

2011-187207

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

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ISMAEL R. CRUZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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### ISSUE PRESENTED

Trial counsel erred in failing to object to and move for the withdrawal of petitioner's pleas after the solicitor recommended significant prison time at the plea sentencing because this was a violation of the plea agreement which included a promise that no sentencing recommendation would be made by the solicitor in the case.

## STATEMENT

Petitioner Ismael R. Cruz was convicted of incest, second-degree criminal sexual conduct with a minor, and two counts of first degree criminal sexual conduct with a minor during the April 2009 term of the Greenville County General Sessions Court before Judge John C. Few. Petitioner received an aggregate sentence of fifty-five years imprisonment. App. 1-35. Petitioner was represented by Richard Warder at the plea proceeding. Petitioner did not enjoy the benefit of a direct appeal in the case.

On October 1, 2009, petitioner filed a PCR application with Greenville County Office of the Clerk of Court. App. 37-46. The respondent filed a return dated December 29, 2009, requesting that a hearing be held in the case. App. 47-50.

A PCR hearing was held on November 16, 2010, at the Greenville County Courthouse before Robin B. Stillwell. Petitioner was represented by Caroline Horlbeck at the PCR hearing. App. 53-72. On January 14, 2011, Judge Stilwell issued an order of dismissal in the case. App. 74-80.

Petitioner appealed Judge Stilwell's order. This petition follows.

## ARGUMENT

Trial counsel erred in failing to object to and move for the withdrawal of petitioner's pleas after the solicitor recommended significant prison time at the plea sentencing because this was a violation of the plea agreement which included a promise that no sentencing recommendation would be made by the solicitor in the case.

Petitioner pled guilty to multiple criminal sexual conduct charges involving his daughter. App. 1-35. During the PCR hearing, petitioner's trial counsel testified that the plea agreement in the case was for the solicitor to have made "no recommendation" at sentencing in exchange for petitioner's guilty pleas to the state's charges, but that ultimately the solicitor reneged on the deal and asked the trial judge to give petitioner "significant" prison time. App. 63, l. 6 – p. 64, l. 10.

Petitioner testified at the PCR hearing as well. Petitioner explained in effect that the solicitor asked for a "severe sentence" at the plea proceeding and that he "didn't know that they were going to do that" i.e. ask for a "long" sentence. Petitioner stated that counsel promised that he would not "be sentenced for a long time." App. 68, l. 1 – p. 69, l. 6. Petitioner stated that if he known the solicitor had planned all a long to ask for along sentence, then he would not have pled guilty in the case. App. 69, ll. 7-10.

PCR counsel argued at the hearing that trial counsel erred in failing to object to and move for the withdrawal of petitioner's pleas because the state violated the plea agreement because despite the fact that no sentence recommendation was supposed to have been made in the case, nonetheless, the recommendation for a significant prison sentence was requested by the solicitor. App. 71, l. 20 – p. 72, l. 15.

The PCR judge found that counsel was not ineffective in this regard under the rationale that trial counsel “was not obligated to have made an objection” to the solicitor’s request for significant time at sentencing since “the assistant solicitor did not request a specific sentence or make a specific recommendation... [but] rather the assistant solicitor merely echoed the [sentencing] request of the investigating officer” in the case. App. 78-79.

During the plea proceeding, trial counsel explained the sentencing recommendation to the trial judge as follows:

The Court: Am I correct that there is no recommendation as to the sentence?

Solicitor: No, sir, Your Honor.

The Court: Mr. Warder [defense counsel]?

DEFENSE COUNSEL: There have been the dismissal of some charges. Though there’s been no plea bargain for a recommendation of any particular time.

App. 14, ll. 1-9.

Then, at sentencing, the assistant solicitor made the following comments:

Solicitor: The officer in this case did want me to relay to the court that this is one of the worse cases he’s ever worked. Lieutenant Ralph Bobo wanted to be present. He had an out of town engagement that was planned previous to this court date being planned. But he did want me to relay to the Court that he wants significant time.

App. 27, ll. 6-16.

Your Honor, one last thing I wanted to put on the record, the fact that the State is making no recommendation, I did not want that in any way to reflect that the State does not believe this deserves very significant time. The defense did not want the State’s recommendation in this case and asked to go without it. But the State naturally would be requesting very significant time on this case. App. 34, l. 20 – p. 35, l. 3.

As a rule, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); Santobello v. New York, 404 U.S. 257 (1971). Therefore, counsel must object if a breach of the plea agreement occurs at the plea proceeding. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009); Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007); Sprouse v. State, 355 S.C. 335, 585 S.E.2d 278 (2003).

In Thompson v. State, *supra*, the Court held that trial counsel erred in failing to object to the solicitor's recommendation for the maximum sentence of thirty years at sentencing in exchange for the defendant's guilty plea to voluntary manslaughter because the plea agreement reached included the solicitor's promise that there would be no specific recommendation requested in the case. The Thompson Court held that the plea agreement was violated and prejudice resulted because the defendant would not have pled guilty if he had known that the solicitor was going to request the maximum sentence for him. See also State v. Jordan, *supra*, where the Court held that counsel was ineffective in failing to move for the withdrawal of the defendant's guilty plea where even though the plea agreement included the solicitor's promise to neither oppose nor recommend probation in exchange for the defendant's plea; nevertheless, he (solicitor) recommended against probation at sentencing in the case. Also, in Jordan, the defendant was prejudiced because he would not have pled guilty had he known the solicitor planned to violate agreement. Compare Sprouse v. State, *supra*, where counsel was found ineffective in failing to object to the state's failure to honor the original plea agreement in the case. In Sprouse, the solicitor's classification of the defendant's second-degree burglary offense as violent deviated from the plea agreement. Also, compare

Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007), where the Court found counsel ineffective in failing to have the plea agreement between the defendant and the solicitor’s office enforced, particularly where the defendant relied on the same to his detriment.

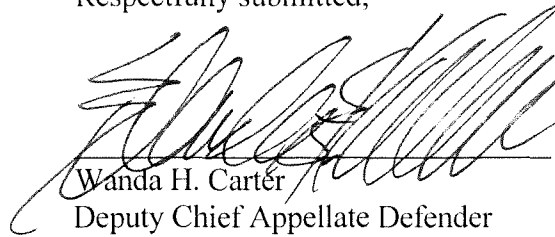
In the case at bar, the solicitor at three intervals specifically requested that petitioner’s sentence contain “significant time.” Clearly, this was in direct contravention of petitioner’s plea agreement that no sentencing recommendation would be made by the solicitor in the case. Note that the solicitor admitted and apprised the trial judge that there would be no sentencing recommendation put forth, but then went on to boldly and blatantly violate the agreement and ask for a significant prison sentence to be given to petitioner. The failure of the solicitor to mention a “specific” sentencing recommendation, and the fact that minimum and maximum sentencing ranges were explained to petitioner, can neither vitiate the violation of the agreement nor nullify counsel’s error in failing to object to the violation of the plea agreement. Finally, petitioner was prejudiced because he stated clearly that he would not have pled guilty to the charges if he had known that the solicitor would request the imposition of significant prison time for him.

Trial counsel’s error in failing to object to the state’s violation of the plea agreement and in failing to move for the withdrawal of petitioner’s pleas constituted deficient performance in violation of petitioner’s Sixth Amendment right to effective assistance of counsel at his plea proceeding. See Hill v. Lockhart, 484 U.S. 52 (1985). But for counsel’s error, petitioner would not have pled guilty to the state’s charges in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24<sup>th</sup> day of October, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge  
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ISMAEL R. CRUZ,

PETITIONER,

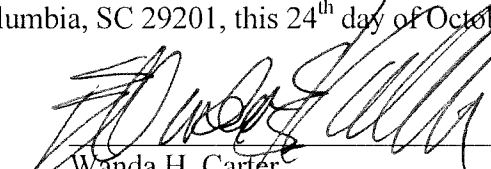
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE  
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24<sup>th</sup> day of October, 2011.

  
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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24<sup>th</sup> day  
of October, 2011.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.