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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-1683

STATE OF FLORIDA,

Petitioner,

v.

KEITH SIROTA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

In this brief, the Respondent, Keith Sirota, will be referred to as "Mr. Sirota." The Petitioner, the State of Florida, will be referred to as the "State." Mr. Sirota's defense attorney at trial will be referred to as "trial counsel."

The Circuit Court of the Fifteenth Judicial Circuit, which presided over Mr. Sirota's criminal trial and summarily denied his motion for post-conviction relief, will be referred to as the "trial court." The Fourth District Court of Appeal, which adjudicated Mr. Sirota's direct and collateral appeals, will be referred to as the "Fourth District." Mr. Sirota's motion for post-conviction relief will be referred to as the "Motion."

JURISDICTIONAL STATEMENT

Jurisdiction lies in this Honorable Court under Article V, Section 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

STATEMENT OF THE CASE AND FACTS

Mr. Sirota alleged in a motion for post-conviction relief that he received ineffective assistance of counsel because: (1) trial counsel erroneously advised him that diminished capacity is a cognizable defense under Florida law; (2) trial counsel mistakenly informed him that he faced, at most, a three-and-a-half year

term of imprisonment; and (3) based on the misadvice of counsel, he rejected a plea offer of five-years of probation and instead proceeded to trial.

The trial court summarily denied the Motion. On July 18, 2012, the Fourth District reversed the trial court and remanded the case for further proceedings. The appellate court recognized that, under *Morgan v. State*, 991 So. 2d 835 (Fla. 2008), Mr. Sirota stated a facially sufficient claim for ineffective assistance of counsel that was not conclusively refuted by the record. As such, it held that Mr. Sirota should have been afforded an evidentiary hearing under Florida law.

The Fourth District noted, however, that the United States Supreme Court rendered two opinions, *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012), that could be read to modify Florida law concerning ineffective assistance of counsel claims based on lost plea offers. Thus, it certified the following as questions of great public importance for resolution by this Court:

I. Do the decisions in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 312 S. Ct. 1399 (2012), which establish the minimum requirements of the Sixth Amendment, supersede the decisions in *Morgan v. State*, 991 So. 2d 963, 969 (Fla. 1999), and *Cottle v. State*, 733 So. 2d 963, 969 (Fla. 1999), as to the pleading requirements and remedy for an ineffective assistance of counsel claim regarding a lost plea offer?

II. If so, are evidentiary hearings on such claims limited to circumstances involving "formal plea offers," that is, verifiable offers that are either in writing or made on the record in open court?

The State timely invoked the jurisdiction of this Court on August 7, 2012. On December 17, 2012, this Court exercised discretionary jurisdiction over this matter.

SUMMARY OF THE ARGUMENT

Lafler and *Frye* do not supersede this Court's decisions in *Morgan* and *Cottle*. Over twenty years ago, in *Cottle*, this Court rejected the heightened pleading standard the State now asks this Court to adopt. *Lafler* and *Frye* do not impact this holding because those cases only deal with the ultimate burden of proof in federal ineffective assistance of counsel claims, not the threshold pleading requirements under state law.

Even if *Lafler* and *Frye* could be read to conflict with *Cottle*, such a conflict would not compel the reversal of longstanding Florida precedent because this Court is permitted to provide additional procedural guarantees to protect the constitutional rights of its citizens. Thus, stare decisis weighs heavily in favor of reaffirming the pleading standard articulated in *Cottle*. Moreover, reversing *Cottle* and adopting a heightened pleading standard would raise serious concerns because it would require defendants to attest to facts, under oath, that are beyond their ken.

In effect, a defendant would be forced to swear to a fact he could not possibly know – that the trial court would have accepted the plea bargain. Therefore, this Court should decline to overrule over twenty years of precedent on the pleading standard governing this species of ineffective assistance of counsel claims.

As for the proper remedy for ineffective assistance of counsel claims, Mr. Sirota agrees with the State that this question is not ripe for review. Since Mr. Sirota has not yet established his entitlement to relief, that question is not properly before the Court. This Court should therefore abstain from addressing the issue.

Finally, with respect to the Fourth District's suggestion that all plea offers be formal and made on the record, Mr. Sirota does not dispute the desirability of such a rule. However, it would not be appropriate for this Court to promulgate a rule of such far-reaching consequences through judicial fiat. Instead, this Court should allow any change to occur through formal amendment to the Florida Rules of Criminal Procedure.

ARGUMENT

I. *LAFLER* AND *FRYE* DO NOT SUPERSEDE FLORIDA LAW REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RELATED TO LOST PLEA OFFERS.

A. Standard of Review

When reviewing a certified question by a district court of appeal, this Court considers all of the facts in a light most favorable to the petitioner. *Hearndon v.*

Graham, 767 So. 2d 1179, 1182 (Fla. 2000). The Court does not question the factual support for the issue; rather, it assumes that the underlying facts can be proven. *Id*.

B. Argument on the Merits

For the reasons that follow, *Lafler* and *Frye* do not abrogate the pleading requirements established by this Court for ineffective assistance of counsel claims stemming from lost plea offers.

1. This Court long ago rejected a heightened standard that would require a defendant to plead that the trial court would have accepted the plea.

In *Cottle v. State*, 733 So. 2d 963 (Fla. 1999), this Court established the pleading standards governing ineffective assistance of counsel claims stemming from defense counsel's failure to advise a client that a plea offer had been extended. The Fifth District had held that an ineffective assistance of counsel claim was legally insufficient because it failed to allege the trial court would have approved of the terms of the plea offer. *Id*. at 964.

This Court reversed that decision. *Id*. In doing so, the Court carefully considered decisional authority from other jurisdictions, as well as a number of decisions under Florida law, regarding the proper application of *Strickland v. Washington*, 466 U.S. 668 (1984) to claims based on lost plea offers. *Id*. at 965-69. The *Cottle* Court found the defendant satisfied the performance prong of the *Strickland* test because cases "uniformly hold that counsel is deficient when he or

she fails to relate a plea offer to a client." *Id*. at 966 (citing *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 752 (1st Cir.1991)).

The Court also rejected the argument that the defendant did not establish *Strickland* prejudice because he failed to allege that the court would have accepted his plea. *Id*. at 968. The Court approvingly quoted an opinion from the Sixth Circuit, where that court held that it would be "unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances." *Id*. at 968 (quoting *Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir.1988), *vacated on other grounds*, 492 U.S. 902 (1989))

It also agreed with the practical concerns raised by a Pennsylvania appellate court, which noted that (1) it "would be extremely difficult to resolve" such claims given the "speculative nature of this counter-factual inquiry"; and (2) "while a court may reject a plea bargain, as a practical matter—especially in crowded urban courts—this rarely occurs." *Cottle*, 733 So. 2d at 968 (citing *Commonwealth v. Napper*, 254 Pa. Super. 54, 385 A.2d 521, 524 (1978)). Finally, this Court found support in a decision by the Illinois Supreme Court, *People v. Curry*, 178 Ill. 2d 509, 687 N.E.2d 877 (1997), in which Illinois joined "the majority" of jurisdictions in rejecting the additional requirement of showing that the court would have ultimately accepted the plea. *Id*.

Based on this authority, and a host of Florida decisions, this Court held that a defendant who has lost the benefit of a plea bargain must plead: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced; (2) defendant would have accepted the plea offer but for the inadequate notice; and (3) acceptance of the State's plea offer would have resulted in a lesser sentence. *Id*. at 969.

In *Morgan v. State*, 991 So. 2d 835 (2008), this Court reexamined the pleading standard articulated in *Cottle*. The defendant in *Morgan* claimed that his attorney performed defectively by urging him to reject a plea based on assurances that she could win at trial or get a reduced offer. *Id*. at 837. The trial court found that the defendant failed to articulate sufficient facts to warrant an evidentiary hearing. *Id*. The Fourth District affirmed that decision, citing to a line of its cases that held that a claim involving the rejection of a plea and proceeding to trial is a tactical or strategic decision that cannot form the basis of an ineffective assistance of counsel claim. *Id*. at 839.

This Court disapproved of that line of cases and reaffirmed the standard articulated in *Cottle*. *Id*. at 840. It noted that the "*Cottle* decision was based on both federal and Florida case law." *Id*. When it applied the *Cottle* standard to the facts presented, however, this Court held that the defendant had not articulated sufficient facts to establish deficient performance. *Id*. This is because counsel

only advised her client that she felt she could win at trial or get a reduced offense. *Id*. Because these assurances did "not translate into misadvice," the claim was deemed legally insufficient, and no evidentiary hearing was warranted. *Id*.

Until now, the *Cottle* standard has unquestionably governed the pleading standards required for a post-conviction defendant to obtain an evidentiary hearing based on the loss of the benefit of a plea bargain. Yet, in the decision below, the Fourth District alerted this Court to a potential divergence between *Cottle* and two companion cases decided in the United States Supreme Court, *Lafler* and *Frye*. As explained below, however, "neither *Lafler* nor *Frye* amounts to any sort of 'jurisprudential upheaval' in Florida." *Simmons v. State*, 104 So. 3d 1185, 1186 (Fla. 1st DCA 2012), *reh'g denied* (Jan. 22, 2013); *see also In Re Perez*, 682 F.3d 930, 932 (11th Cir. 2012) ("*Frye* and *Lafler* did not announce new rules. To begin, the Supreme Court's language in *Lafler* and *Frye* confirm that the cases are merely an application of the Sixth Amendment right to counsel, as defined in Strickland, to a specific factual context.").

2. <u>*Lafler* and *Frye* do not overrule *Cottle* because those cases only recognize that intervening circumstances may defeat a defendant's claim of prejudice.</u>

Lafler and *Frye* recognize that intervening circumstances can defeat a defendant's allegation of *Strickland* prejudice, provided the circumstances demonstrate that the trial court would have rejected the lost plea in the first place.

The cases do not, however, mandate the minimum pleading standards required for an evidentiary hearing under Florida law.

Frye concerned defense counsel's failure to convey a favorable plea offer to a client before the offer lapsed. The defendant in *Frye* was charged with driving with a revoked license. *Frye*, 132 S. Ct. at 1404. Because he had three prior convictions for the same offense, he was charged under Missouri law with a felony carrying a maximum four-year prison term. *Id*.

The prosecutor sent defense counsel a letter, offering two possible plea bargains. *Id*. In one of the plea offers, the prosecutor offered to reduce the charge to a misdemeanor and to recommend a ninety-day sentence. *Id*. The misdemeanor charge of driving with a revoked license carried a maximum term of imprisonment of one year. *Id*.

The letter stated that both offers would have an expiration date. *Id*. However, Frye's counsel did not convey the offers to his client, and they expired. *Id*. Less than a week before his preliminary hearing, Frye was again arrested for driving with a revoked license. *Id*. He subsequently pleaded guilty to a felony with no plea agreement and was sentenced to three years in prison. *Id*. at 1405.

Frye sought post-conviction relief in Missouri court. *Id*. Frye alleged that trial counsel's failure to inform him of the plea offers denied him effective assistance of counsel, and he testified that he would have pleaded guilty to the

misdemeanor had he known about the offer. *Id*. The trial court denied his motion. *Id*.

The Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668. *Id*. The appellate court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown prejudice because he pleaded guilty to a felony instead of a misdemeanor. *Id*. To remedy the constitutional violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. *Id*.

The State of Missouri argued in the United States Supreme Court that a criminal defendant has no right to a plea offer or a plea bargain. *Id*. at 1406. According to Missouri, Frye could not establish *Strickland* prejudice because he was not deprived of any legal benefit to which he was entitled. *Id*. In addition, the state argued that, unlike prior plea bargain cases, which dealt with formal offers on the record, Frye's lost plea offer took place outside of court and off the record. *Id*. Thus, the state maintained it would be unfair to punish it for the deficiencies of defense counsel, particularly since the defendant entered an otherwise valid guilty plea to the charged offense. *Id*.

The Supreme Court rejected these arguments. *Id*. The court reasoned that the right to counsel extends to the plea-bargaining process because of the "simple reality" that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id*. at 1407. Because the criminal justice system is "for the most part a system of pleas, not a system of trials, . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant." *Id*. Therefore, the court held that the right to counsel applies in the plea bargain context. *Id*.

The court held that defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. *Id*. at 1408. The failure to do so constitutes defective performance under *Strickland*. *Id*. at 1409. With respect to prejudice, the Supreme Court held that defendants must "demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id*. A defendant must also "demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id*.

The *Frye* Court was careful to note that the holding was limited to the facts of the case. "This application of *Strickland* to the instances of an uncommunicated,

lapsed plea does nothing to alter the standard" laid out in *Hill v. Lockhart*, 474 U.S. 52 (1985), where it held that a defendant whose counsel led him to accept a plea offer as opposed to proceeding to trial had to show "'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 1409 (quoting *Hill*, 474 U.S. at 59).

In *Frye*, however, the defendant's alleged prejudice stemmed from his claim that he would have accepted an earlier plea offer that would have limited his exposure to one year of incarceration, as opposed to entering an open plea with sentencing exposure of four years. Therefore, the *Strickland* inquiry "requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed." *Id*. at 1410. For this reason, "to complete a showing of *Strickland* prejudice," a defendant "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*.

The *Frye* Court also emphasized that the application of the foregoing principles would depend in large measure on the different procedural rules that govern various jurisdictions. *See id*. at 1410-11. In "most jurisdictions prosecutors

and judges are familiar with the boundaries of acceptable plea bargains and sentences," and this familiarity should permit 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." *Id*. "Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters." *Id*. at 1411. The court also stressed that the ruling only "established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose." *Id*.

Applying that standard, the Supreme Court concluded that remand was appropriate. The court had little trouble concluding that counsel performed deficiently, given the failure to relay a favorable plea offer. *Id*. As for prejudice, though, the court found the defendant's commission of another crime in the interval between the lost plea offer and its expiration provided "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final." *Id*. If "Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice." *Id*. The court thus remanded the matter to the Missouri courts for determination of that question of state law. *Id*.

In *Lafler*, the defendant shot a victim in her buttock, hip, and abdomen. *Lafler*, 132 S. Ct. at 1383. The victim survived the shooting, and the defendant was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. *Id*.

The prosecution twice offered favorable plea deals, which defense counsel relayed to his client. *Id*. However, counsel convinced his client to reject the offers based on erroneous advice – that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. *Id*. Based on this misadvice, the defendant went to trial and received a mandatory minimum sentence of more than three times the period of incarceration he would have received had he accepted the plea deals. *Id*.

The Michigan courts denied the defendant's motion for post-conviction relief. *Id*. However, the federal district court granted a conditional writ of habeas corpus, which was affirmed by the Sixth Circuit. *Id*. at 1384. On certiorari review, the Supreme Court affirmed the petitioner's entitlement to habeas relief under *Strickland*, but reversed the remedy fashioned below. *Id*. at 1387.

The State of Michigan conceded that the defense counsel was deficient when he advised the defendant to reject the plea offer based on the grounds that he could not be convicted at trial. *Id*. at 1384. The state argued, however, that there can be

no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. *Id*. at 1385.

The Supreme Court found this argument unpersuasive. The court noted that "the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged." *Id*. To obtain post-conviction relief on these facts, a defendant must show:

> 1. But for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances);
>
> 2. That the court would have accepted its terms; and
>
> 3. That the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id.

Unlike *Frye*, where the intervening circumstances led the court to doubt whether the plea would have been accepted, the *Lafler* Court noted that the "favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel." *Id*. at 1387. For this reason, the *Lafler* Court found that the defendant had sufficiently established *Strickland* prejudice. *Id*. at 1390.

Nevertheless, the court found the remedy ordered below – specific performance of the original plea agreement – was inappropriate. *Id*. at 1391. Instead, the federal courts should have ordered the state to reoffer the plea agreement, at which point the state trial court could "exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Id*.

The primary question before this Court is whether *Lafler* and *Frye* overrule the pleading standards set forth in *Cottle* and reaffirmed in *Morgan*. The State and the Fourth District assume, based on the language from *Lafler* and *Frye*, that *Cottle* and *Morgan* have been overruled. This is incorrect.

Frye and *Lafler* concern the ultimate burden required to obtain post-conviction relief, not the pleading standards required to obtain an evidentiary hearing. In *Frye*, the court stated that the defendant must show that the trial court would have accepted the plea "to *complete* a showing of Strickland prejudice." *Frye*, 132 S. Ct. at 1410 (emphasis supplied). The concern in *Frye* arose because a post-offer conviction on the same charges raised considerable doubt as to whether the defendant could carry this burden. *Id*. at 1411. The Missouri appellate court

failed to require any demonstration in this regard, so the Supreme Court remanded the matter to determine whether the defendant could demonstrate prejudice. *Id*.

Frye stands for an unremarkable proposition: intervening circumstances that raise obvious doubts about the viability of a lost plea offer can defeat a showing of *Strickland* prejudice. If the lost plea offer was a dead letter because of the commission of a subsequent crime, it is only natural that a post-conviction court can deny relief. In such a circumstance, the State could attempt to conclusively refute the claim with record evidence of the conviction, or, alternatively, defeat the claim at an evidentiary hearing by adducing evidence of the conviction. In this way, intervening circumstances can serve as an affirmative defense that the State can employ to defeat the claimed prejudice. But it does not follow that *all* defendants must allege that the court would have accepted the plea in order to obtain an evidentiary hearing. Nor does *Frye* so hold.

Lafler is clear on this point. The *Lafler* Court expressly stated the allegation of prejudice: "Having to stand trial, not choosing to waive it, is the prejudice alleged." *Lafler*, 132 S. Ct. at 1385. There is no indication from state court opinion, the opinion of the federal district court, or that of the federal appellate court that the defendant alleged that the trial court would have accepted his plea. *See People v. Cooper*, 250583, 2005 WL 599740 (Mich. Ct. App. Mar. 15, 2005);

Cooper v. Lafler, 06-11068, 2009 WL 817712 (E.D. Mich. Mar. 26, 2009) *aff'd*, 376 F. App'x 563 (6th Cir. 2010).

Nor was there any need to do so. As noted by the Supreme Court, the "favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel." *Id*. at 1387. Thus, unlike *Frye*, intervening circumstances posed no bar to relief, and the acceptance of the plea was essentially a non-issue in the case, despite the apparent failure to expressly raise such an allegation. Thus, the language in *Frye* and *Lafler* regarding the requirement that a court would have accepted the plea is best interpreted as a summation of the ultimate burden that a defendant must satisfy to obtain relief. It cannot be read as a mandate regarding the required contents of a motion for post-conviction relief.

Frye also supports this view. The Supreme Court stated that the level of procedural protections afforded a criminal defendant "is a matter of state law, and it is not the place of this Court to settle those matters." *Frye*, 132 S. Ct. at 1411. Moreover, in other cases, the Supreme Court has repeatedly reiterated that it lacks the authority to serve "as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967); *Marshall v. Lonberger*, 459 U.S. 422, 429 ("the Due Process Clause does not permit the federal

courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); *see also Estelle v. McGuire*, 502 U.S. 62, 70 (1991).

As this Court observed in *Cottle*, Florida follows the majority rule in declining to impose the additional pleading requirement the State urges this Court to adopt. *Cottle*, 733 So. 2d at 968; *see also State v. Donald*, 198 Ariz. 406, 415, 10 P.3d 1193, 1202 (Ct. App. 2000). If the Supreme Court had intended to overrule Florida and the majority of other jurisdictions on this point, (a dubious proposition given the language of *Spencer*), then it would have clearly articulated such a holding. It did not.

Thus, it is safe to assume that *Lafler* and *Frye* did not affect the holding of *Cottle* and *Morgan*, which provide the standard under Florida law for stating a facially sufficient claim that requires an evidentiary hearing. Accordingly, this Court should decline the invitation to reverse the well-settled standard announced in *Cottle*.

3. Even if *Lafler* and *Frye* conflict with *Cottle*, such a conflict would not compel the reversal of longstanding Florida precedent because this Court may provide additional procedural guarantees to protect the constitutional rights of its citizens.

Even if this Court disagrees with the foregoing analysis, it can still reaffirm the pleading standard in *Cottle*, which offers the additional procedural safeguard of an evidentiary hearing on a facially sufficient claim. The *Frye* Court made clear that its application would depend in large part on the different procedural rules that

governed the specific jurisdiction where the claim arose. *See id*. at 1410-11. It also expressly stated that it only "established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose." *Id*.

Florida has already chosen to confer the additional procedural guarantee of an evidentiary hearing on facially sufficient claims regarding lost plea offers, even in cases where the defendant has not alleged that the court would have accepted its plea. *Cottle*, 733 So. 2d at 968. *Frye* expressly endorses this exercise of discretion.

The State points to *State v. Powell*, 66 So. 3d 905 (Fla. 2011), as an example where this Court declined to provide additional guarantees beyond those required under the federal constitution. State Brief at 22. *Powell* is distinguishable both in its procedural posture and substance. Unlike this case, *Powell* came for consideration in this Court on remand after the United States Supreme Court reversed the prior decision. *Powell*, 66 So. 3d at 908. Thus, this Court was constrained in its ability to fashion the relief requested by the petitioner.

In addition, the United States Supreme Court noted in its opinion that the Florida and Federal constitutions were interchangeable on the particular issue presented – the sufficiency of *Miranda* warnings. *Id*. Nevertheless, the defendant in *Powell* asked this Court hold the warnings deficient under the Florida

constitution. *Id.* at 910. This Court declined to do so because its earlier rulings were based on federal constitutional law, not on any independent basis under Florida law. *Id.*

As noted, this case arrives not on remand following reversal, but on a certified question from Fourth District. In addition, while *Powell* concerned a question of federal constitutional law, the "*Cottle* decision was based on both federal and Florida case law." *Morgan*, 991 So. 2d at 840. Moreover, in *Morgan*, which dealt with a defendant's entitlement to an evidentiary hearing, the Court determined the scope of Florida Rule of Criminal Procedure 3.850 in light of Florida precedent. *Id.* Accordingly, since this case raises concerns of Florida law that were absent in *Powell*, that case provides little guidance.

This Court should look instead to the many instances where Florida law has recognized its ability to confer additional protections beyond the minimum constitutional guarantees. For instance, in *State v. Cable*, 51 So. 3d 434 (Fla. 2010), this Court was asked to determine whether Florida's statutory knock-and-announce statute, which triggers the exclusionary rule, survived *Hudson v. Michigan*, 547 U.S. 586 (2006), where the United States Supreme Court concluded that violation of the federal knock-and-announce rule does not warrant application of the exclusionary rule. *Cable*, 51 So. 3d at at 435.

This Court reaffirmed its interpretation of the statute, noting that "Florida case law recognizes the common law and constitutional background for the knock-and-announce statute. But the case law does not support the conclusion that the statute has no force independent of the requirements of the Fourth Amendment." *Id*. at 441. The analogy to this case is clear. Rule 3.850 operates in the same manner as the statute in *Cable*: both provide additional procedural protections beyond the established federal constitutional standard.

Likewise, in *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984), this Court declined to adhere to the federal standard of *Swain v. Alabama*, 380 U.S. 202 (1965), for establishing a claim for a racially discriminatory exercise of a peremptory challenge to a juror. The *Neil* Court explained that "adhering to the *Swain* test of evaluating peremptory challenges impedes, rather than furthers, article I, section 16's guarantee." *Id*. Accordingly, it disapproved of the continued adherence to the *Swain* test by state courts confronted with the allegedly discriminatory use of peremptory challenges. *Id*.

As is clear from the foregoing examples, even if the Court finds that *Frye* and *Lafler* conflict with the standard articulated in *Cottle* and *Morgan*, this Court is by no means bound to reverse its established rule governing a defendant's entitlement to an evidentiary hearing under Rule 3.850.

4. Stare decisis weighs in favor of reaffirming the pleading standard articulated in *Cottle*.

Although neither *Lafler* nor *Frye* requires this Court to overturn the standard *Cottle* standard, this Court certainly has the authority to do so. However, the doctrine of stare decisis weighs heavily in favor of reaffirming the settled law governing this case.

"This Court adheres to the doctrine of stare decisis." *Puryear v. State*, 810 So. 2d 901, 904 (2002). The *Puryear* Court described the underpinnings of the doctrine as follows:

> A court when deciding a particular legal issue will pay due deference to its own past decisions on the same point of law. This is a judge-made rule created to assist courts in rendering decisions by making the work of judges easier, fostering stability in the law, and promoting public respect for the law as an objective, impersonal set of principles.

Id. at 905 (quoting *Perez v. State*, 620 So.2d 1256, 1267 (Fla. 1993) (Shaw, J., dissenting)). This Court's adherence to stare decisis is not "unwavering," and prior precedent may be revised where "there has been a significant change in circumstances since the adoption of the rule" or "where there has been an error in legal analysis." *Id*. (citations omitted).

But this case does not present a change in circumstances or legal error in prior precedent. As explained above, *Frye* and *Lafler* did not deal with the issues presented here, which arise primarily under Florida law. Nor are the prior holdings tainted by legal error. *Morgan* describes the circumstances when a defendant is

entitled to an evidentiary hearing under Rule 3.850, a determination which, under *Frye*, falls within the discretion of this Court. Finally, the pleading standard laid out in *Cottle* and reaffirmed in *Morgan* has been the law for more than twenty years. Departing from the standard would disturb the stability that stare decisis guarantees. As such, stare decisis weighs in favor of reaffirming *Morgan* and *Cottle*.

5. Reversing *Cottle* and adopting a heightened pleading standard would raise serious concerns because it would require defendants to attest to facts, under oath, that are beyond their ken.

Finally, as was the case when this issue was first presented in this Court, adopting the standard espoused by the State would raise grave policy concerns. First and foremost, the proposed pleading standard would force a defendant to plead that the trial court would have accepted his plea – a fact that a defendant cannot possibly know. More troubling, the defendant would have to do so under oath. FLA. R. CRIM. P. 3.850(c) ("The Motion shall be under oath . . ."). While prosecutors and the courts may have familiarity with the practices of a particular judge, *Frye*, 132 S. Ct. at 1410, the same cannot be said of the criminal defendants who appear before them.

Forcing criminal defendants to plead facts that are beyond their ken is both "unfair and unwise." *Cottle*, 733, So. 2d at 968. Forcing them to do so under oath as a condition of vindicating their Sixth Amendment rights also raises serious

constitutional concerns. *Cf. Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977) (requirement that drivers, as condition of using the roads, display state motto "Live Free or Die" on license plates held unconstitutional); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (requirement that veterans, as condition of receiving property tax exemption, declare that they do not advocate the forcible overthrow of government held unconstitutional); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (requirement that schoolchildren, as condition of going to school, salute the flag found unconstitutional: such "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence").

Adopting this heightened pleading requirement is also unworkable for other reasons. A *pro se* defendant is unlikely to be able to marshal *any evidence whatsoever* to support his averment. In addition, a trial court judge who has presided over a trial might well learn unsavory facts regarding a defendant that would be unknown if the defendant had taken a plea. It would be difficult, if not impossible, for that judge, after learning these facts, to speculate as to how he would have reacted to a plea without that knowledge. Thus, as Justice Wells aptly observed, "proof of what a trial judge 'would have done' is necessarily speculative, hindsight-looking, and problematic because of the disruptive effect to the judicial system of judges becoming witnesses in postconviction proceedings." *Cottle*, 733 So. 2d at 970 (Wells, J., dissenting).

Finally, though the Fourth District raises concerns regarding the burden that evidentiary hearings places on the judicial system, it is unlikely that this additional pleading requirement will deter the filing of motions for post-conviction relief. All it will do is force defendants to add a speculative allegation to their Rule 3.850 motions.

For the foregoing reasons, this Court should decline to adopt the heightened pleading standard requested by the State.

6. Mr. Sirota agrees with the State that the remedy for ineffective assistance of counsel claims is not properly before this Court.

The State correctly notes that the issue of appropriate remedy is not properly before this Court because Mr. Sirota has not yet established his entitlement to any relief. Mr. Sirota also agrees in large part with the State's analysis of *Lafler* regarding the remedy he might obtain if he successfully carries his burden on remand. Mr. Sirota differs on one point, though. The State suggests that under no circumstances would Mr. Sirota be entitled to a new trial.

Mr. Sirota disagrees. In the event that the State were compelled to reoffer the plea, and the trial court declined to enter it, Mr. Sirota should be entitled to withdraw from negotiations and proceed to trial. *See* FLA. R. CRIM. P. 3.171(d); *Odom v. State*, 310 So. 2d 770 (Fla. 2d DCA 1975); *Mantle v. State*, 592 So. 2d 1190, 1192 (Fla. 5th DCA 1992).

II. THIS COURT SHOULD DECLINE TO LIMIT EVIDENTIARY HEARINGS TO "FORMAL" PLEA OFFERS BECAUSE SIGNIFICANT CHANGES IN CRIMINAL PROCEDURE SHOULD OCCUR THROUGH FORMAL AMENDMENT TO THE RULES OF CRIMINAL PROCEDURE.

Even if this Court answers the first certified question in the affirmative, it should reject the Fourth District's recommendation that evidentiary hearings on these cases be limited to instances concerning "formal" plea offers. The Fourth District suggests that the Court should limit evidentiary hearings based on lost plea bargains to what it deems "formal" offers, that is, "verifiable offers that are either in writing or made on the record in open court."

Mr. Sirota is mindful that evidentiary hearings consume considerable judicial resources, and the proposed rule is in many respects desirable. However, as recognized in *Lafler* and *Frye*, the overwhelming majority of criminal cases are resolved through plea bargains. Hence, any change in the dynamics of plea negotiations would necessarily amount to a fundamental shift in Florida criminal procedure. It would be more appropriate to allow this sort of change to occur, as it has in the past, through formal amendment to the Florida Rules of Criminal Procedure. *See* FLA. R. CRIM. P. 3.171 Committee Notes to 1977 Amendment ("For protection of the prosecutor and the defendant, plea discussions between the state and a pro se defendant should be recorded, in writing or electronically.").

Accordingly, this Court should answer the second certified question in the negative.

CONCLUSION

Based on the foregoing, this Court should answer both of the certified questions in the negative and remand this matter to the trial court for the conduct of an evidentiary hearing.

DATED this 10th day of June, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I furnished a true and correct copy of the foregoing motion, via electronic mail, this 10th day of June, 2013 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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