 (2012).

This Court in *Lafler* stated that "Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." citing *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981). Thus, a remedy must "neutralize the taint" of a constitutional violation, as stated in *Lafler*, 132 S.Ct. at 1388.

It should be noted that the *Lafler* Court dealt with the rejection of a plea whereas petitioners' case deals with counsels' failure to *convey a favorable plea*, thus, the question is what remedy is proper for the finding of counsel's failure to convey a favorable plea? This Court in *Missouri v. Frye*, 566 U.S. 134,132 S. Ct. 1399, 182 L Ed 2d 379 (2012) dealt with counsels' failure to convey a favorable plea, however, the *Frye* Court held that a defendant had to show not only a reasonable probability that he would have accepted the lapsed plea, but also a reasonable probability that the prosecution would have adhered to the plea *and that the trial court would have accepted it.* (emphasis added).

There lies the problem! The postconviction court in petitioners' case and many other of its kind makes a determination that they would not have accepted the plea. This was done after the defendant was successful on his claim of ineffective assistance of counsel, thereby, arbitrarily negating the constitutional violation.

As petitioner pointed out in his motion for reconsideration to the Eleventh Circuit:

> It is well settled that a majority of criminal cases are disposed of by plea agreements, as noted in *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L Ed 2d 379 (2012) "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas" and reiterated in *Lafler v. Cooper*, 566 U.S 156, 132 S. Ct. 1376, 182 L Ed 2d 398 (2012)

> For the Postconviction Court to state that he would not accept the plea under any circumstances is suspect at best,1) because the court was well aware of the appellants' criminal history prior to going to trial; 2) was by its own admittance in the habit of reviewing all the facts in a particular case when considering a plea offer made by the state and accepted by the criminal defendant; and 3)"Quite commonly accepted negotiated pleas".
>
> Furthermore, it should be noted, that after the State filed their Response to Appellant's 3.850 motion, the Postconviction Court had all of the records before it, *including Appellant's criminal history*, therefore, the Court could have denied Claim One based on "he would not accept the plea under any circumstances", the third factor of *Frye,* 132 S. Ct. at 1410. *See also Lafler*, 132 S. Ct. at 1384. (emphasis added).
>
> It also must be considered that as in any other court, a majority of criminal cases in the repeat offender division are disposed of by plea agreements between the state and the defendant in order to save judicial resources, and the state trial judge accepts these pleas as a matter of course. The appellant's case would have been no different. (motion for reconsideration pages 2-3).

As noted in *Frye*, "In order to complete a showing of Strickland prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." Id at 392-93

The *Frye* court went on to state 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." Id at 393.

The reasonable probability that the trial court would have or would not have accepted the plea is one that is left up to hindsight or to the whim of a particular judge, where the judge does not want to, or feels he/she is not obligated to correct the constitutional violation. In other words, the proven constitutional violation has no apparent remedy available to the defendant who has been adversely affected by counsels' deficient performance.

It is well settled that there is no absolute right to have a guilty plea accepted, The decision whether to accept a plea bargain is in the exclusive discretion of the trial judge. However, the pivotal question(s) are whether the state court's application of the Strickland standard was unreasonable and what is the remedy that cures the constitutional violation such as the one in this case?

Petitioner would asseverate that the third prong of the *Frye* decision, "that the trial court would have accepted it",(the plea), in essence, leaves a

criminal defendant, such as the petitioner, with no type of remedy for the constitutional violation where the postconviction court has to do nothing but state that he/she would not have accepted the plea.

Four compelling reasons make setting aside the sentence and reoffering the lost plea the proper remedy in this case:

First, it is the remedy dictated by this Courts' holdings in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Lafler v. Cooper*, 566 U.S 156, 132 S. Ct. 1376, 182 L Ed 2d 398 (2012) and *Missouri v. Frye*, 566 U.S. 134,132 S. Ct. 1399, 182 L Ed 2d 379 (2012).

In this line of precedent, the Courts' focus was properly upon counsels' duty when representing a criminal defendant in the plea process and the inadequate assistance of counsel in that process. This duty was triggered by the Sixth Amendment and this Courts' long-standing determination that a defendant had a right to the effective assistance of counsel during the plea process. *Frye*, at 132 S. Ct. 1405, 182 L. Ed. 2d 379, 387; see also *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *Hill*, supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. 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).

Second, it is the only remedy that responds to the real possibility that Harris would not have received the mandatory life sentence if he had been represented by constitutionally effective counsel during the critical stage of plea negotiations with the prosecuting attorney.

Third, it is the only remedy that is consistent with the legal profession's historic and universal condemnation of the ineffective representation of a criminal defendant during the plea process. This ineffectiveness is unacceptable unless it can be proved that counsel's performance did not actually affect the outcome of the proceedings.

Finally, "justice must satisfy the appearance of justice." *Offutt v United States*, 348 US 11, 14, 99 L Ed 11, 75 S Ct 11 (1954). Setting aside Harris' conviction is the only remedy that can maintain public confidence in the fairness of the procedures employed in cases such as this one. The mandatory life sentence without the opportunity for parole or any other type of early release amounts to a walking death sentence. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of the State of Florida, Is it a legitimate state action not to correct the constitutional violation.?

It is of vital importance to the defendant and to the community that any decision to allow a constitutional violation of this magnitude to go unchecked is one that should be addressed by this Court in order to instill confidence in the judicial process. A rule that allows the State to ignore a violation of the accused's constitutional rights is not only capricious; it poisons the integrity of the adversary system of justice.

The Strickland/Lafler error should be presumed to have affected the defendant's substantial rights, and in turn, the error did seriously affect the fairness, integrity and public reputation of the judicial proceedings. Thus, this Court should conclude that "the real threat then to the fairness, integrity, and public reputation of judicial proceedings would be if despite the overwhelming and uncontroverted evidence that counsel was ineffective for failing to convey a plea that would have resulted in a substantially lesser sentence, would be that the criminal defendant was to receive no remedy whatsoever.

In the context of ineffective assistance resulting in the failure to convey a plea offer, "prejudice is determined based upon a consideration of the circumstances as viewed at the time of the offer and what would have been done with proper and adequate advice." Alcorn, 121 So. 3d at 432. The State incorrectly focused on what occurred after Harris was never conveyed the

plea offer; what happened after did not rectify counsel's failure to provide Harris with all of the information necessary, i.e., the plea, to make an informed decision on whether to accept the offer.

Thus, events occurring after counsel failed to convey the favorable plea offer to Mr. Harris could not cure the constitutional "taint" of counsel's failure to convey the plea and provide him with all of the information necessary to make an informed decision concerning the offer.

Petitioner in this case has shown that there was a "reasonable probability" that the trial court "would have accepted the terms of the plea agreement" at the original proceedings otherwise the court could have and would have denied the postconviction motion in the first instance, but instead, the postconviction court granted the 3.850 motion finding that counsel was ineffective for failing to convey the favorable plea offer of fifteen (15) years.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

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