IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC11-1322

TOMMY LEE ALCORN,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as “the State.”

In this brief, the symbol "A" will be used to denote the appendix. The symbol “IB” will be used to denote the Initial Brief on the Merits and it may be followed by the appropriate page number for that document.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's Statement of the Case and Facts as set forth in his brief on the merits except for any minor additions, corrections or clarifications in the argument that follows.

SUMMARY OF THE ARGUMENT

Petitioner cannot show prejudice. It is clear that Petitioner rejected the plea offer even though he was told he

was facing a maximum sentence of thirty years prior to trial based on the charge with sale of cocaine within a thousand feet of a church. Petitioner did not suffer prejudice because thirty years was what he was offered pretrial and thirty years was what he got after trial. Petitioner is not entitled to relief. Even if he was, he has already been afforded all the relief possible; he got a fair trial.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON PETITIONER'S INEFFECTIVENESS OF COUNSEL CLAIM AND THE FOURTH DISTRICT DID NOT ERR IN AFFIRMING THE TRIAL COURT. (Restated)

Petitioner seeks review of a single claim of ineffective assistance of counsel, the claim that he was not advised of the maximum sentence he faced at the time of the plea offer.

A. STANDARD OF REVIEW

Whether counsel was ineffective under Strickland v. Washington, 104 S.Ct. 2052 (1984), is reviewed de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Strickland, 104 S.Ct. 2052 (observing that both the

performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact). However, this Court has also stated that the standard of review following a denial of a post conviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. Derrick v. State, 983 So.2d 443, 450 (Fla.2008); Sochor v. State, 883 So.2d 766, 771–72 (Fla.2004); McLin v. State, 827 So. 2d 948, 954 n.4 (Fla. 2002). "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)).

B. A GENERAL OVERVIEW OF THE STRICKLAND STANDARD

Before examining each of the individual claims of ineffective assistance of counsel raised below, it is necessary to have a clear understanding as to the standards of review against which these claims are measured. Such operative standards are set forth in the governing case of Strickland v. Washington, 104 S.Ct. 2052 (1984). Strickland establishes a two-

prong analysis, both facets of which must be affirmatively established, before a defendant can prevail upon a claim of ineffective representation.

The first component requires a showing that defense counsel's performance was deficient and fell below an objective standard of reasonableness considering all the circumstances. In applying this method of review, the Court cautions that judicial scrutiny must be "highly deferential," avoiding the "distorting effects of hindsight" and, as such, must indulge in a strong presumption that the defense counsel's conduct falls within the wide range of reasonable professional assistance. Moreover, strategic decisions made by defense counsel after a thorough review of the law and facts are virtually unassailable and immune from such retrospective analysis. Id., at 2064-2066.

The second factor considers the actual prejudice attributable to defense counsel and how such conduct directly impacted upon the overall result obtained. It is not sufficient to show that the defense counsel's errors in judgment had "some conceivable effect on the outcome" but rather it must be proven with reasonable probability that "but for the defense counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 2068. Thus, the integrity of the entire

proceeding must have been compromised by the defense counsel's deficiencies.

It is not necessary, and is often unwarranted, to scrutinize claims of ineffectiveness under both prongs of the Strickland analysis. The Court has made it clear that the defendant's failure to make a sufficient showing as to one component will vitiate the claim. Id., at 2069. The purpose of such review is not intended 'to grade counsel's performance" and the Court emphasizes that where the record demonstrates a lack of prejudice the analysis may cease.

In Hill v. Lockhart, 474 U.S. 52, 57, (1985), the Court held that the Strickland standard is also “applicable to ineffective assistance claims arising out of the plea process.” However, the prejudice analysis is slightly different: “to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id., at 58.

C. THE FOURTH DISTRICT DID NOT ERR IN ANALYZING THIS CLAIM UNDER THE PREJUDICE PRONG OF STRICKLAND

Florida courts have stated that in order to prevail on an ineffective assistance of counsel claim based on an allegation that counsel failed to properly advise a defendant about a plea

offer by the State, the claimant must show that: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) he, the defendant, would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's offer would have resulted in a lesser sentence. See Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000); Murphy v. State, 869 So. 2d 1228 (Fla. 2d DCA 2004); and Cottle v. State, 733 So. 2d 963 (Fla. 1999). It is not necessary for a defendant to additionally establish that a trial court would have accepted the plea agreement offered by the state but not properly conveyed to the defendant. Id.

As the Fourth District properly recognized, the trial court did not err in denying Claim V of Petitioner's Florida Rule of Criminal Procedure 3.850 motion which concerned trial counsel's misadvice regarding habitual offender status after an evidentiary hearing. Alcorn v. State, __ So. 3d __, 2011 WL 2200625 (Fla. 4th DCA Jun 8, 2011). This was because Petitioner could not show prejudice under the prejudice prong of Strickland. That is, Petitioner was told he was facing a thirty year sentence (instead of a life sentence), rejected a plea offer of twelve years, and was given the same thirty year sentence he thought he was facing when he rejected the plea. Contrary to Petitioner's protestations, the Fourth District's

analysis of the prejudice prong did in fact comport with the Strickland standard.

Petitioner cites as support, Revell v. State, 989 So. 2d 751 (Fla. 2d DCA 2008), and Lewis v. State, 751 So. 2d 715 (Fla. 5th DCA 2000). In Revell, the Second District Court of Appeal found that Revell's counsel was ineffective for failing to advise him of the possibility and consequences of being sentenced as a habitual felony offender even where trial counsel testified that he did not know of the possibility of HFO sentencing until after the State filed its notice. And in Lewis, the Fifth District Court of Appeal found that trial counsel was ineffective for failing to advise Lewis of the possibility of a HFO sentence where counsel testified that he did not advise Lewis of same because such was unlikely based upon his previous experience with the State. Both cases essentially hold that a trial attorney whose client is potentially facing habitual offender sentencing is always ineffective for not advising his client about same. Both cases were remanded for a new trial.

Lewis and Revell seem to have adopted a per se rule that prejudice always results when counsel fails to advise his client of the possibility and consequences of HFO sentencing and that a new trial is therefore always warranted. However, bright line or per se rules have been consistently discouraged and rejected by

the United States Supreme Court. In Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000), the United States Supreme Court rejected the Ninth Circuit's decision and held that counsel's failure to file a notice of appeal without defendant's consent was not per se deficient. The Court noted that it was rejecting that per se rule because it was inconsistent with Strickland's circumstance-specific reasonableness requirement. And, in Florida v. Nixon, 543 U.s. 175 (2004), the Supreme Court recognized that conceding guilt is not per se ineffective assistance of counsel; a reasonable guilt phase strategy in a death penalty case may include the decision to concede guilt and focus on the penalty phase in an effort to spare the defendant the death penalty. Also compare Hill v. Lockhart, 474 U.S. 52 (1985)(holding that Strickland's requirements of deficiency and prejudice must be proven by the defendant in a challenge to counsel's advice to plead guilty); Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011)(maintaining Strickland standard and refusing to defer to post-trial inquiry and proposed detailed guidelines for evaluating counsel's performance as it would encourage proliferation of claims); Harrington v. Richter, 131 S.Ct. 770, 779 (2011)(again endorsing Strickland standard and explaining that it would be rare to recognize any specific approach or technique that should be imposed on counsel to ensure

constitutionally adequate representation). The petitioner's request for an explicit bright line or per se rule that prejudice must be presumed when counsel fails to advise the defendant of the correct maximum sentence, would be contrary to the aforementioned United States Supreme Court's rulings.

The Fourth District Court of Appeal, in Lester v. State, 15 So. 2d 728 (Fla. 4th DCA 2009), paid due respect to the teachings of Strickland by taking a more flexible path. While acknowledging Revell and Lewis and agreeing with the Second and Fifth Districts that an attorney who failed to advise his client of the maximum sentence he might face as a habitual felony offender had provided deficient representation, the Lester court concluded that a new trial is not always warranted. Rather, as Strickland dictates, the question of whether prejudice resulted must rest on an analysis of the particular circumstances of each case.

As a result, the Lester court reversed and remanded to permit the defendant to withdraw his plea. However, the appellate court held that on remand the State could elect to go to trial and thereby expose the defendant to the full sentence that he might be subject to as a habitual violent felony offender or the State could elect to withdraw its notice of intent to seek HVFO sentencing. If the State withdrew notice,

the court could sentence Lester as a PRR to fifteen years; this was the maximum sentence that Lester's counsel had advised that Lester was facing. In other words, "Lester would receive a sentence no greater than he anticipated when rejecting the plea offer of the state, and the state would not be required to retry him." Id., at 732. Clearly, the court was interested in crafting an equitable remedy for both parties. The appellate court's reasoning and its approach was eminently sensible and valid.

Based on its own precedent in Lester, the Fourth District noted in the instant case that the correct remedy in cases such as the case at bar, where the defendant has already had a fair trial, was not to grant a new trial or remand for renewed plea negotiations as in Revell and Lewis, but to impose a sentence not greater than the **expected** maximum sentence that the defendant would have received by proceeding to trial based upon the attorney's advice. However, the district court properly recognized that Petitioner could not show prejudice in the instant case because the expected maximum sentence was the one he actually received. Here, Petitioner rejected the State's plea offer of twelve years even though it appeared prior to trial that he was facing a maximum sentence of thirty years. Petitioner did not suffer prejudice because thirty years was what he believed he was facing before trial and thirty years was

what he got after trial; he already had the remedy to which he was entitled.

The State further submits Petitioner has not demonstrated prejudice in another way based on Pennington v. State, 34 So.3d 151, 154–55 (Fla. 1st DCA 2010). In that case, the court reversed and remanded to the trial court to determine whether a reasonable probability existed that the defendant would have accepted the plea if he had known of the correct maximum penalty he faced. In other words, the First District instructed the trial court to grant relief only if the defendant could show prejudice by showing that he would have accepted the plea if he had known of the correct maximum penalty. Based on the rationale of Pennington, Petitioner is not entitled to relief. That is, it is clear from the facts of this case that Petitioner would not have taken the plea offer even if he had been correctly advised of the maximum sentence.

For the first time in any court, Petitioner makes much of the fact that his counsel made a motion for judgment of acquittal based on a lack of proof that the offense happened within 1000 feet of a church and the State stipulated there was insufficient proof of same. (IB 10) He says, based on this, that "Mr. Alcorn may well have known that he was realistically only facing a possible conviction of the lesser offense of sale of

cocaine without the enhancer." (IB 7) However, Petitioner fails to acknowledge that this information only came out at trial. (T 33) Notably, he did not cite this as a reason he did not take the plea in either his Rule 3.850 motion, at the evidentiary hearing, or in his appellate brief. In fact, he claimed at the Rule 3.850 evidentiary hearing that he had not gotten the plea offer at all. (T 12-13) Therefore, his speculation that he may well have rejected the plea because he knew that he was realistically only facing a lesser included offense is just that, mere speculation.

Further, Petitioner speculates that, had he known he was facing life as a habitual offender instead of thirty years, he might have taken the plea. In response to this speculation, the State submits that, had the parties realized Petitioner was facing life because of habitualization, the prosecutor certainly would not have offered Petitioner a twelve year plea offer in the first place. Petitioner again cannot adequately demonstrate prejudice.

The State also submits that Petitioner has failed to show prejudice in yet another way. He requests a new trial in this case. However, he has already had a trial, and a fair trial. The fact he has had a trial has already cured any ineffectiveness in the plea stage. The United States Supreme Court has never

applied the Strickland standard to a situation where the defendant rejected the plea and went to trial. That is because there is no prejudice since the defendant has received that which the constitution guarantees, the right to a fair trial. The defendant's requested remedy of a new trial is inappropriate.

Moreover, if renewal of the plea offer was employed as the remedy, this too would be inappropriate since the defendant is receiving both the benefit of a plea and the chance of an acquittal at trial. This is a "heads I win, tails you lose" claim. And, notably, there is no constitutional right to a plea bargain. Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

Certainly, if counsel were ineffective during the plea process, and counsel's misadvice resulted in a guilty plea, then the defendant would be entitled to withdraw his plea because his waiver of the right to trial was not freely, knowingly, and intelligently made. The plea, which involved the waiver of the constitutional right to a trial, would have been rendered involuntary by counsel's ineffectiveness. The defendant would have lost his right to a trial based on counsel's ineffectiveness.

But the converse is not true. If the defendant did not plead guilty but instead exercised his right to a trial, then

the underlying rational of the plea being rendered involuntary due to the ineffectiveness does not apply. Such a defendant has had a fair trial. There is no constitutional right to a plea bargain and, therefore, no constitutional right that was adversely affected by counsel's conduct.

The Sixth Amendment to the United States Constitution, applicable to the States via the Fourteenth Amendment to the United States Constitution, seeks to ensure a fair trial by guaranteeing the right to counsel at trial and during "critical confrontations" with a State's prosecutorial forces. The Sixth Amendment right to the effective assistance of counsel is limited to preserving the right to a fair trial. That is, the right to effective assistance is not provided for its own sake but because it aids the accused in obtaining a fair trial. United States v. Cronic, 466 U.S. 648, 658 (1984).

"[T]he 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" United States v. Gouveia, 467 U.S. 180, 188-89 (1984). The Sixth Amendment "right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." Id., at 190.

The Court has held that the right to counsel is not limited to the presence of counsel at the trial itself. See Kirby v. Illinois, 406 U.S. 682, 688 (1972). The Sixth Amendment's right to counsel extends to "protecting the unaided layman at critical confrontations with his adversary," including ones that precede the trial itself. Gouveia, 467 U.S. at 189. This is because the fairness of trial is oft dependent on pre-trial events. It is for this reason the right to counsel attaches when adversary proceedings have been initiated against the defendant. Kirby, 406 U.S at 688. Thus, the Court has held that arraignment is a critical stage in a criminal proceeding. See, Powell v. Alabama, 287 U.S. 45, 57 (1932); Hamilton v. Alabama, 368 U.S. 52, 54 (1961). Similarly, a post-indictment interrogation of the defendant by a government agent is a critical confrontation at which the defendant is entitled to counsel. Massiah v. United States, 377 U.S. 201, 204-06 (1964). A post-indictment lineup is also a critical confrontation. United States v. Wade, 388 U.S. 218, 219-20, 236-37 (1967).

Here, however, the prejudice of which Petitioner claims – the lost benefit of a favorable plea offer- is not the sort of prejudice against which Strickland and Hill were designed to guard. See generally Premo v. Moore, 131 S.Ct. 733, 745 (2011)(stating that in light of the test in Hill, it was not

"clearly established" that the probability of a "better plea agreement" would constitute "prejudice for Strickland purposes." The Court has never held that a plea bargain standing alone has constitutional significance or that a defendant has any right to receive one. See Mabry v. Johnson, 467 U.S. 504, 507(1984)("a plea bargain standing alone is without constitutional significance"); Weatherford v. Bursey, 429 U.S. 545, 561 (1997)("there is no constitutional right to plea bargain").

Thus, while plea negotiations can be "critical," generally speaking, unaccepted plea offers and unsuccessful negotiations, unlike actual guilty plea hearings, are not "critical confrontations" in which the effectiveness of counsel demands constitutional protection. This is not to suggest that counsel has no duty to consult with the defendant when a state extends an offer. To the contrary, under professional and ethical norms, counsel should be expected to discuss legitimate, acceptable offers with the accused and it may even behoove counsel, in an appropriate case, to open plea negotiations with the prosecutor in an effort to broker favorable terms. However, there is no justification for extending the Sixth Amendment's right to counsel to protect a defendant's purported "right" to receive the most favorable result that would have been possible through fully informed and successful plea bargaining.

The critical nature of counsel's advice during plea negotiations lies not in counsel's ability to obtain certain specific favorable results but in counsel's obligation to protect the right to a fair trial. Certainly, in Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010), a case where the defendant alleged counsel gave him affirmative misadvice by telling the defendant he did not have to worry about the immigration consequences of his plea," the Supreme Court observed that plea negotiations are a "critical phase of litigation." However, a careful review of the case shows that it did not alter the test for determining prejudice. Rather, Padilla's continued reliance on Hill indicates that plea negotiations are critical only because, and when, they can induce the defendant to waive trial and plead guilty. It was in the specific context of Padilla, where the defendant alleged he would not have pled and given up his right to a trial but would have proceeded to trial, that the Court opined that the negotiation of the plea bargain involved was a critical phase of litigation for purposes of the Sixth Amendment right to counsel. Id., at 1486. It must be noted that the "critical confrontation" with the prosecution still takes place at the guilty-plea hearing itself, the hearing at which the defendant pleads guilty and foregoes his right to trial. "It is the ensuing guilty plea

that implicates the Constitution." Mabry, 467 U.S. at 507-08. Also compare, Gouveia, 467 U.S. at 189.

Thus, if counsel, in error, simply fails to properly present or secure a plea bargain, the accused cannot be constitutionally prejudiced because unsuccessful plea negotiations do not entail a waiver of the right to trial. Because the plea negotiations here were not a critical confrontation with the prosecution, nor did they result in one, there was no constitutional prejudice in the case at bar.

Notably, in extending the plea offer, the prosecutor did not subject Petitioner to any pre-trial procedures, Petitioner was not confronted by any state agent, he was not required to assert any defenses, and he was not placed in a lineup. Moreover, Petitioner was not induced to forego his right to trial and plead guilty. The offer had no effect on his right to receive a fair trial. Thus, this plea negotiation did not involve a "critical confrontation." And, again, a defendant is not constitutionally entitled to a plea bargain; "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executor agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." Mabry, 467 U.S. at 507.

Limiting these claims of prejudice to cases in which the accused waives trial and pleads guilty also makes sense because it protects the fundamental interests of finality. In Hill, the Court recognized this and further stated that finality was particularly important in guilty-plea cases given the great number of such cases. Id., 474 U.S. at 58.

Even if the requisite prejudice existed herein, Petitioner still would not be entitled to the remedy he seeks, a new trial. He would not even be entitled to specific performance of the plea agreement, were he seeking that remedy. The test adopted by Strickland and Hill was designed to protect the accused's right to a fair trial, not to ensure the best possible outcome or sentence for the accused. See Kimmelman v. Morrison, 477 U.S. 365, 396-397 (1986)("it would shake that right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall")(Powell, J., concurring)

Admittedly, the remedy for an ineffective assistance of counsel claim in the plea context when the State proceeds to trial has been litigated with mixed results. Compare State v. Greuber, 165 P.3d 1185 (Utah 2007)(taking the position that a subsequent trial vitiate the prejudice from the ineffectiveness

during the plea process) with Williams v. Jones, 571 F.3d 1086, 1093 (10th Cir. 2009)(rejecting the position that a subsequent trial vitiates the prejudice). In fact, the United States Supreme Court recently requested the parties to brief substantially the same issue in another case currently pending before the court, Missouri v. Frye, case no. 10-444.

In Frye, the allegation was that counsel failed to convey a plea offer, with the corresponding assumption that the defendant, but for the error, would have pleaded guilty and obtained more favorable terms. The Supreme Court asked the parties to brief the following question: what remedy should be provided for ineffective assistance of counsel during plea bargains negotiations where the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures. In Frye, the constitutionally adequate procedure was the plea colloquy itself; here, it is the fair trial that Petitioner received. While not directly on point, the facts and issue of law in the instant case are sufficiently similar to the Frye case that this Court should be aware that there is a significant possibility that the opinion in the Frye case could affect the disposition in this case.

In another case, the United States Supreme Court observed that a remedy "should be tailored to the injury suffered from

the constitutional violation and should not unnecessarily infringe on a competing interest" including the competing interest of preserving society's interest in the administration of criminal justice. United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). In Lockhart v. Fretwell, 506 U.S. 364, 366 (1993), the defendant argued that his counsel should have objected to a certain aggravator and that, had counsel objected, it would have been granted and there was a reasonable probability the defendant would not have received a death sentence. Notably, the caselaw that would have supported this objection was later overruled. The Supreme Court noted that a prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." 506 U.S. at 369. "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Id., at 369-70. Also see, Williams v. Taylor, 529 U.S. 362, 392 (2000)("in Lockhart, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate

prejudice contemplated by our opinion in Strickland."). Thus, if the alleged error did not legitimately affect the reliability of the verdict, the error is immaterial and there is no Strickland prejudice.

On that note, it is useful to review the Utah Supreme Court's reasoning in State v. Greuber, 165 P.3d 1185 (Utah 2007). In that case, the Utah Supreme Court held that a subsequent fair trial remedied any Sixth Amendment violation in the plea process. Therein, the defense attorneys did not listen to the recordings of Greuber's prison phone conversations prior to trial; the recordings contained admissions utterly undermining Greuber's and his witnesses' credibility. The defendant rejected a plea offer and proceeded to trial. On appeal, Greuber claimed he would have accepted the plea bargain if his attorneys had listened to the recordings prior to trial. In contrast, defense counsels testified that Greuber would not have accepted the plea offer because he did not want to plead guilty to murder. The Utah Supreme Court concluded that Greuber's rejection of the plea offer did not result in prejudice because he received a fair trial. Greuber, 165 P.3d at 1188.

The Utah Supreme Court explained that the right to effective counsel included the plea stage. Greuber, 165 P.3d at

1188, citing Hill v. Lockhart, 474 U.S. 52 (1985). However, they drew a distinction between a situation where the defendant accepted the plea offer and one where the defendant rejected it and proceed to trial. Greuber stated that the constitution guarantees fair trials, not plea bargains. Id. While Greuber possessed the right to effective assistance of counsel during the plea process, he could not have been prejudiced because he received a fair trial – the fundamental right that the Sixth Amendment is designed to protect. And nothing suggested that the trial Greuber did have could not be relied on as having produced a just result. Greuber, 165 P.3d at 1189, citing Strickland, 466 U.S. at 686, 104 S.Ct. 2052.

The Utah Supreme Court acknowledged the Massachusetts Supreme Court's case to the contrary. Commonwealth v. Mahar, 442 Mass. 11, 809 N.EE.2d 989, 993 (Mass. 2004). That Court concluded that, if the offer was rejected because of ineffectiveness, the fact that a defendant subsequently received a fair trial did not ameliorate the constitutional harm that occurred in the plea process. Mahar, 809 N.E.2d at 993 n.5 (collecting cases).

The Utah Supreme Court noted, however, that two intermediate state appellate courts agreed with the conclusion that a fair trial negates prejudice. Greuber, 165 P.3d at 1189

n.5, citing Bryan v. State, 134 S.W.3d 795 (Mo. App. Ct. 2004), and State v. Monroe, 757 So. 2d 895, 898 (La. App. Ct. 2000). Notably, Greuber had not argued that his attorneys' deficient performance rendered the trial's result unreliable or fundamentally unfair in any way.

The Greuber Court explained that it was not ignoring the importance of plea bargains but stated that if a defendant rejects a plea offer and is later convicted after a fair trial, he has not been deprived of a "substantive or procedural right to which the law entitles him." Greuber, 165 P.3d at 1189-1190, citing Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). "There is no right to a plea offer or a successful bargain." Id. If a defendant has been convicted at a fair trial after rejecting, with the assistance of counsel, the plea opportunity, there is nothing unreliable or fundamentally unfair about the conviction.

The Greuber Court noted the problems associated with fashioning an appropriate remedy for ineffectiveness when a plea offer is rejected. Greuber, 165 P.3d at 1190. The Court observed that where the ineffectiveness caused a defendant to plead guilty and waive his right to trial, the remedy is clear: allow him to go to trial. But where the defendant rejects the plea offer, it is impossible to resuscitate the original opportunity. Greuber, 165 P.3d at 1190, n.6. "Courts cannot recreate the

balance of risks and incentives on both sides that existed prior to trial, and the attempts to do so raise their own serious constitutional problems." Id.

Greuber noted that some courts have required the prosecution to give the defendant the same offer he had before trial, even though the defendant had since been convicted at a fair trial. But this remedy often requires courts to force the prosecution to dismiss charges which were part of the original rejected plea offer which raises separation of powers concerns. Additionally, requiring the state to reoffer the original offer which was made to avoid the expense and risk of a trial also violates separation of powers and basic fairness principles. Id. In recognition of this, other courts have granted a new trial. However, a new trial does not remedy the lost opportunity to plead and often amounts to "a thinly veiled attempt to force the prosecution to reinstate the initial offer." Id. Moreover, if witnesses and evidence are not available for the second trial, it is possible that an unjust acquittal will be the result, "a remedy out of all proportion to the damage allegedly done by the ineffective assistance in connection with the earlier plea offer." Id. And even if a plea offer is reinstated, there is no guarantee the defendant will accept it, and, presumably, courts could not require a defendant to do so, so again, an unjust

dismissal or acquittal may be the result. A new trial simply gives the defendant a second opportunity at an acquittal.

Greuber observed that the unavailability of a rational remedy for ineffectiveness of counsel in the rejection of plea offers context illustrates the flaws inherent in treating identically defendants who have received fair trials and those who have forgone trials and pled guilty. Greuber, 165 P.3d at 1191. The Court also observed that judges have long tried to hold themselves apart from the complex negotiations that characterize the plea bargaining process and have instead focused on their duty to ensure that defendants receive a fair trial. The Greuber court concluded that the defendant suffered no prejudice from his attorneys' deficient representation because he received a fair trial.

Given the foregoing reasoning, it is clear that a new trial would not be an appropriate remedy in the instant case. It should be noted that specific performance would not be an appropriate remedy either. This is a contract remedy used to remedy a breach of a contract. But here, the State did not breach the plea agreement, rather, Petitioner rejected it. There was no breach.

In fact, specific performance cannot be applied for another, more important reason. There was never an actual

agreement or contract since Petitioner rejected the offer, since the State could have withdrawn it at any time until accepted by the court, and since the court never had the chance to accept it following a thorough plea colloquy. The offer remained "a mere executor agreement." Mabry, 467 U.S. at 507.

In fact, if the Court were to require the State to once again extend a certain plea offer or require the State to again engage in plea negotiations, this would raises separation of powers concerns. Like the decision whether to prosecutor or what charges to bring, the decisions about whether to engage in plea bargaining belong solely to the Executive. Although a trial court may reject certain plea agreements, it cannot compel the prosecutor to plea bargain or dictate the terms of any deal. See, e.g., United States v. Redondo-Lemos, 955 F.2d 1296, 1299, 1302 (9th Cir. 1992).

And, importantly, specific performance cannot place either party in the instant case back in the same position they would have been but for the deficient representation during the plea process. The defendant gained the opportunity for an acquittal; in fact, he obtained a judgment of acquittal as to one of the original charges (which begs the question of whether the defendant thinks the original plea offer is even appropriate anymore). The State incurred the time, expense, and risk of a

trial. Finally, the defendant has already been sentenced to the same sentence he would have received had he accepted the plea offer. Specific performance makes no sense in the instant case, and for the same reasons, a new round of plea negotiations makes no sense either, especially given that Petitioner has been acquitted of one of the original charges.

An approach that focuses on the reliability of the trial that was held in the instant case is superior because it accomplishes the ultimate aim of the Sixth Amendment, which is, as the United States Supreme Court stated in Cronic, to see "that the guilty be convicted and the innocent go free." Here, Petitioner was convicted after a constitutionally adequate trial, the fairness and reliability of which no one contests. To grant him another trial, and the possibility of another acquittal, would be a windfall to which the petitioner is not entitled. The inability to identify any appropriate remedy simply "serves only to underscore one thing: the absence of anything in need of remedying in the first place." Williams v. Jones, 571 F.3d 1085, 1109 (10th Cir. 2009)(Gorsuch, J., dissenting), cert. denied, 130 S.Ct. 3385 (2010)

In sum, the Fourth District correctly concluded Petitioner had not satisfied the prejudice prong of Strickland under the particular circumstances of this case. Therefore, Petitioner was

not, and is not, entitled to relief. This Court should affirm the Fourth District's decision to uphold the trial court's denial of post conviction relief without further ado.

CONCLUSION

In conclusion, the State respectfully requests this Court DENY relief on this claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" complete with

Appendix has been furnished by courier to RICHARD B. GREENE, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, and by email to the Office of the Public Defender at appeals@pd15.state.fl.us and to this Court at e-file@flcourts.org on _____, 201_.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

_____
Of Counsel