THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2009-CP-40-2523

Jaime E. Marrero, ... Petitioner,

v.

State of South Carolina, ... Respondent.

REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. The issue of whether the trial judge violated South Carolina law and impermissibly initiated the plea discussions is preserved and is appropriate for this Court's review.

Respondent's assertion that the issue of whether trial counsel was ineffective for failing to object to the trial judge's initiation of the plea proceedings is not preserved for this Court's review is incorrect. The issue was not raised to and ruled upon by the PCR Court. The issue of whether the trial counsel was ineffective for failing to object to the judge's initiation of the plea proceedings was raised to the PCR Court during the PCR hearing, was raised again in a 59(e) Motion to Alter or Amend the Judgment, and ultimately was ruled upon by the PCR Court when it denied Petitioner's Motion, albeit without specific factual findings.

Petitioner first raised this issue in his Application for Post-Conviction Relief filed April 7, 2009, and again in his Amended Application, filed November 16, 2012. (App. pp. 28, 34–37.) This issue was argued before the PCR court. (App. p. 167, line 8 through p. 169, line 2.) Despite Respondent's assertions to the contrary in its Return, the PCR court made no finding that trial counsel was not ineffective for failing to object to the coercive plea proceedings. In fact, this issue was not discussed in the Order, which is why Petitioner filed a Rule 59(e) motion on March 21, 2013, again arguing the point that the trial judge improperly initiated the plea proceedings. (App. pp. 180–83.) Thus, as is readily apparent from a review of the Appendix in this case, Respondent's assertion that this "argument was never brought before the lower court" is completely baseless. Therefore, this Court should disregard the Respondent's incorrect assertion that this issue is not preserved for the Court's review, and should grant Petitioner's Petition for a Writ of Certiorari to review the PCR Court's determination that trial counsel did not render ineffective assistance of counsel.

II. South Carolina law is clear that a judge may not initiate plea discussions, and the trial judge in this case violated that prohibition.

As stated in the Petition, the question in this case is whether the guilty plea was "voluntarily, knowingly, and intelligently entered." Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011).

In its Return, Respondent recounts the details of the guilty plea and PCR hearing in an attempt to muddy the issue. However, it is immaterial to the question at hand whether the solicitor could have refused the trial judge's directive to offer a plea deal, whether defense counsel felt Petitioner had the information to make a voluntary decision on whether to plead, or whether the judge executed a perfect plea colloquy. As discussed in the Petition, in Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981), this Court adopted the ABA Standards for Criminal Justice, Standard 14-3.3, Pleas of Guilty, Responsibilities of the Trial Judge, to provide guideposts for judges to follow, which will ensure the judge's ability to participate in plea discussions while retaining both the fact and the appearance of his neutrality. 276 S.C. at 253–57, 277 S.E.2d at 694–95. Here, during an *in camera* hearing, the trial judge plainly instructed the solicitor to make Petitioner a plea offer. The judge violated the Standards (1) by not having a plea discussion on the record, and (2) by initiating the plea discussions himself. Trial counsel should have objected to the improper plea discussions. Failing to raise that objection constitutes ineffective assistance of counsel. Because trial counsel failed to object to the coercive plea proceedings, Petitioner's plea was coerced and was not "voluntarily, knowingly, and intelligently entered." Any other facts are irrelevant to the instant inquiry.

Further, even a perfect plea colloquy cannot cure the constitutional infirmities in this case. This Court has held that a plea colloquy can cure a defendant's **misconceptions** about the sentence based upon inaccurate advice of counsel. See Bennett v. State, 371 S.C. 198, 205, n.6, 638 S.E.2d 673, 676 (2006) ("Regardless, even where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range."); Burnett v. State, 352 S.C. 589, 593–94, 576 S.E.2d 144, 146 (2003) ("Regardless, any possible misconceptions on Burnett's part were cured by the colloquy during the actual plea hearing."); Stalk v. State, 375 S.C. 289, 300–01, 652 S.E.2d 402, 408 (Ct. App. 2007) *aff'd as modified*, 383 S.C. 559, 681 S.E.2d 592 (2009) ("Any possible misconceptions concerning his constitutional rights, the charges, or potential sentences on Stalk's part were cured by the colloquy during the essentially perfect plea proceeding conducted by the learned judge."). In this case, Petitioner does not complain about a misconception regarding his sentence; Petitioner complains that plea was desired, initiated, and urged by the judge. Such an infirmity in the plea proceeding cannot be cured by the colloquy. By initiating and driving the plea discussions, the judge created a coercive atmosphere such that Petitioner felt he had no choice but to accept the plea offer. In such a situation, a colloquy with the judge cannot reasonably be held to cure that coercion, and therefore the colloquy has no bearing on whether Petitioner's plea was freely and voluntarily made. Accordingly, this Court should grant the Petitioner's Petition for a Writ of Certiorari.

III. Trial counsel's ineffective assistance of counsel deprived Petitioner of a direct appeal to have the judge's error reviewed.

Respondent's arguments that trial counsel was not ineffective when he failed to file a direct appeal ignore the facts of this case and the applicable law.

First, Respondent misstates the facts regarding whether trial counsel consulted with Petitioner about filing a direct appeal. At the PCR hearing, trial counsel stated that he did not know if he discussed a direct appeal with Petitioner and that "no objection was raised in the plea colloquy itself." (App. p. 112, line 25 through p. 113, line 24.) He further testified that "if we don't raise an objection there's really nothing to appeal." (App. p. 130, lines 2–3.) This statement goes to the heart of Petitioner's argument—trial counsel **should have** raised an objection to the plea proceedings that violated established South Carolina law, and he **should have** filed a direct appeal on behalf of Petitioner. Failure to perform these two actions is ineffective assistance of counsel that prejudiced Petitioner by depriving him of his right to a trial by jury and his right to have the judge's error reviewed by an appellate court.

Petitioner's testimony accords with trial counsel's testimony in that Petitioner states when Petitioner asked trial counsel about a direct appeal, trial counsel said, "I don't see where the Court erred." (App. 149, lines 15–16.) The only testimony in this case is that Petitioner states he asked trial counsel about a direct appeal (App. 149, lines 4–16) and that trial counsel cannot recall if he discussed a direct appeal with Petitioner. Petitioner's assertions are uncontroverted evidence—trial counsel, the only other witness at the PCR hearing, offered testimony that supported Petitioner's assertions. Respondent's suggestion that only a "bare assertion" supports Petitioner's view is incorrect. In support of its position against accepting Petitioner's "bare assertion," Respondent offers the case of Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Bannister case, however, is completely inapposite as it concerns the burden a PCR applicant bears to establish prejudice from trial counsel's failure to call a witness at trial. That simply is not the issue in this case, and Bannister has no bearing on the issues raised in the Petition.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

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PROOF OF SERVICE

I certify that I have served the attached Reply to Respondent's Return to the Petition for a Writ of Certiorari on the below-named parties, at the addresses given, by depositing a copy in the United States Mail, postage prepaid, on this 16th day of January, 2014.

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