At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April 2009.

PRESENT:

HON. GLORIA M. DABIRI,

Justice.

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff(s),

- against - **Indictment No. 13106/95**

WILLIAM CAROLAN,

Defendant(s).

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The motion of defendant William Carolan (CPL §440.10[1][h]) to vacate his conviction of Attempted Murder in the Second Degree and related crimes, and sentence as a Second Felony Offender to a term of imprisonment of 20 years on the Attempted Murder count, concurrent with sentences imposed on the lesser crimes, was held in abeyance pending a hearing. During the hearing, held pursuant to this court's decision and order of April 30, 2008, defendant William Carolan waived his attorney-client privilege, permitting his trial counsel Joseph R. Corozzo to testify regarding their settlement discussions prior to, and during, the criminal trial of this matter.[1] The defendant testified in his own behalf and also called Diane Rubel.

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[1]Testimony was received on August 1, 2008 and October 3, 2008. Conferences on the matter were held on November 7, 2008 and December 5, 2008. Written summations and memoranda of law were submitted to court by January 9, 2009 and an additional memorandum supplied by the defendant on or about March 31, 2009.

Attorney Corozzo testified that he represented Mr. Carolan from 1995 through 1996, following the defendants arraignment through trial and sentencing. The top count of the indictment charged Mr. Carolan with Attempted Murder in the Second Degree (PL 110/125.25). At trial the defendant was found guilty by a jury of the top count and of lesser offenses. Attorney Corozzo recalls that during the months leading up to trial he engaged in plea negotiations with Assistant District Attorney Mark Lee. Settlement discussions ceased, however, once the trial commenced. According to Attorney Corozzo, the ADA's only offer was an indeterminate sentence of 5 to 15 years incarceration. Mr. Corozzo stated that this was the best offer he could get for his client.

Attorney Corozzo testified that prior to trial he advised Mr. Carolan that he faced a B felony on the top count which carried with it a maximum indeterminate sentence of 8 1/3 to 25 years incarceration. Following the jury's verdict, ADA Lee requested that the court revoke Mr. Carolan's bail and remand him. Attorney Corozzo testified that it was at this time that he learned, for the first time, that due to a change in the law, which had become effective a few days before the crime was committed, that Mr. Carolan faced a maximum mandatory determinate sentence of 25 years. Mr. Corozzo reiterated that all of his prior conversations with ADA Lee had concerned an indeterminate sentence as a potential plea offer. Mr. Corozzo testified that he never advised Mr. Carolan that he could be sentenced to a determinate sentence of up to 25 years if convicted of Attempted Murder in the Second Degree, — a class B violent felony offense — as a second felony offender (CPL 70.06[6]).

When he and Mr. Carolan discussed the claimed plea offer of 5 to 15 years, they evaluated the evidence to be presented at trial, and discussed trial strategy and the severity of the offered sentence. Mr. Corozzo indicated that he advised the defendant that he thought that the case was defendable, in that the only witness was the victim who had credibility problems. According to Mr. Corozzo, based upon these discussions the defendant was unwilling to accept the People's offer of 5 to 15 years. Mr. Corozzo testified that when he learned at the conclusion of the trial that the People's offer had been an impermissible sentence, he placed on the record that he was under the misapprehension that his client was facing a maximum of 8 1/3 to 25 and that he had not been aware of the recent amendment which exposed his client to a maximum, flat sentence of 25 years. Mr. Corozzo stated the he felt horrible about this mistake, but that he did not raise the issue further because it was not relevant to sentencing, but could be raised on appeal. Mr. Corozzo did not note the People's offer on the record. In terms of his earlier discussions with the defendant regarding the plea, Mr. Corozzo testified that had he known that his client's maximum exposure was 25 years, it would not have altered his discussions with Mr. Carolan because the decision to take a plea is personal to a client and he generally does not push clients into pleas.

In support of the defendant's motion, Mr. Corozzo also supplied an affidavit, dated September 17, 2004, in which he avers that prior to proceeding to trial he conveyed to Mr. Carolan a plea offer, made by ADA Mark Lee. That offer was a plea to a Class C Felony with a sentence of 5 to 15 years. Mr. Corozzo avers that he informed Mr. Carolan that he

could be facing an "indeterminate term of eight and one third to twenty-five year[s] in prison if he were found guilty of the top counts at trial."

Defendant William Carolan testified that he was informed by Mr. Corozzo of the People's offer of 5 to 15, and that he made a counter offer of 3 to 9 years which was rejected by the ADA. Mr. Carolan testified that Mr. Corozzo told him that the maximum sentence he would face, if he lost, was 8 1/3 to 25 years, and also advised him that the case was winnable. Mr. Carolan discussed the plea with his wife, Diane (Rubel) Carolan, and they agreed "that if [he] was going to be away from home longer than eight and a third to 25, that [he] would take the 5 to 15." Mr. Carolan stated "I told him that – you know – you're dealing with three years, the difference between the minimum and the maximum; the five to 15 would be the minimum five, an extra three years would be the eight years. So [Mr. Corozzo] said yes. So I said all right, let's go to trial based on believing that he could win the case. I would never have went to trial if I thought I was going to face 25 flat."

According to the Mr. Carolan, he had "just . . . finished parole on a split bid for two to six. So when [Mr. Corozzo's] telling me five to 15, and he's relaying the number, I have already got in my mind that he's talking about an indeterminate sentence." When asked what his understanding of the meaning of an eight and a third to 25-year sentence was, Mr. Carolan responded that he understood it to mean that if he lost he would have to do 8 1/3 years, then he would go before the parole board and could be released at that time based on good behavior. He testified that based upon his prior incarceration and appearance before

a parole board, he believed that he would likely make parole.

According to Mr. Carolan, he would not have gone to trial if he had been told that he was facing a determinate sentence of up to 25 years. He testified that he told Mr. Corozzo that if it was any more than 8 1/3 to 25, he would take the 5 to 15 plea. Mr. Carolan stated that he did not learn that he faced a flat 25 years until the prosecutor sought remand, telling the judge that he's facing an 8 to 25 year determinate sentence. However, Mr. Carolan testified, "it really fully dawned on me, when Joseph [Corozzo] told me that the Court sentenced me to 20 years, and I asked him right there in Court what was he talking about 20 years. You told me eight and a third to 25, and he wasn't really sure at the time is my recollection." Mr. Carolan contends that his wife spoke to Mr. Corozzo, after the sentencing hearing, and was told by Mr. Corozzo that he made a mistake on the sentencing guidelines and that there was a change in the law a week prior to his arrest. Mr. Carolan's wife asked Mr. Corozzo about appealing and was told it would cost $15,000. Mr. Carolan, therefore, sought the assistance of the Legal Aid Society.

Diane Rubel, the defendant's wife at the time of his arrest, trial and sentencing, testified that she was present during discussions between Mr. Corozzo and Mr. Carolan related to plea bargaining and sentencing. Ms. Rubel testified that sometime during a pre-trial hearing or the trial Mr. Corozzo advised them that the defendant faced 8 1/3 to 25 years for a B felony, Attempted Murder. She testified that Mr. Corozzo stated that the defendant would be up for parole right after 8 1/3 years. She stated that she was present when Mr.

Corozzo communicated an offer of 5 to 15 to Mr. Carolan. When she heard this offer she told Mr. Carolan: "they are never going to let you go at five, that might mean ten before they would let you out. That's so close to the eight and-a-third where he would see . . . a parole board." Ms. Rubel indicated that at that time Mr. Carolan's and her daughter was 8 years of age, and she believed 10 years was too long for him to be away from her. She, therefore, suggested that he "fight it." She did not think "8 1/3 to 25 was much more time than 5 to 15. "For the difference it didn't make sense to take the plea." She further testified that Mr. Corozzo advised them that their chances were very good and the defendant would not serve 25 years because there was a max out time. She recalled that she was willing to accept a plea of 3 to 9, but she did not recall whether the defendant was willing, at the time, to accept such a plea if made. Ms. Rubel was present during all of Mr. Carolan's court dates. She did not recall any other offer being made by the prosecution.

Ms. Rubel contends that on the last day of trial, when the ADA asked to have Mr. Carolan remanded, she learned that Mr. Carolan was facing up to 25 years incarceration. After Mr. Carolan was found guilty, ADA Lee stated that he could be sentence to up to 25 years. She remembers Mr. Corozzo objecting and that there was "a whole thing" in court.

Diane Rubel also supplied an affidavit, dated November 16, 2007, in support of Mr. Carolan's motion in which she avers that in her presence Joseph Corozzo informed Mr. Carolan of a plea offer of 5 to 15 years and that the maximum sentence he could receive was 8 1/3 to 25 years. She avers that the defendant told her that "if the minimum sentence were

greater than 8 1/3, he would enter a plea of guilty so that he would not have to be away from his family for too long."

No witness or evidence was offered on behalf of the prosecution.

DISCUSSION

The defendant seeks to vacate his conviction on the grounds that his trial counsel related an illegal plea offer of 5 to 15 years, failed to put the offer on the record and misinformed him about the maximum sentencing exposure should he be found guilty on the top count of the indictment at trial. Defendant maintains that had he been aware that his maximum sentencing exposure was a determinate sentence of 25 years, as a second felony offender (CPL 70.06[6] [effective October 10, 1995]) rather than an indeterminate sentence of 8 1/3 to 25 years, as a second felony offender (CPL 70.06 [effective until October 1, 1995]), he would have entered a guilty plea to the charges earlier in the proceedings or would have plead to a lesser charge for a sentence less than the inflexible mandatory maximum of 25 years.

In view of the conflicting factual allegations raised by the affidavits offered in support of and in opposition to the motion, the court directed a hearing pursuant to CPL 440.30(3), (5), (6) and 440.10 (*Strickland v. Washington*, 466 US 668 [1984]; *see also People v. Garcia*, 19 AD3d 17, 18 [2005]; *People v. Fernandez*, 13 AD3d 271 [2004], lv. den., 4 NY3d 837 [2005]).

At such a hearing pursuant to CPL 440.30 a defendant must prove facts essential to support his motion by a preponderance of the evidence (CPL 440.30[6]). "The preponderance standard is met when it produces 'a reasonable belief in the truth of the fact asserted' (*Jarrett v. Madifari*, 67 AD2d 396, 404 [1979]). The party who has the burden of proof must convince the fact finder that the existence of the fact is more probable than its nonexistence" (*People v. Alexander*, 136 Misc2d 573, 582 [Sup. Ct. Bnx. Co. 1987]). Furthermore, the defendant's right to counsel attaches at all critical stages in the proceedings after the initial formal charges (*Moran v. Burbine*, 475 US 412, 431 [1986]), which has been held to include plea negotiations. Moreover, because the defendant could have raised the claim of ineffective assistance of counsel on his direct appeal (CPL 440.10(2)(a), (b), (c); *People v. Castaneda*, 189 AD2d 890 [1993]), matters in the original transcript which could have been raised on direct appeal (or on prior motions) may not be considered (*see People v. Smith*, 169 Misc2d 581, 583 [1996], *aff'd* 237 AD2d 388 [1997]).

A defendant's right to effective assistance of counsel is guaranteed by both the Federal and State Constitutions (U.S. Const. 6th Amend.; N.Y. Const., art I §6; *People v. Turner*, 5 NY3d 476, 479 [2005], citing *Strickland v. Washington*, 466 US 668, 687 [1984]; *People v. Baldi*, 54 NY2d 137 [1981]).

In *Strickland v. Washington*, (466 US 668, 687 [1984]) the United States Supreme Court adopted a two-prong test for evaluating Sixth Amendment claims (466 US at 688). Under the federal constitution "[a] 'defendant must show that counsel's performance was

deficient,' and 'that the deficient performance prejudiced the defense' (*Strickland*, 466 US at 687 . . .). The first prong of the *Strickland* test . . . essentially . . . requires a showing that counsel's representation fell below an objective standard of reasonableness" (*Hill v. Lockhart*, 474 US 52 at 56 [1985]). The second prong focus on whether "there is a reasonable probability that, *but for,* counsel's unprofessional errors the result of the proceeding would have been different" [emphasis added] (466 US at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" (*id.*). *Strickland* requires that judicial scrutiny of counsel's performance be "highly deferential," as "[i]t is all too tempting . . . to second guess counsel's assistance . . . and it is all too easy for a court . . . to conclude that a particular act or omission of counsel was unreasonable" (466 US at 699). New York has departed from the second, or "but for," prong of *Strickland*, adopting a rule somewhat more favorable to defendants" (*People v. Turner* 5 NY3d 476, 480 [2005], citing *People v. Caban*, 5 NY3d 143, 155-156 [2005]; *People v. Stultz*, 2 NY3d 277, 284 [2004]; *People v. Benevento*, 91 NY2d 708, 713-714 [1998]; *see also People v. Ozuna,* 7 NY3d 913, 915 [2006]).

To prevail on a claim of ineffective assistance of counsel under the New York Constitution, a defendant must first demonstrate that his attorney failed to provide "meaningful representation" (*People v. Baldi*, 54 NY2d 137, 147 [1981]; *People v. Benevento*, 91 NY2d 708, 713-714). The state Constitution guarantees the accused the right to a fair trial, not necessarily to a perfect trial (*People v. Turner, supra*). "So long as the

evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the [state] constitutional requirement will have been met" (*People v. Baldi*, 54 NY2d 137, 147 [1981]). Under the state standard prejudice is examined more generally. "Meaningful representation" includes a prejudice component which focuses on the fairness of the process as a whole rather than on any particular impact on the outcome of the case (*People v. Henry*, 95 NY2d 563, 566 [2000]; *People v. Alford*, 33 AD3d 1014, 1015 [2006]).

"The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case" (*U.S. v. Gordon*, 156 F3d 376, 380 [2nd Cir. 1998], citing *Boria v. Keane*, 99 F3d 492, 496-497 [2nd Cir. 1996]). A defendant is entitled to "rely upon . . . counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his (or her) informed opinion as to what plea should be entered" (*Von Moltke v. Gillies*, 332 US 708, 721 [1948]). "Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty" (*United States v. Day*, 969 F2d 39, 43 [3rd Cir. 1999]), citing *Hill v. Lockhart*, 474 US 52 at 56-57; *Von Moltke v. Gillies*, 332 US 708 at 721). Here, counsel's representation was deficient. Counsel concedes that his representation fell below an objective standard of reasonableness in that, during plea negotiations, he underestimated the maximum sentence Mr. Carolan would face if convicted on the top count of the indictment at trial (*see People v. Garcia*, 19 AD3d 17 [2005]; *Aeid*

v. Bennett, 296 F3d 58 [2nd Cir. 2002], *cert. den.* 537 US 1093 [2002]; *Mask v. McGinnis* 28 F Supp 2d 122 [1998], aff'd 233 F3d 132 [2000], *cert. den.* 534 US 943 [2001]; *United States v. Gordon*, 156 F3d 376, 380 [2nd Cir. 1998]; *see also N.Y. Code of Prof. Resp. Canon 7* [McKinney's Book 29 App.] ["A defense lawyer in a criminal case has the duty to advise the client fully on whether a particular plea to a charge appears to be desirable . . ."]). However, there is no evidence in the hearing record of a plea offer by the office of the Kings County District Attorney other than the illegal offer of 5 to 15 years. Nor did Mr. Carolan indicate that he would have been willing to enter a plea to the entire indictment and sought to negotiate a sentence of less than 20 years, rather than face a possible maximum sentence of 25 years after trial.

To be entitled to relief, the defendant must also demonstrate that "there is a reasonable probability that, but for, counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 US at 694). In the context of this case, the "prejudice" requirement of *Strickland* focuses on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill v. Lockhart*, 474 US at 59). Upon this record the defendant has not established a reasonably probability that it did.

In *Aeid v. Bennett* (296 F3d 58 [2nd Cir. 2002] *cert. den.*537 US 1093 [2002]) which involved facts similar to those herein, defense counsel conveyed a plea offer of five to fifteen years to the defendant to cover rape charges. Counsel incorrectly advised the defendant that his sentence exposure, if found guilty on the top count after trial, was 8 1/3 to 25 years, rather

than 12½ to 25 years which was the correct sentence. The prosecutor and the judge, under the same mistaken impression, approved the plea. A recent statutory amendment had changed the minimum sentence from 1/3 of the maximum to ½ of the maximum sentence. The defendant in *Aeid*, relying on counsel's incorrect advice, rejected the plea offer, was found guilty of the top count at trial and was sentenced to 12½ to 25 years. In a *habeas corpus* proceeding *Aeid*, like Mr. Carolan, maintained that had he been correctly advised by his counsel of his maximum sentence exposure, he would have accepted the prosecutor's offer of 5 to 15 years.

While the Second Circuit in *Aeid* agreed that counsel's representation was deficient, it concluded, nonetheless, that no Sixth Amendment violation had been demonstrated since the the "but for," prejudice requirement of *Strickland* had not been met. The court stated:

> "[I]n order to show prejudice under *Strickland, Aeid* is required to prove that, "but for his attorney's mistaken advice, *Aeid* and the prosecutor would have agreed on the imposition of a legal sentence [that would have been] more favorable than the 12 to 24 year sentence ultimately imposed on *Aeid* after trial" . . . . That is, *Aeid* had to prove (1) that the prosecutor would have offered him such a sentence and (2) that *Aeid* would have accepted that offer, (*see Cullen v. US*, 194 F3d 401, 403, 404-405 [2nd Cir. 1999] [discussing prejudice requirement of *Strickland*, requiring *habeas* petitioner to show reasonable probability that he would have accepted plea bargain if he had been accurately informed of sentencing ranges he faced upon a plea and upon conviction after trial]; *US v. Gordon*, 156 F3d 376, 380-381 [2nd Cir. 1998] [discussing prejudice requirement of *Strickland*, requiring *habeas* petitioner to show reasonable probability that he would have accepted plea bargain if he had been accurately informed of his maximum sentencing exposure]; *Purdy v. United States*, 208 F3d 41, 49 [2nd Cir. 2000] [finding that in order to show prejudice under *Strickland*, defendant "must demonstrate a reasonable probability that, but for [defense counsel's] deficiencies, [defendant] would have pled guilty"], citing *Cullen*, 194 F3d at 404).

> The prosecution suggests it is likely that the prosecutor would have offered *Aeid* a sentence of 7½ to 15 (*id.*). However, *Aeid* has never suggested this and, even more significantly, has never asserted that he would have accepted an offer of 7½ to 15 years of imprisonment. This is a critical omission in light of *Hill v. Lockhart* (474 US 52, 106 S.Ct. 366, 88 L.Ed.2d 203 [1985], in which the United States Supreme Court held that the defendant had failed adequately to allege prejudice where he had failed to "allege in his *habeas* petition that, had counsel correctly informed him about his parole eligibility date, he would have not pleaded guilty and [would have] insisted on going to trial" (*id.* at 60, 106 S.Ct. 366). Thus, while *Hill* accepted a plea bargain and *Aeid* rejected one, both claims suffer from the same defect: failure to allege that correct advice from defense counsel would have altered the defendant's decision [296 F3d at 63-64].

In *People v. Thomson* (46 AD3d 939 [2007]), the defendant alleged that he was prejudiced by counsel's failure to ascertain that a prior out-of-state conviction did not constitute a predicate felony, in that during plea negotiations both the prosecutor and defense counsel considered him a second felony offender. Thomas rejected the People's plea offer of an aggregate sentence of 8 to 16 years, and was convicted at trial and sentenced to concurrent prison terms, on the top count, of 16 years to life. *Thomson* moved, pursuant to CPL 440.10, to vacate his conviction on the grounds that counsel's failure to verify his criminal history prior to plea negotiations constituted inadequate legal assistance (46 AD3d at 940). *Thomson*, like Mr. Carolan, maintained that he was prejudiced by counsel's conduct since he would have "considered" a more favorable plea offer. The court agreed that trial counsel's assistance was deficient and then addressed the question of prejudice, stating:

> Acknowledging counsel's error, we must also determine whether there is a reasonable probability that, but for this error, the result would have been different (*see Mask v. McGinnis*, 233 F3d at 140;

> *People v. Williams*, 299 AD2d at 580 [748 NYS2d 879]. To establish such prejudice, defendant must show *that the People would have offered a plea deal more favorable than their offer of an aggregate prison term of 8 to 16 years* if they had been aware of his actual status *and, if such a deal were offered, defendant would have pleaded guilty* (*see People v. Garcia*, 19 AD3d at 20-21). [emphasis supplied]

Here, there is no evidence of a legal plea offer more favorable to Mr. Carolan then the 20-year sentence he is currently serving.

Any plea bargain or sentence promised is conditioned upon the sentence being lawful (*People v. Selikoff*, 35 NY2d 227 [1974]). Were neither the sentence pursuant to a plea agreement nor the sentence actually imposed by the court was authorized by law for the crime for which a defendant has pleaded, or has been otherwise convicted, that sentence is illegal and may not stand (*People v. Cameron*, 83 NY2d 838, 840 [1994]; *People v. Bartley*, 47 NY2d 965, 966 [1976] [illegal plea bargain was a "total nullity"]).

A defendant's failure to obtain the benefit of [an] illegal 5 to 15 year sentence does not constitute prejudice under *Strickland*. The prejudice injury "focuses on the question whether counsel's deficient performance renders the result of the [proceeding] unreliable or the proceeding fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him" (*Aeid v. Bennett*, 296 F3d 58 (2nd Cir. N.Y. [2002], cert. den. 537 US 1093 [2002], citing *Lockhart v. Fretwell*, 506 US 364, 372 [1993]). As Mr. Carolan was not entitled to an illegal sentence of 5 to 15 years, his counsel's deficient performance did not deprive him of a benefit to which the law entitled him. Nor, is there

evidence that any other offer was made by the prosecution.

The cases relied upon by the defendant are easily distinguished (*see People v. Perron*, 287 AD2d 808 [2001] [counsel's erroneous advice concerning the maximum sentence if convicted, failure to contest defendant's status as a second felony offender and demonstrated pattern of inadequate representation of preventing defendant from properly assessing the risks of proceeding to trial as opposed to concluding with a negotiated plea]). Accordingly, it is

ORDERED, that the motion is denied.

This constitutes the decision and order of the court.

The defendant is hereby advised of his right to apply to the Appellate Division, Second Department, 45 Monroe Place, Brooklyn, NY 11201 for a certificate granting leave to appeal from this determination. This application must be made within 30 days of service of this decision. Upon proof of financial inability to retain counsel and to pay the costs and expenses of the appeal, the defendant may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Application for poor person relief will be entertained only if and when permission to appeal or a certificate granting leave to appeal is granted (22 NYCRR §671.5).

E N T E R,

J.S.C.
HON. GLORIA DABIRI