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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KEITH SIROTA,

Respondent.

Case No. SC12-1683

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page:

TABLE OF CITATIONS

Statutes And Other Authorities: **Page:**

PRELIMINARY STATEMENT

Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was Appellee and Respondent was Appellant in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the following symbols will be used:

"Motion" to denote Respondent's 3.850 motion;

"Response" to denote the State's Response;

"Order" to denote the trial court's order on Respondent's motion; and

"R" to denote the record on appeal in Case No. 4D07-1025.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

1. Course of Proceedings And Disposition In The Trial Court.

[1]Respondent was charged by Information with soliciting a child under the age of 16 via the internet (Count I) and five (5) counts of transmitting material harmful to a minor (Counts II through VI) (R. 9-10).

Respondent's first proposed defense to the charges was consent. Respondent filed a motion to allow consent as a defense (R. 19). A hearing was held on Respondent's motion on June 30, 2006 (T. 1). The trial court disallowed consent as a defense (T. 1-10).

Respondent came up with a new plan of attack and six (6) weeks later, he filed a supplemental witness and exhibit list wherein he notified the State that he intended to call Ben Taylor, Ph.D., and his own mother, Marlene Sirota, as witnesses at trial (R. 41, 48). Respondent also notified the State that he intended to introduce, inter alia, his bank records and proof his home was destroyed in a hurricane (R. 41, 52).

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[1] **Error! Main Document Only.**In addition to the following, Petitioner relies upon those facts set forth in the opinion of the Fourth District Court of Appeal in Sirota v. State, 95 So. 3d 313 (Fla. 4th DCA 2012).

On the morning of trial, the State filed a written motion in limine seeking to exclude both the testimony of Dr. Taylor and Mrs. Sirota (R. 53-55). The State argued as follows:

> 1. The defendant should not be permitted to call Marlene Sirota to the witness stand without first proffering the admissibility of her testimony. At her deposition on December 8, 2006, Mrs. Sirota testified that the defendant told her that he fantasized about her sexually and that he has previously attempted to commit suicide. Her testimony is based on the statements of the defendant and the defendant's wife. As a result it is hearsay and not admissible. In addition, it is not relevant to the charge currently before the court.
>
> * * *
>
> 3. Dr. Ben Taylor should not be permitted to testify that the defendant did not believe that he was corresponding with a fourteen year old. The only bas[is] for this opinion is the discussions that he had with the defendant. Dr. Taylor did not review any of the other evidence in this case including the chat sessions. In his deposition on December 8, 2006, Dr. Taylor recognized that several statements made by the defendant in the chat sessions are inconsistent with the defendant truly believing that he was corresponding with an adult. The issue of whether the defendant believed that he was corresponding with a minor is the ultimate issue for the jury. Any opinion [about] the genuineness of the defendant's beliefs by Dr. Taylor unfairly bolsters the defendant's testimony.
>
> 4. The defendant should not be permitted to testify that he had sexual fantasies about his mother, that he had an internet relationship with Galinda Grosvenor, that he was having business problems, that he was having financial problems, that he has a gambling problem, that his home and business were destroyed by a hurricane, that his best friend passed away, that his cat passed away, that he was having marital problems, or that he tried to commit suicide. None of these issues are relevant to the charges in this case. These issues are not relevant and are

> being used solely to gain sympathy for the defendant in the eyes of the jury.

(R. 53-54).

Respondent's defense to the charges, as presented throughout trial, was that he was "role playing" with someone he believed to be an adult, and that his fantasies originated partly from depression (T. 107-11, 312-24). That is, Respondent admitted committing the charged acts, except on the issue of his specific intent to communicate with a minor. His defense at trial was, first and foremost, one of mistake.

The State presented the testimony of a single witness during its case-in-chief: Detective Toby Athol who worked for the Boynton Beach Police Department and was assigned to the Special Victims Unit (T. 112-13). Det. Athol testified that he was posing as a fourteen (14) year old girl named "Monica" (T. 113). To that end, he set up an online profile with AOL indicating that she attended Boynton Beach High School (T. 114). The profile did not include her age or a picture (T. 114, 177-78). Respondent chatted with "Monica" online from September 27, 2005, to February 3, 2006 (T. 114-16).

Respondent initially contacted "Monica" on September 27, 2005, in a chat room called "I Love Older Men" (T. 121, 175). When "Monica" asked him for his age, sex and location, Respondent responded that he lived in South Florida and that he was 43 years old (T. 123). "Monica" told Respondent that she

lived in Boca Raton and that she was 14 years old (T. 123). The two exchanged pictures with each other (T. 124). Det. Athol sent Respondent a picture of "Monica," which was actually a picture of his lieutenant when she was twelve (12) years old (T. 118-19).

With the preliminaries out of the way and within two minutes of contacting "Monica," Respondent asked her if she ever fantasized about her father (T. 124, 180). After about half an hour, Respondent told "Monica" he would make his penis hard for her (T. 125). He continued with the fantasy of what he would do to her, including having her put her hand inside his jeans to hold his penis and tear a hole in her pantyhose so he could massage her vagina and finger her (T. 126). Respondent also describe how he would penetrate her vagina with his penis (T. 126). He told "Monica" that he was currently in New York, but that when he came back to Florida in December they would "fuck" (T. 127). He told "Monica" he wanted her to think of him "fucking" her until the time he came back to Florida (T. 127). Respondent told Monica he would act as if he were her father and her wanted her to call him "daddy" (T. 127-28, 183). During the ensuing chats, Respondent sent "Monica" pictures of his erect penis (T. 141-42).

When chatting in January, Respondent made arrangements to finally meet "Monica" in person (T. 144-51). They decided to

meet at a park and Respondent suggested that they could meet in a public place and walk to his car so they could be seen leaving as "dad and daughter" (T. 150). Respondent told "Monica" that he would be driving a green 2006 Nissan Altima (T. 151). Before they met, however, Respondent was insistent that "Monica" erase all of the emails from him in her AOL account (T. 152-53). During one chat, "Monica" told Respondent that she wished she could touch Respondent but she couldn't because she was only fourteen (14) years old (T. 154). Respondent replied, "It's okay, as long as we both are smart, it will work out" (T. 154).

Respondent and "Monica" made arrangements to meet in the afternoon on February 4, 2005 (T. 155). They were to meet at St. Joseph's Church in Boynton Beach (T. 155). Respondent would be driving his green Nissan (T. 155). When Det. Athol arrived, the parking lot was completely empty (T. 155, 173). When Respondent drove into the parking lot, officers intercepted his vehicle (T. 156). Respondent matched the pictures that were sent to "Monica" over the internet (T. 156, 173). After waiving his Miranda rights (T. 163-65), Respondent admitted that he was speaking to a fourteen (14) year old girl online since September (T. 166).

After the State rested, the trial court heard argument on Respondent's request to present the testimony of Dr. Taylor and evidence that when Respondent "becomes very depressed, he sinks

into these fantasies" (T. 200). Respondent argued that the evidence was relevant to Respondent's state of mind:

> Well, they are relevant to his state of mind which is it forced him into a deeper depression which forced him into, based on what Dr. Taylor says and what he has told me, it's a fall deeper into this fantasy world that he is taking part in. So it goes directly to state of mind. The State does have to prove that he specifically believed -- actually, they have to prove that this is beyond mere fantasizing in order to prove their case, that he actually believed or knew this person to be 14 years old. So this goes directly to his state of mind. I mean, it's part of our defense.

(T. 203). The trial court delayed ruling on Respondent's request until after Respondent testified and after it could hear a proffer from Dr. Taylor (T. 210).

Respondent testified on his own behalf (T. 216). At the time of trial, Respondent was 48 years old (T. 217). Respondent testified that he first met "Monica" in a mature interest chatroom called "I Love Older Men" (T. 218). On the first day he contacted "Monica," Respondent could not get into a chatroom that he normally went into called "I Like Older Women," because it was too busy (T. 218). Respondent explained that he went into the "I Love Older Men" chatroom to see if women role play and act out fantasies the same way that men do (T. 219).

Respondent testified that since puberty he had been fantasizing about his mother (T. 219-21). Respondent stated that whenever he was depressed or something bad was happening in his life, he would fall into the fantasies about his mother (T.

221-22). In 2001, Respondent began searching online for people with medical backgrounds to discuss his problems while still maintaining his anonymity (T. 222). Respondent found a woman in south Florida who was a psychiatric nurse and struck up a sexual relationship with her (T. 222-24). In their relationship, Respondent was able to role play his mother-son fantasies (T. 224-25).

Respondent testified that he met a 57 year old woman online named Gail Brosner (T. 225). They traded sexually explicit instant messages with each other (T. 226). Soon Respondent sent her pictures of himself masturbating and photos of his penis (T. 227). Respondent testified that the photos of his penis were the same photos he sent to "Monica" (T. 227).

Respondent went on to testify about the significant problems in his life that occurred during the time frame of the pending charges (T. 228-30). He was gambling and he had just lost his job (T. 229-30). His friend had just died the week before (T. 229). His house was destroyed by a hurricane on October 23 (T. 235). According to Respondent, his personal issues made him so depressed that he would fantasize about his mother (T. 229-30). Respondent went into the "I Love Older Men" chatroom to see if women shared the same fantasies that he did (T. 230-31). Respondent testified that he never believed that

"Monica" was a child and thought at all times that he was speaking to an adult who was role playing (T. 232-34).

Respondent decided to meet "Monica" because he needed to know who he was talking to, but denied that he agreed to the meeting to have sex with her (T. 238).

After Respondent concluded his testimony, the trial court revisited the issue of Dr. Taylor's testimony (T. 259). Respondent asserted he wished to have the testimony admitted for the following reason: "Based on your prior ruling that he cannot get into any other subjects, I would limit him only to whether or not the depression could have caused him to slip further into these fantasies" (T. 259). The trial court denied the admission of Dr. Taylor's testimony, finding that Respondent merely wished to present a diminished capacity defense (T. 259).

The jury found Respondent guilty of soliciting a child under the age of 16 via the internet (Count I) and three counts of transmitting material harmful to a minor (Counts II, V and VI) (R. 62-63). The trial court sentenced Respondent to a five year term of imprisonment, to be followed by a ten year term of probation (R. 112-13).

a. <u>Direct Appeal</u>.

Respondent filed a timely notice of appeal of his conviction and sentence to the Fourth District Court of Appeal

(R. 134). Respondent was represented by his trial attorney who filed a brief raising the following six issues on direct appeal:

> 1. whether the trial court erred in denying Respondent's request to allow consent as a defense;
>
> 2. whether the trial court erred in denying Respondent the right to present his exhibits and witnesses in support of his depression defense;
>
> 3. whether the trial court erred in denying Respondent's motion for judgment of acquittal relating to the transmission counts;
>
> 4. whether the trial court erred in denying Respondent's motion for mistrial when the State informed the jury during closing that the lesser included offense was a misdemeanor;
>
> 5. whether the trial court erred in denying Respondent's request to instruct the jury on contributing to delinquency of a minor as a lesser included offense; and
>
> 6. whether the trial court erred in denying Respondent's motion to declare §§ 847.001 and 847.138(2) unconstitutional and to dismiss the information.

On March 19, 2008, the Fourth District affirmed the lower court's decision. Sirota v. State, 977 So. 2d 700 (Fla. 4th DCA 2008). Mandate issued on May 9, 2008.

2. <u>Respondent's Motion For Postconviction Relief</u>.

On February 24, 2009, Respondent filed a motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850 (Motion). In that motion, Respondent raised the following ten (10) grounds:

> 1. trial counsel failed to conduct an adequate pretrial investigation;

2. trial counsel misadvised Respondent regarding his diminished capacity defense;

3. trial counsel failed to investigate and present favorable evidence at trial;

4. trial counsel failed to interview, depose and call favorable witnesses at trial;

5. Respondent was denied counsel at a critical stage of the proceeding;

6. trial counsel was ineffective during opening statement when he disparaged Respondent's character and referred to evidence that was not ultimately introduced at trial;

7. trial counsel was ineffective when he failed to properly conduct redirect examination of Respondent;

8. trial counsel was ineffective when he gave an inadequate and inconsistent closing argument;

9. trial counsel failed to file a motion to suppress evidence seized from an illegal stop; and

10. Respondent was denied effective assistance of counsel due to the cumulative effect of trial counsel's errors.

With regard to Respondent's claim that trial counsel misadvised Respondent regarding a diminished capacity defense, the State pointed out that Respondent's defense at trial had remained consistent all along and that it was never one of diminished capacity (Response at p. 11). Rather, Respondent's defense was he was merely role-playing with someone he believed to be an adult, and the fantasies originated partly from his

depression (Response at p. 11-12). The trial court summarily denied Respondent's motion (Order).

a. Direct Appeal.

Respondent filed a timely notice of appeal of the trial court's denial of his postconviction motion. After reviewing Respondent's Initial Brief, the Fourth District Court of Appeal issued an order directing the State to only address Respondent's claim that trial counsel misadvised him about (1) the admissibility of Dr. Taylor's testimony and (2) about the maximum sentence, causing Respondent to reject a favorable plea offer. With regard to the issue of counsel's misadvise regarding the maximum sentence, Respondent claimed that counsel told him the maximum sentence he could receive after trial was a three and a half year term of imprisonment and that he relied on that statement in rejecting a plea offer for a five-year term of probation. Respondent claimed he would have accepted the plea had he been properly advised about the maximum sentence.

The Fourth District affirmed the denial of all of Respondent's claims except his claim that ineffective assistance of counsel regarding the maximum penalty caused him to reject a favorable plea offer. Sirota v. State, 95 So. 3d 313 (Fla. 4th DCA 2012). The Fourth District reversed and remanded the case to the trial court, holding that the trial court erred in summarily denying the claim because Respondent's claim was

sufficiently pled according to this Court's requirements set forth in Morgan v. State, 991 So. 2d 835 (Fla. 2008). Sirota v. State, 95 So. 3d at 319-20.

The Fourth District observed that the decisions of the United States Supreme Court in Lafler v. Cooper, 132 S.Ct. 1376 (2012), and Missouri v. Frye, 132 S.Ct. 1399 (2012), changed the Sixth amendment analysis to be applied on remand, believing the two decisions overrule this Court's holding in Cottle v. State, 733 So. 2d 963, 969 (Fla. 1999), that to establish prejudice, a defendant was not required to show that the trial court would have accepted the plea arrangement. Sirota v. State, 95 So. 3d at 320. The Fourth District noted that it "perceived [this Court's] decisions in Morgan and Cottle to be based solely on an interpretation of the requirements of the Sixth Amendment to the Constitution of the United States." Id. The Fourth District certified the following question for this Court's consideration:

> DO THE DECISIONS IN LAFLER V. COOPER, --- U.S. ----, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), AND MISSOURI V. FRYE, --- U.S. ----, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), WHICH ESTABLISH THE MINIMUM REQUIREMENTS OF THE SIXTH AMENDMENT, SUPERSEDE THE DECISIONS IN MORGAN V. STATE, 991 So.2d 835 (Fla. 2008), 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? 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?

Sirota v. State, 95 So. 3d at 321.

SUMMARY OF THE ARGUMENT

The certified question should be answered in the positive. In Lafler v. Cooper, 132 S.Ct. 1376 (2012), and Missouri v. Frye, 132 S.Ct. 1399 (2012), the United States Supreme Court chose to adopt the standard for prejudice previously rejected by this Court in Cottle v. State, 733 So. 2d 963, 969 (Fla. 1999). This standard demands more of defendants seeking to demonstrate ineffectiveness than this Court had previously imposed, i.e., that a defendant is required to show that the State would not have withdrawn the offer and that the trial court would have accepted the plea arrangement. This Court, which has never waivered from the Strickland standard and never given defendants more rights than provided by Strickland, is now bound by the more demanding standard set forth in Lafler and Frye.

This new change in pleading requirements to show prejudice should not hamper defendants in presenting their claims and does not impose an onerous burden upon them. A defendant can demonstrate that the State would not have withdrawn the offer and that the judge would have accepted it by showing there was no intervening change in circumstances. Further, this Court has provided additional protection for defendants as they are permitted the opportunity to amend their pleading to provide the required allegations to state a facially sufficient claim, pursuant to Spera v. State, 971 So. 2d 754 (Fla. 2007). There

is nothing in the language of either Frye or Lafler to indicate that such inquiries are limited to "formal plea offers."

Finally, the Fourth District erred when it remanded Respondent's claim to the trial court for an evidentiary hearing. Even without taking the new pleading requirements of Frye and Lafler into account, Respondent's claim was insufficient as pled and could not form the basis for relief. The claim is unsupported by any specific allegations regarding the alleged plea offer extended to him by the State and nothing in the record supports Respondent's allegation that he would have accepted the State's plea offer.

To the extent the Fourth District requests this Court to determine the extent to which Frye and Lafler affect the remedy available once a trial court has made a finding of deficient performance and prejudice pursuant to Strickland v. Washington, 466 U.S. 668 (1984), this issue is not ripe for review in the present case based on its procedural posture. Even assuming, arguendo, that the issue is properly before this Court, Lafler enumerates the remedies available and specifically excludes a new trial as one of those remedies.

ARGUMENT

THIS COURT IS NOW BOUND BY THE MORE DEMANDING PLEADING REQUIREMENTS FOR LOST PLEA OFFERS SET FORTH IN LAFLER V. COOPER, 132 S.CT 1376 (2012), AND MISSOURI V. FRYE, 132 S.CT. 1399 (2012).

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012) (citing Missouri v. Frye, 132 S.Ct. 1399, 1404 (2012), and McMann v. Richardson, 397 U.S. 759, 771 (1970)). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler, 132 S.Ct. at 1387. The two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984), applies to claims that counsel was ineffective during plea negotiations. Lafler, 132 S.Ct. at 1384 (applying Strickland's two-part test to federal habeas petitioner's claim that counsel was ineffective for advising him to reject a plea offer); Frye, 132 S.Ct. at 1404, 1409-10 (applying Strickland's two-part test to federal habeas petitioner's claim that counsel was ineffective for failing to communicate a prosecution plea offer before it lapsed); Hill v. Lockhart, 474 U.S. 52, 48 (1985) (applying Strickland's two-part test to defendant's challenge to his guilty plea based on ineffective assistance of counsel).

Strickland's first prong requires a defendant to show "'that counsel's representation fell below an objective standard

of reasonableness.'" Hill, 474 U.S., at 57 (quoting Strickland, 466 U.S. at 688. Strickland's second prong requires a defendant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In the context of pleas, "[t]he . . . 'prejudice' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59.

A. This Court Created The Standard For Prejudice In The Context Of A Lost Plea Offer in Cottle v. State, 733 So. 2d 963 (Fla. 1999), Rejecting The Proposition That A Defendant Must Show The Trial Court Would Have Accepted The Plea Offer.

Recently the United States Supreme Court addressed the standard for determining prejudice under Strickland in cases of ineffective assistance of counsel during the plea process. See Missouri v. Frye, 132 S. Ct. 1399 (2012), and Lafler v. Cooper, 132 S. Ct. 1376 (2012). However, before the United States Supreme Court announced a standard for prejudice when defendants were not informed of plea offers, or rejected them because of misadvice, this Court created a standard in Cottle v. State, 733 So. 2d 963 (Fla. 1999). This Court held that in order to state a sufficient claim of ineffective assistance of counsel where an attorney's deficient performance resulted in the loss of a favorable plea offer, a defendant must establish: (1) counsel

failed to convey a plea offer or misinformed the defendant concerning the possible sentence he faced; (2) the defendant would have accepted the plea but for counsel's failures; and (3) acceptance of the plea would have resulted in a lesser sentence than was ultimately imposed. Id. at 969. See also Morgan v. State, 991 So. 2d 835 (Fla. 2008).

After examining the holdings of other jurisdictions, this Court specifically concluded that a defendant need not show the trial court would have actually accepted the plea agreement. Id. This Court noted that "any finding on that issue would necessarily have to be predicated upon speculation." Id.

B. Lafler/Frye Prejudice Now Requires Proof That The State Would Not Have Withdrawn The Offer And That The Trial Court Would Have Imposed The Sentence From The Original Plea Offer.

As noted above, in Missouri v. Frye, 132 S. Ct. 1399 (2012), and Lafler v. Cooper, 132 S. Ct. 1376 (2012), the United States Supreme Court finally established, inter alia, the standards for determining whether ineffective assistance of counsel at the plea stage resulted in prejudice.[2]

[2] The Court also established how the appropriate remedies should operate for a criminal defendant who has proven prejudice. Based on the procedural posture of the case at bar, any issue concerning remedy is not relevant to the question presented.

In the context of a rejected plea, Strickland's prejudice component requires a defendant to show that deficient counsel deprived him of the opportunity to plead guilty. In Frye, the Court determined that a criminal defendant must prove three things to demonstrate prejudice for ineffective assistance of counsel for a plea that lapsed or was rejected:

> [1] defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel[;]
>
> [2] [d]efendants must also demonstrate a reasonable probability
>
> > [a] the plea would have been entered without the prosecution canceling it or
> >
> > [b] [without] the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] [and]
>
> [3] [t]o establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 132 S. Ct. at 1409. Similarly, in Lafler, the Court articulated a three-part test for this proof. A defendant must show "a reasonable probability

> [1] that the plea offer would have been presented to the court (i.e.,
> > [a] that the defendant would have accepted the plea and
> >
> > [b] 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 the punishment ultimately faced.]

Lafler, 132 S. Ct. at 1385. The two tests focus on the same factors. Notably, these two tests are in conflict with this Court's prior opinion in Cottle, wherein this Court specifically rejected the requirement that a defendant must prove the trial court would have actually accepted the plea offered by the State.

Based on these two decisions, the Fourth District certified the following question to this Court:

> DO THE DECISIONS IN LAFLER V. COOPER, --- U.S. ----, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), AND MISSOURI V. FRYE, --- U.S. ----, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), WHICH ESTABLISH THE MINIMUM REQUIREMENTS OF THE SIXTH AMENDMENT, SUPERSEDE THE DECISIONS IN MORGAN V. STATE, 991 So.2d 835 (Fla. 2008), 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? 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?

Sirota v. State, 95 So. 3d at 321.

C. **This Court Is Now Bound By The More Demanding Pleading Standards Set Forth In Frye And Lafler.**

This court has never waivered from the Strickland standard and never given defendants more rights than provided by Strickland. Significantly, this Court has never felt the need

to adopt a different test for ineffective assistance of counsel claims than the federal test laid out in Strickland v. Washington, 104 S. Ct. 1052 (1984), and adopted by this Court in Downs v. State, 453 So. 2d 1102 (Fla. 1984). See e.g., Thompson v. State, 990 So. 2d 482, 488 (Fla. 2008) (stating that Strickland is the standard for evaluating claims of ineffective assistance of counsel); Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007) ("A defendant's claim that his counsel offered ineffective assistance at trial, for whatever reason, must be analyzed under the standard the Supreme Court enunciated in Strickland."); and Cottle v. State, 733 So. 2d 963, 965 (Fla. 1999) (endorsing Strickland as the test for ineffective assistance of counsel claims).

This Court noted in Morgan that the holding in Cottle was based on both federal and state law. To the extent it was based on federal law, Cottle used the Strickland standard previously set forth by the United States Supreme Court. To the extent the holding in Cottle was based on what this Court described as "state law," the state cases relied upon trace back to federal circuit court cases interpreting Strickland in the context of missed plea offers. The main case relied upon for the test set forth in Cottle was Young v. State, 608 So. 2d 111, 113 (Fla. 5th DCA 1992). In Young, the Fifth District relied upon United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 437 (3d Cir.

1982), wherein the Third Circuit held that a claim for ineffective assistance of counsel was adequate where it was alleged that (1) a specific plea offer had not been communicated to the defendant; (2) that, had it been communicated, it would have been accepted, and (3) had it been accepted, defendant's sentence would have been less.

In State v. Powell, 66 So. 3d 905 (Fla. 2011), although there was a clear invitation by the defendant to do so, this Court declined to find that the defendant had state law rights distinct from and broader than those federal rights delineated by the Fifth Amendment to the United States Constitution and described in Miranda v. Arizona, 384 U.S. 436 (1966). This Court acknowledged that, although the United States Supreme Court had declined to find that the Miranda warnings given in the Powell case were inadequate under the federal constitution, this Court had the authority to uphold the decision of the Second District should the Court find the warnings deficient under the Florida Constitution. Powell, 66 So. 3d at 910. This Court stated, "As we have previously explained, however, our conclusions in Traylor 'were no different than those set forth in prior holdings of the United States Supreme Court.' Owen, 696 So.2d at 719. Moreover, we find no basis for concluding that different pre-interrogation warnings are required by the Florida Constitution than are required by the Fifth Amendment."

Powell, 66 So. 3d at 910. Therefore, the Miranda warnings were sufficient under both Federal and Florida Constitutions.

Just as Powell saw no need to expand a defendant's rights under the Florida Constitution beyond those federal rights delineated in Miranda, so too should this Court see no need to expand a defendant's rights under the Florida Constitution beyond those federal rights delineated in Strickland and Lafler. Certainly, this Court has the power to do so, but there is no good reason for such an expansion beyond the standard delineated in Strickland that was not already considered at great length by the United States Supreme Court in deciding Lafler and Frye.

D. The Change In Pleading Requirements Does Not Impose An Onerous Burden On Defendants.

In these cases, such a claim would be that the prosecution would not have withdrawn the offer and the trial court would have accepted its terms. In Florida, plea offers are made informally in some jurisdictions and formally in others. Sometimes plea offers are extended based on incomplete facts regarding the circumstances of the offense, the defendant's prior record, the applicable laws, or other salient factors. As a result, plea offers are subject to withdrawal at any time until accepted by the trial court. See Fla. R. Crim. P. 3.172(g). A defendant could certainly plead that there were no intervening circumstances or unknown facts that would have caused the State to withdraw the offer. The defendant could

then further allege that based on the circumstances of his own case, the trial court would have accepted the plea.

This change in pleading requirements to show prejudice should not hamper defendants. As noted by the Court in Frye:

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

Frye, 132 S. Ct. at 1410.[3]

Furthermore, this Court's decision in Spera v. State, 971 So. 2d 754 (Fla. 2007), provides a safety net for defendants. Spera applies where a motion lacks required allegations so it that fails to state a sufficient claim. Id. at 762 ("We also stress that our decision is limited to motions deemed facially insufficient to support relief—that is, claims that fail to contain required allegations."). Spera permits a defendant an opportunity to amend his pleading to state a facially sufficient claim. Id. at 755 ("in dismissing a first postconviction motion based on a pleading deficiency, a court abuses its discretion in

[3] There is nothing in this language indicating that such an inquiry is limited to "formal" plea offers.

failing to allow the defendant at least one opportunity to correct the deficiency unless it cannot be corrected"). This Court noted:

> A determination of facial sufficiency will rest upon an examination of the face, or contents, of the postconviction motion. **Because the determination of facial sufficiency under rule 3.850 is one of law and involves an evaluation of the legal sufficiency of the claim alleged, the evidence in the record will ordinarily be irrelevant to such an evaluation**.

Id. at 758 (quoting Jacobs v. State, 880 So. 2d 548, 551 (Fla. 2004)) (emphasis added). Thus, a defendant will merely be required to amend his motion to provide the required allegations to state a sufficient claim.

E. The Fourth District Erred In Remanding Respondent's Case To The Trial Court For An Evidentiary Hearing.

Even without taking the new pleading requirements of Frye and Lafler into account, the Fourth District erred in remanding Respondent's case to the trial court for an evidentiary hearing. Respondent's claim was insufficient as pled and could not form the basis for relief. The claim is unsupported by any specific allegations regarding the alleged plea offer extended to him by the State and nothing in the record supports Respondent's allegation that he would have accepted the State's plea offer.

Respondent alleged that he received a favorable plea offer of a five (5) year term of probation, that counsel misadvised him that the maximum penalty he faced was only 3.5 years, and

that the misadvice cause him to reject the plea offer. Notably, nowhere in his motion did Respondent specify when the State's plea offer was made to him, or whether that plea offer was made with any contingencies, or when the plea offer was set to be withdrawn. Respondent's claim was insufficient as pled and cannot form the basis for relief. In fact, Respondent's claim is unsupported by any specific allegations regarding the alleged plea offer extended to him by the State. Thus, the Fourth District erred in finding that Respondent's claim was facially sufficient under the prior pleading requirements dictated by Cottle and Morgan and granting Respondent an evidentiary hearing.

Furthermore, once the new requirements enunciated in Frye and Lafler are taken into account, it is clear that Respondent's claim is facially insufficient under the holdings of those cases. It follows, then, that pursuant to Spera, supra, Respondent's case should be remanded to the trial court to give Respondent the opportunity to amend his pleading to conform to the requirements of Frye and Lafler.

F. The Effect Of Frye And Lafler On The Remedy For An Ineffective Assistance Of Counsel Claim Regarding A Lost Plea Offer.

As part of its certified question, the Fourth District also requested that this Court analyze Frye and Lafler's effect on the remedy for an ineffective assistance of counsel claim

regarding a lost plea offer. The State respectfully suggests that this issue is not ripe for review in the present case based on its procedural posture. The instant case is still in the pleading stage with no evidentiary hearing having been conducted. Furthermore, neither the trial court nor the Fourth District have ever addressed the merits of Respondent's claim that trial counsel was ineffective for misadvising regarding the maximum penalty he faced and determined that prejudice has been proven. See Sarasota-Fruitville Drainage District v. Certain Lands, 80 So. 2d 335, 336 (Fla. 1955) ("It is a fundamental principle of appellate procedure that only actual controversies are reviewed by direct appeal.").

However, in an abundance of caution, the State provides the following:

Once prejudice is proven, Lafler says that a state trial court has three options on remand: (1) "vacate the convictions and resentence respondent pursuant to the plea agreement"; (2) "vacate only some of the convictions and resentence respondent accordingly"; or (3) "leave the convictions and sentence from trial undisturbed." Lafler, 132 S. Ct. at 1391. In implementing a remedy, the Court did not define the boundaries of a state trial court's discretion but instead left "open to the trial court" how best to exercise its discretion. Id. The Court identified two considerations of relevance: the

defendant's earlier willingness to accept responsibility for his actions, and information discovered post plea. Id. at 1389. In Frye, the Court explained that an "intervening circumstance" was a relevant consideration for prejudice and might cause the trial court to refuse to accept the plea. Frye, 132 S.Ct at 1410. Whereas in Lafler, the Court provided that the sentencing trial court need not "[disregard] any information concerning the crime that was discovered after the plea offer was made." Lafler, 132 S.Ct. at 1389.[4]

The Court in Lafler addressed the circumstance in which a criminal defendant was convicted at a fair trial after ineffective assistance caused him to reject a favorable plea offer. If the defendant can prove that he would have accepted the plea but for ineffective assistance, and the trial court would have accepted the plea with the sentence agreement, then the trial court has three options:

> [1] to vacate the convictions and resentence respondent pursuant to the plea agreement,

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[4] Presumably, once the criminal defendant has proven prejudice, the same range of remedy options exist in the circumstance in which there is a subsequent conviction by plea as in Frye, or as here and in Lafler, where there was a subsequent conviction from trial. That is, the sentencing court may impose the original plea offer, vacate some of the convictions (from the subsequent, accepted plea) and modify the sentence, or allow the subsequent plea and sentence to remain. Accord Lafler, 132 S.Ct. at 1391.

> [2] to vacate only some of the convictions and resentence respondent accordingly, or
>
> [3] to leave the convictions and sentence from trial undisturbed.

Lafler, 132 S. Ct. at 1391.

Everyone - including Lafler - agreed that the one remedy which made no sense was to grant a new trial to a defendant who had already received a fair trial:

> JUSTICE ALITO: The remedy of giving a new trial when the person has already had a fair trial makes zero sense.
>
> MS. NEWMAN [Counsel for habeas petitioner]: That's correct.

Transcript, p. 45. See also p. 53 (Kennedy, J., "You're saying it was unfair to have a fair trial?"). For this reason, the Court in Lafler foreclosed this possible remedy. Lafler, 132 S. Ct. at 1389 ("The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.") (emphasis added).[5] Thus, Lafler specifically excluded a new trial as one of the remedies.

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[5] Frye did not reach the issue of remedy. Once the Court identified the proper standard for determining prejudice, the Court remanded without providing further guidance. 13 S.Ct. at

Therefore, since it remains the case that the remedy for a Lafler violation is to direct the prosecutor to reoffer the plea, Lafler, 132 S.Ct. at 1389, if this Court chooses to remand for further proceedings, it should clarify that trial courts have the full range of remedy options that Lafler specifies, but trial courts have no authority to grant a new trial.

1411.

CONCLUSION

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully requests that this Court reverse the decision of the Fourth District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF SERVICE, E-MAIL TRANSMISSION AND ELECTRONIC FILING

I HEREBY CERTIFY that on this 5th day of April, 2013, in accordance with Fla. R. Jud. Admin. 2.516, a .pdf copy of the foregoing with an electronic signature has been e-mailed to Robert L. Sirianni, Esquire, Brownstone, P.A., 400 N. New York Avenue, Suite 215, Winter Park, FL, 32789-3159 at robert@brownstonelaw.com. Additionally, in accordance with Administrative Order 2013-01 of the Florida Supreme Court, a .pdf copy of the foregoing with an electronic signature has been electronically filed at https://myfloridacourtaccess.com.

/s/ Heidi L. Bettendorf
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210(a)(2), Appellant hereby certifies that the instant brief has been prepared with Courier New 12 point font.

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