ADNAN SYED,	*	IN THE
Appellant,	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND,	*	Application for Leave to Appeal (Post Conviction)
Appellee.	*	No. 2519 September Term, 2013

* * *** * *

RESPONSE IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL

The State of Maryland, Appellee, by its attorneys, Brian E. Frosh, the Attorney General of Maryland, and Edward J. Kelley, Assistant Attorney General, pursuant to this Court's order, hereby responds to the application for leave to appeal filed by counsel on behalf of Petitioner, Adnan Syed, and respectfully requests that this Court deny the application. Although Petitioner's application raises two claims of ineffective assistance of counsel, this Court has directed the State to address only Petitioner's claim that his trial counsel was ineffective for failing to abide by his alleged request to solicit a plea offer from the State. As discussed below, post conviction relief properly was denied because Petitioner plainly failed to establish that his trial counsel was ineffective. The lower court's ruling denying post conviction relief was correct, and thus, Petitioner's application for leave to appeal should be denied.

QUESTION PRESENTED

Whether trial counsel rendered ineffective assistance of counsel by not following the applicant's request that she solicit a guilty plea offer from the State, and if trial counsel's representation was ineffective, what sanction, if any, would be appropriate?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Trial and Direct Appeal

Petitioner was charged in the Circuit Court for Baltimore City with first degree murder, kidnapping, and related offenses in conjunction with the murder of his former girlfriend. *See* R. (Docket Entries). Petitioner retained the late M. Christina Gutierrez as his trial attorney, and he elected to be tried by a jury. Petitioner's first jury trial occurred in December of 1999 with the Honorable William Quarles presiding and ended in a mistrial. *Id.* Petitioner's second jury trial occurred in January and February of 2000 with the Honorable Wanda Keyes Heard presiding. *Id.*; *see also* Exhibit 1.[1] With respect to the facts developed at trial, the State, for the purposes of this response, adopts the facts set forth by this Court in the opinion resolving Petitioner's prior direct appeal. Exhibit 1 at 2-7.

On February 25, 2000, based on the evidence adduced at trial, the jury convicted Petitioner of first degree murder, robbery, kidnapping, and false imprisonment. *See* Exhibit 2.[2] Following the verdict, Petitioner hired a different attorney, Charles Dorsey, to represent him at sentencing, which was held on June 6, 2000. *See* Exhibit 3.[3] Judge Heard sentenced Petitioner to serve his life in prison for first degree murder, a consecutive 30 years in prison

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[1]This Court's prior direct appeal opinion in Petitioner's case is attached hereto as Exhibit 1.

[2]The February 25, 2000, trial transcript is attached hereto as Exhibit 2. The State is also attaching as exhibits additional transcripts that are necessary to document the factual assertions stated herein. The State will supply additional transcripts if directed to do so by this Court.

[3]The June 6, 2000, transcript is attached hereto as Exhibit 3.

for kidnapping, and a concurrent ten years in prison for robbery. *Id.* at 16-18. The false imprisonment conviction was merged for sentencing purposes. *Id.*

Following sentencing, Petitioner, represented by Warren Brown and Lisa Sansone, filed a direct appeal to this Court in which the following claims were asserted:

> I. Whether the State committed prosecutorial misconduct, violated *Brady [v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963)] and violated Appellant's due process rights when it (1) suppressed favorable material evidence of an oral side agreement with its key witness, and (2) when it introduced false and misleading evidence?
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> II. Whether the trial court committed reversible error in prohibiting Appellant from presenting evidence to the jury?
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> III. Whether the trial court erred in admitting hearsay in the form of a letter from the victim to Appellant, which is highly prejudicial?
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> IV. Whether the trial court erred in permitting the introduction of the victim's 62-page diary, which constituted irrelevant prejudicial hearsay?

Id. In an unreported opinion filed on March 19, 2003, this Court affirmed Petitioner's judgment of conviction. *Id.* On June 20, 2003, the Court of Appeals denied Petitioner's pro se petition for a writ of certiorari. *Syed v. State*, 376 Md. 52 (2003).

B. Post Conviction

For close to seven years, Petitioner's case was dormant. *See* R. (Docket Entries). On May 28, 2010, Petitioner, through counsel, filed a petition for post conviction relief, which was supplemented on June 27, 2011. *See* R. (Docket Entries; Post Conviction Petition; Amended Post Conviction Petition). The post conviction petition, as amended, raised the following claims: (A) trial counsel was ineffective for (1) failing to establish a timeline that would have disproved the State's case, (2) failing to investigate and call to testify alibi

witness Asia McClain, (3) failing to move for a new trial based on McClain's statements, (4) failing to adequately cross-examine Deborah Warren, (5) failing to approach the State about a possible plea deal, (6) failing to inform Petitioner of his right to request a change of venue, and (7) failing to investigate Jay Wilds for impeachment evidence; (B) sentencing counsel was ineffective for failing to request that the motion for modification of sentence be held in abeyance; and (C) appeal counsel was ineffective for failing to challenge the scope of expert testimony admitted at trial. *Id.* With respect to claim (A)(5), Petitioner asked for the following specific relief: "Order that the State offer to Petitioner an appropriate and fair plea offer as would have been offered at the time of his representation by Gutierrez." *Id.*

Motions hearings were held on November 29, 2010, and February 6, 2012. *See* Exhibits 4 & 5 [4] An evidentiary hearing on the claims raised in the post conviction petition was held on October 11, 2012, and October 25, 2012. *See* Exhibits 6 & 7.[5] At the hearing, Petitioner only presented evidence and argument on claims (A)(2), (A)(5), and (B). *Id.* The defense called five witnesses to testify at the hearing: Kevin Urick (the trial prosecutor), Rabia Chaudry (Petitioner's friend), Shamin Rahman (Petitioner's mother), Petitioner, and Margaret Meade (admitted as an expert in criminal defense in Baltimore City). *Id.* During their testimony, Chaudry and Rahman never indicated that Petitioner ever considered entering a guilty plea to any of the charges. Exhibit 6 at 32-100. To the contrary, Chaudry's testimony focused on her efforts to prove Petitioner's innocence. *Id.* at 32-78. Similarly,

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[4]The transcript of the November 29, 2010, hearing is attached hereto as Exhibit 4. The transcript of the February 6, 2012, hearing is attached hereto as Exhibit 5.

[5]The transcript of the October 11, 2012, hearing is attached hereto as Exhibit 6. The transcript of the October 25, 2012, hearing is attached hereto as Exhibit 7.

Rahman testified that Gutierrez was retained and paid a substantial sum to defend Petitioner's innocence at trial. *Id.* at 83-100. In other words, the family wanted an acquittal. *Id.* at 99-100. In response to defense counsel's question in this respect, Rahman stated: "Yes, I know he is innocent." *Id.* at 97-98. Rahman indicated that she would have respected Petitioner's decision to enter a guilty plea, but nothing in her testimony indicated that a guilty plea outcome was ever considered or discussed. *Id.*

Urick, who prosecuted Petitioner's case with Kathleen Murphy, testified that he considered the State's case against Petitioner "extremely strong." *Id.* at 15-18, 24. Urick stated that Gutierrez did not approach the State about a obtaining a plea offer for Petitioner. *Id.* at 18-19. According to Urick, Gutierrez "never made any presentation other than that they were seeking a finding of actual innocence." *Id.* at 19.

> As I said, there was never any presentation from Ms. Gutierrez, or anyone involved in the case, that this was other than an effort to determine the Defendant's actual innocence. That an acquittal was what the defense was seeking in this case. And that's -- it would be a trial. And we -- from the beginning, we're preparing it as a trial.

Id. at 22.

Urick confirmed that "he had no idea what kind of plea [Petitioner] might have received" had a plea offer been requested. *Id.* at 19. This is because he did not have the authority to offer a plea in Petitioner's case:

> But it would have required a conference with the family. It would have required talking to my supervisor and probably bringing Ms. Jessamy, who was the State's Attorney at that time, into the discussion as well. So, it would have been a process, not my individual preference that would have involved a plea in this case.

Id. Urick testified that, to the best of his recollection, no presiding judge ever made any inquiry regarding plea negotiations. *Id.* at 22. Urick testified that, at the time of Petitioner's trial, the State's Attorney's Office did not have "an established plea bargaining policy," and that he handled other murder cases in Baltimore City where the defendant was not offered a plea deal. *Id.* at 25-26.[6]

Petitioner testified that Gutierrez was selected by the members of his community to represent him: "Well when I was arrested, the community that I was a part of, they raised money to hire an attorney. So, that's how she was hired. The members of the community they hired her." Exhibit 7 at 9. Petitioner met Gutierrez for the first time in the city jail visiting room. *Id.* He deferred to her experience and trusted her to make the best decisions in the case. *Id.* at 9-10, 16, 39.

Petitioner stated that he learned about the plea bargaining process by talking to other inmates. *Id.* at 11, 17-19, 46-47. Petitioner testified that, at a time prior to the first trial when he allegedly lacked "confidence" in his case, he asked Gutierrez if the State had extended a plea offer. *Id.* To this inquiry, Gutierrez purportedly responded that the State had not offered a plea deal. *Id.* at 19. Petitioner testified that he asked Gutierrez to "speak to the State's Attorney or request some type of plea." *Id.* at 19. According to Petitioner, Gutierrez responded as if she would do so. *Id.* Petitioner stated that, in a subsequent meeting, Gutierrez told him that the State was "not offering you a plea deal." *Id.* Petitioner testified

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[6]There was no evidence presented at the post conviction hearing that the victim's family or anyone at the State's Attorney's Office with authority to do so would have entertained plea negotiations in the case. *See* Exhibit 6 & 7. The record regarding the trial court's outlook was also undeveloped because Judge Heard was not called to testify at the post conviction hearing.

that he took this to mean that the State had told Gutierrez that they were not offering a plea deal. *Id.* Petitioner stated that, after the first trial ended in a mistrial, he again asked Gutierrez to inquire about a plea offer because he lacked confidence in his case. *Id.* at 22, 34-37. According to Petitioner: "She responded that, they're not offering you a deal." *Id.* at 23, 37. On cross-examination, Petitioner acknowledged that he always maintained his innocence to Gutierrez. *Id.* at 56.

Petitioner suggested he would have considered a plea offer that carried a sentence of "20 or 30 years," assuming, however, he would only have to serve "half the time." *Id.* at 47. Petitioner never got more specific than that with respect to the terms he would have considered. *Id.* at 47-48. Petitioner never testified that he would have admitted guilt to any of the specific charges in the case. *Id.*

Testifying as an expert in criminal defense matters in Baltimore City, Meade stated her opinion that a defense attorney has a duty to engage in plea negotiations on behalf of a client, even when the client is claiming innocence. *Id.* at 76-77. This is because, in her view, a plea offer allows the client to make an informed choice between available options. *Id.* at 78-79. She also testified that it is important to keep the defendant's family apprised of plea negotiations because outcomes will affect these relationships going forward. *Id.* at 81.

Meade stated that, in her years of experience trying murder cases in Baltimore City, the prosecution never ignored her attempts to pursue plea negotiations. *Id.* at 82. Meade stated that, in Baltimore City, judges typically have a tremendous impact on plea negotiations, acting as a neutral party. *Id.* at 79-83. She stated further that in a typical case, every trial judge's first question was "have you guys discussed a plea?" *Id.* at 83. According to Meade, Judge Heard, who presided over Petitioner's trial, "always asks about a plea." *Id.*

at 85. Meade testified: "The only way that Judge Heard would have not gone into that, is if somebody said, no plea negotiations." *Id.* at 86.

Meade stated that, in her opinion, defense counsel in Petitioner's case should have sought a plea offer from the State whereby Petitioner could plead guilty to second degree murder in exchange for a sentence of 25 to 30 years in prison. *Id.* at 89-90. Meade testified that, if the State countered with a higher offer, she would have sought the judge's participation. *Id.* at 90-91. Meade agreed that for a plea agreement to be entered, it had to be acceptable to the trial judge. *Id.* at 99-100.

In post conviction closing argument, the court inquired whether there was any evidence of plea negotiations in the case, to which defense counsel replied: "There is none, Your Honor." *Id.* at 108-09. Defense counsel also acknowledged that the only proof that Petitioner even asked Gutierrez to pursue a plea offer was Petitioner's own post conviction testimony. *Id.* at 110-11.

The State rejoined that Petitioner was lying about asking Gutierrez to obtain a plea offer; rather, he wanted an acquittal. *Id.* at 123-29. The State emphasized that there is "simply no evidence of any offer whatsoever and that's undisputed." *Id.* at 126. The State noted that not only had the defense failed to establish evidence of a plea offer, the defense also failed to establish that there was a plea offer that would have been acceptable to Petitioner and the trial court. *Id.* at 127-28.

On January 6, 2014, the circuit court filed an opinion denying post conviction relief. *See* R. (Post Conviction Opinion and Order). In rejecting the claim that trial counsel was ineffective with respect to plea negotiations, the court stated:

Defendants are "entitled to the effective assistance of competent counsel" during plea negotiations. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Moreover, trial counsel has a duty to communicate to the client any plea that has been offered or suggested by the State and advise the client as to whether or not that plea should be accepted. *Williams v. State*, 326 Md. 367, 378 (1992). However, defendants have no constitutional right to be offered a plea. *See Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) (quoting *Missouri v. Frye*, 132 S.Ct. 1399, 1410 (2012)).

Petitioner asserts that trial counsel rendered ineffective assistance by ignoring Petitioner's request to pursue a plea deal and falsely reporting back that the State would not put forth an offer. In support of this claim, Petitioner asserts that, at the time of Petitioner's trial, it was the policy of the Baltimore City States Attorney's Office to make plea offers to defendants charged with murder and such an offer was never conveyed to Petitioner. Petitioner relies on *Merzbacher v. Shearin*, where the court found defense counsel ineffective when [s]he failed to communicate a plea offer that was discussed during a meeting between defense counsel, the state's attorney, and the judge. *Merzbacher v. Shearin*, 706 F.3d 356 (4th Cir. 2013).

The Court disagrees with Petitioner's assertion that trial counsel was deficient in this case. First, there is nothing in the record indicating that the State was prepared to make a plea offer had trial counsel pursued such negotiations. In fact, Petitioner has provided no convincing evidence that a plea offer was even contemplated or discussed by the State. Petitioner's bald assertion that the policy of the State's Attorney's Office at the time was to offer pleas to defendants charged with murder is unfounded and is inconsistent with the State's claim that there was never a plea offer available in Petitioner's case. This greatly distinguishes Petitioner's case from *Merzbacher v. Shearin*, where there was clear evidence that a plea offer had been discussed prior to counsel's unilateral decision not to pursue the plea. *Id.* at 365.

Second, even if trial counsel had gone ahead and negotiated a plea offer with the State, it is impossible to determine with certainty whether the Petitioner would have agreed to accept a plea. In fact, Petitioner's own statements at sentencing indicate the contrary; that Petitioner intended to maintain his innocence throughout. Trial Tr., Jun. 6, 2000 at 14-15. Therefore, Petitioner has not established that trial counsel's alleged failure to elicit a plea caused him prejudice.

> Consequently, trial counsel's failure to initiate plea negotiations was not a deficient act and did not prejudice Petitioner. Therefore, Petitioner is not entitled to relief on this claim of ineffective assistance of counsel.

Id. at 15-16.

Petitioner subsequently filed an application for leave to appeal the post conviction court's ruling, arguing that the post conviction court erred when it rejected his claims that trial counsel was ineffective for (1) failing to investigate a possible alibi witness and (2) failing to honor his request to seek a plea offer. *See* R. (Application for Leave to Appeal). By order dated September 10, 2014, this Court directed the State to file a response addressing only the second of these two questions.

ARGUMENT

> THE CIRCUIT COURT PROPERLY DENIED POST CONVICTION RELIEF WHERE PETITIONER FAILED TO ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO SOLICIT A PLEA OFFER FROM THE STATE.

The issue currently before the Court is whether the post conviction court erred in denying Petitioner's claim that trial counsel was ineffective for failing to solicit a plea offer from the State. This Court has stated that the appellate role in reviewing ineffective assistance of counsel claims is to

> evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered. Whether counsel's performance has been ineffective is a mixed question of fact and law. As a question of whether a constitutional right has been violated, we make our own independent evaluation by reviewing the law and applying it to the facts of the case. We will not, however, disturb the findings of fact and credibility determinations of the post-conviction court, unless they are clearly erroneous. Instead, we "re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed."

State v. Purvey, 129 Md.App. 1, 10–11 (1999) (citations omitted); *see also State v. Latham*, 182 Md. App. 597, 613 (2008).

Claims of ineffective assistance of counsel are evaluated under the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Kulbicki v. State*, 440 Md. 33, 46 (2014). To succeed on an ineffective assistance claim, a Petitioner must show that: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance was prejudicial. *See Strickland*, 466 U.S. at 687; *Kulbicki*, 440 Md. at 46. The reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. All circumstances are to be considered. *Id.* at 688. The reviewing court's scrutiny of counsel's conduct "must be highly deferential." *Id.* at 689. The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Thus, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* To prevail, the defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Additionally, even if counsel commits a professionally unreasonable error, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

This is so because "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* at 693. Indeed, "[r]epresentation is an art, and an act or omission that may be unprofessional in one case may be sound or even brilliant in another." *Id.* Furthermore, whereas "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 694, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," *id.* at 693.

A. Failure to pursue a plea offer is not a cognizable ineffective assistance of counsel claim.

The Supreme Court most recently addressed the standard for showing ineffective assistance during the plea bargaining stage in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). In *Lafler*, the Court held that the Sixth Amendment right to counsel discussed in *Strickland*, *supra*, applies to the plea bargaining process. *Lafler*, 132 S. Ct. at 1384-85; *see also McMann v. Richardson*, 397 U.S. 759, 771 (1970) (recognizing right to effective assistance of counsel when entering a guilty plea); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2009) (same); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (same). In order to establish deficient performance in this context, a defendant must show that counsel's representation fell below an objective standard of reasonableness with respect to plea negotiations. *Lafler*, 132 S.Ct. at 1384; *Strickland*, 466 U.S. at 688.

In *Frye*, the Court emphasized that defining "the duty and responsibilities of defense counsel in the plea bargain process" was "a difficult question" because the "art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision." *Frye*, 132 S.Ct. at 1408 (citation omitted). The Court

went on to note the impossibility of promulgating a bright line standard that would apply to all stages of the plea bargaining process: "Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." *Id.*

The Supreme Court explained that Frye's case did not present "the occasion to define the duties of defense counsel" because the question presented was "whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both." *Id.* at 1408. According to the Court, this did not present a difficult question because

> as a general rule, 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. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Id.

Under *Frye*'s reasoning, it is the act of extending the formal plea offer that engages the corresponding obligation of action in accordance with the Constitution. *Id.* The formal plea offer is the critical benchmark because "there is no constitutional right to a plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Indeed, defendants have "'no right to be offered a plea . . . nor a federal right the judge accept it." *Lafler*, 132 S.Ct. at 1387 (quoting *Frye*, 132 S.Ct. at 1410). Thus,

"[i]f no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge," the issue of whether counsel was ineffective with respect to plea negotiations simply "does not arise." *Id.*; *see also Williams v. State*, 326 Md. 367, 378 (1992) ("A trial attorney performs deficiently when he or she does not disclose to the client that the State has made a plea offer."). It follows that the failure to pursue a plea bargain, by itself, is not enough to engage the ineffective assistance of counsel test. This must be the case because, in the absence of formalized plea terms, it is simply impossible to fashion a valid remedy for the purported constitutional violation. *Lafler*, 132 S. Ct. at 1389.[7]

In this case, it is undisputed that the government never extended a plea offer to Petitioner. *See, e.g.*, Exhibit 7 at 108-09, 126; R. (Application for Leave to Appeal). Indeed, it is undisputed that the government never even considered extending a plea offer to Petitioner. *Id.* There is then no evidence regarding a specific charge or sentence that Petitioner would have been offered or accepted. Since no plea offer, formal or otherwise, was extended by the prosecution to the defense, the Constitution was not engaged and no

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[7]In *Lafler*, the Supreme Court described two remedial alternatives that apply where ineffective assistance of counsel results in the nonacceptance of a formal plea offer, both of which are defined by the offer's terms. *Id.* at 1389. The first remedial alternative involves the situation where the charge offered in the plea is the same as the charge the defendant was convicted of at trial, and the sole advantage to the defendant under the plea is a lesser sentence. *Id.* Upon a showing that there is a "reasonable probability" that the defendant would have accepted the plea but for counsel's errors, the trial court may simply re-sentence the defendant for the charge on which he was convicted. *Id.* The second remedial category involves the situation where the charge offered in the plea is less serious than the charge the defendant was convicted of at trial. In this scenario, a re-sentencing would not suffice; instead, the proper remedy may be to require the prosecution to reoffer the plea proposal. *Id.* Under both scenarios, the trial court retains discretion to impose the appropriate sentence. *Id.*

constitutional violation occurred. Accordingly, the judgment below should be affirmed for this reason alone.

B. Petitioner failed to prove that Gutierrez acted deficiently.

Even assuming Petitioner raised a cognizable ineffective assistance of counsel claim, he still failed to establish that Gutierrez acted deficiently in the context of his case. The post conviction court found as fact that there was no evidence that the prosecution ever considered extending a plea offer in the case. *See* R. (Post Conviction Opinion and Order at 15) ("In fact, Petitioner has provided no convincing evidence that a plea offer was even contemplated or discussed by the State."). The post conviction court also found as fact that Petitioner never would have agreed to enter a guilty plea. *Id.* at 16. Both of these critical findings of fact are fully supported by the record and are not clearly erroneous.

In light of these facts, any attempt by trial counsel to engage the prosecution in plea negotiations certainly would have been a futile, if not counterproductive, effort. As one court has stated, "[l]awyers must take clients as they find them, and the client who persists in his protestation of innocence would scarcely welcome advice from his champion that would insure incarceration. Put another way, it stretches common sense to impose on a lawyer the affirmative duty to canvass options the lawyer knows are directly contrary to his client's wishes." *United States v. Gordon*, 979 F.Supp. 337, 341 (E.D. Pa. 1997). To be sure, defense counsel is not compelled to engage an unwilling prosecutor in plea negotiations solely for the purpose of reporting to a client unwilling to enter a guilty plea that no plea

offer is forthcoming. Here, opting not to engage the prosecution in plea negotiations was a reasonable strategic decision under the circumstances. *See, e.g., Strickland*, 466 U.S. at 688-89 (emphasizing that Petitioner bears the burden of proving deficient conduct and reviewing court must give substantial deference to counsel's strategic decisions).

Petitioner's contention that Gutierrez acted deficiently by reporting to him that the State was not offering him a plea deal is equally unavailing. *See* R. (Application for Leave to Appeal at 9, 13, 17). The only evidence supporting this claim is Petitioner's own, self-serving post conviction testimony that the post conviction court did not credit. *See* R. (Post Conviction Opinion and Order at 15-16). Moreover, to the extent Gutierrez reported to Petitioner that the State was not offering him a plea deal, that information was accurate. Based on the evidence presented at the post conviction hearing, entering a guilty plea was not an available option for Petitioner, regardless of whether Gutierrez affirmatively pursued that option on his behalf. Petitioner's only option was going to trial, which, in fact, was the only option he actually wanted to pursue. *See* R. (Post Conviction Opinion and Order at 16) ("In fact, Petitioner's own statements at sentencing indicate the contrary; that Petitioner intended to maintain his innocence throughout.") Petitioner's mother's post conviction testimony is perhaps the best evidence of this -- clearly Gutierrez was hired and paid substantial sums to obtain an acquittal, not a guilty plea. Exhibit 6 at 83-100.

The cases Petitioner cites to support his assertion of deficient conduct pre-date *Lafler* and *Frye*, the two Supreme Court decisions that clarified the constitutional obligations of

counsel in this context. Petitioner does not even mention *Lafler* or *Frye* in his application for leave to appeal, and the cases cited by Petitioner generally do not support his claim for relief. *Newman v. Vasbinder*, 259 Fed. Appx. 851 (6th Cir. 2008) (unpublished) ("We will not hold that an attorney rendered constitutionally deficient assistance because she did not seek a plea agreement that she reasonably believed the prosecutor would reject, and that could not be reconciled with her client's version of the facts of the offense."); *Freund v. Butterworth*, 165 F.3d 839, 880 (11th Cir. 1999) (proposition upon which Petitioner relies is from dissenting opinion where majority found no ineffective assistance of counsel); *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976) (ineffective assistance found on "assembly-line nature" of representation, not failure to pursue plea negotiations); *Martin v. Rose*, 717 F.2d 295, 296 (6th Cir. 1983) (ineffective assistance premised substantially on total failure of counsel as opposed to the failure to pursue plea negotiations); *Cole v. Slayton*, 378 F.Supp. 364, 368 (W.D. Va. 1974) (same).

Petitioner does not suggest, nor could he, that Gutierrez's representation was a total failure, and, indeed, the record proves the complete opposite. Petitioner's case was tried not once, but twice. At a pretrial hearing on January 10, 2000, the defense, with Petitioner present, specifically informed the court that, based on interviews of jurors following the first trial, the defense was confident in its case and ready to proceed to trial. Exhibit 8 at 33.[8] Gutierrez thereafter presented a reasonable and forceful defense to the State's case in a trial

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[8]The transcript of the January 10, 2000, hearing is attached hereto as Exhibit 8.

that lasted several weeks. *See, e.g.,* Exhibits 1 & 2; R. (Docket Entries). What the record shows is that Petitioner was totally satisfied with Gutierrez's services until the jury returned an adverse verdict at the second trial. Because no deficient act was proved, the post conviction court properly denied relief as to this claim.

C. Petitioner failed to establish prejudice.

Even assuming Petitioner proved a deficient act, which he did not, he clearly failed to establish prejudice. In *Frye*, the Supreme Court stated that

> [t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants 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 authority to exercise that discretion under state law. To 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. 1409 (citation omitted). This further showing is of particular importance because, as stated, a defendant has no right to be offered a plea, nor a federal right that the judge accept it. *Frye*, 132 S.Ct. at 1410 (citing *Weatherford* and *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

Here, there was no plea offer, and, there was no proof that the State ever would have extended a plea offer to Petitioner in the case. As a result, Petitioner failed to establish that, but for a deficient act by his trial counsel, his case would have ended in a plea to a lesser charge or a sentence of less prison time. *See, e.g., Augilar v. Alexander*, 125 F.3d 815, 820-

21 (9th Cir. 1997) (explaining that no prejudice proved where there was no proof that that further attempt to pursue plea offer would have resulted in the prosecution extending an offer).[9]

There is similarly no proof that Petitioner would have entertained a plea offer that required him serving a substantial time in prison. To the contrary, the post conviction court, which observed Petitioner's testimony, found as fact that, at the time of trial, Petitioner was only interested in pursuing a full acquittal. *See* R. (Post Conviction Opinion and Order at 15-16). This finding is not only consistent with the manner in which the case was defended from the outset, but also by Syed's own comments at sentencing, where he stated:

> Yes. Since the beginning I have maintained my innocence, and I don't know why people have said the things that they have said that I have done or that they have done. I understand that I've been through a trial, and I've been found guilty by a jury, and I accept that. Not because I agree with what they did. I respectfully disagree with their judgment; however, I accept it, and there's nothing at this point that I can do except to be sentenced and to go on with the next step, which is to file my appeal.
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> I have maintained my innocence from the beginning, and to my family and to those who have believed in me since the beginning, I would just like to let them know it is for a reason. I can only ask for the mercy of the court in

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[9]Petitioner states in his application: "Had Gutierrez approached the prosecution regarding a plea deal, . . . she certainly would have received an offer more favorable than the life sentence that Petitioner risked, and actually received, at his trial." *See* R. (Application for Leave to Appeal at 19-20). There is no record evidence that supports this statement. Additionally, and just by way of example, if the prosecution had decided to engage in plea bargaining, it would have been entirely reasonable under the circumstances of this case to extend a plea offer that allowed Petitioner to plead guilty to first degree murder in exchange for a life sentence. To the extent Petitioner acknowledges that he would not have considered such reasonable terms, his claim would fail on this basis as well.

sentencing me, and I can only remain strong in my faith and hope that one day I shall have another chance in court.

I'm just sorry for all the pain that this has caused everyone.

Exhibit 3 at 15-16.

In simple terms, Petitioner's post conviction testimony that he would have considered a plea offer in the case was not credible. Regardless, such testimony, by itself, was insufficient to show prejudice in any event. *See, e.g., Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (holding that petitioner's self-serving statement that he would have been "insane" not to accept the plea was insufficient, by itself, to establish a reasonable probability that he would have accepted the plea); *Johnson v. Duckworth,* 793 F.2d 898, 902 n. 3 (7th Cir. 1986) ("Nonetheless, Johnson cites no evidence prior to his conviction which would indicate any desire on his part to plead guilty to a lesser charge. Under these circumstances, we seriously doubt whether Johnson's after-the-fact testimony regarding his wishes in and of itself would be sufficient to establish that prior to trial, but for [his counsel's] actions, there was a reasonable probability he would have accepted the plea agreement."); *United States v. Turchi*, 645 F.Supp. 558, 568 (E.D. Pa. 1986) (holding that petitioner who steadfastly maintained innocence failed to adduce evidence to show that there was a reasonable probability that but for his counsel's omission, he would have entered into a plea agreement).[10]

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[10]Even if credible, Petitioner's testimony falls short of establishing a reasonable probability that he would have entered a guilty plea. In his post conviction testimony, Petitioner only vaguely suggested he would have considered a plea offer that carried a sentence of "20 or 30 years" of which he would only have to serve half; he also has made clear that he would not have considered an offer that included a term of life in prison. Exhibit 7 at 47-48; *see* R. (Application for Leave to Appeal at 19-20). Petitioner never has

Finally, there is no proof whatsoever that Petitioner and the State could have presented a plea agreement that was acceptable to the court. The record shows that Judge Heard proceeded in this case as if there would be no guilty plea discussions. Indeed, Meade's testimony regarding Judge Heard's normal practices supports the notion that this was the unique murder case unsusceptible to plea negotiations. Exhibit 7 at 79-86. The actions of all parties to the case -- the prosecution, the defense, and the court -- establish that this was a case to be tried, not pled. For these reasons, Petitioner failed to establish *Strickland* prejudice.

In sum, having failed to present a cognizable claim of ineffective assistance of counsel or establish an entitlement to relief under either prong of the *Strickland* standard, Petitioner was not entitled to post conviction relief. Accordingly, Petitioner's application for leave to appeal the post conviction court's ruling should be denied.

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indicated that that he would have made a full confession to murdering the victim, a certain precondition to any plea agreement in this case. *Id.* Petitioner also testified that he followed Gutierrez's advice, and there is no evidence that she would have advised him to enter a guilty plea.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that Petitioner's Application for Leave to Appeal be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2015, a copy of the foregoing Response in Opposition to Application for Leave to Appeal was mailed, together with exhibits, postage prepaid, to C. Justin Brown, 231 E. Baltimore Street, Suite 1102, Baltimore, MD 21202.

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