

Douglas Thompson
Petitioner

v.

State of South Carolina
Respondent

State of South Carolina
In The Supreme Court
County of Richland

Petitioners second
Motion to Amend

J. Ernest Kinard Jr., Case# 2012-211296
Circuit court Judge

Violation of Substantial Rights
Based on Plain Error

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S.C. SUPREME COURT

Introduction

Petitioners sentence sixth Amendment right to effective assistance of counsel was violated by his attorney's failure to object the constitutionality of section 16-3-655 of the South Carolina code, thereby rendering his guilty plea unknowing and involuntary.

Argument

Petitioner contends in his first allegation that he was denied effective assistance of trial counsel, when counsel abandoned meritorious objections to the guidelines calculations in favor of an alternative calculation of the guideline range. Consequently, petitioners sentence was enhanced under 16-3-655; A fact that was determined by the judge and based on the preponderance of the evidence, rather beyond a reasonable doubt.

Petitioner also contends that the sentence - appeal waiver in his plea agreement should not be enforced and that his sentence is unreasonable because the trial court applied a presumption of reasonableness to a within-guidelines sentence and failed to properly consider relevant mitigating factors; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). When there has

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been a guilty plea, the petitioner must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 99 L. ed. 203 (1985).

Petitioner argues in his second allegation that his guilty plea was not voluntary because he was not informed of and did not understand every element of the offenses and because the factual bases were insufficient to prove every element of the offenses. Because petitioner did not raise this issue at trial or direct appeal; however, this "review" is only for Plain Error. See *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009). To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L. ed. 2d. 274 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E. 2d 391 (1991).

In determining a guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the hearing. *Harris v. Leake*, 282 S.C. 131, 318 S.E. 2d 360 (1984). See Petitioner's trial Transcript Appendix page eleven, numbers twelve through fifteen, also page nineteen, numbers eight through fifteen.

Petitioner contends that he was not informed of and did not understand every element regarding the penalty enhancement value of his prior burglary 3rd under 16-11-311; and thus, the government was required to specify each of the elements in the indictment and to prove the element beyond a reasonable doubt to a jury, and the court did not inform petitioner of this element of the offense. See also *United States v. Johnson* 381 F. 3d. 506, 508 (5th Cir. 2004); and *United States v. Hooker*, 997 F. 2d 67, 74 (5th Cir. 1993); describing this as a "crucial element" offense.

By not informing petitioner of this as a crucial element of the offense, the court erred by failing to inform petitioner of, and ensuring that he understood, the nature of the charge, in violation of federal rule of criminal procedure 11(b)(1)(G); Additionally, the court erred in accepting petitioners guilty plea because there was an insufficient factual basis to support petitioners guilty plea as to this element of the offense, United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992). If he was not properly advised: "The factual basis cannot be implied from the fact that the defendant entered the plea, but must appear on the face of the record and must be precise enough and sufficiently specific to demonstrate that the accused the charged criminal offense". In light of the record as a whole and Johnson and Hooker, these errors are clear and obvious. Further, these errors affected petitioners substantial rights, see United States v. Dominguez Benitez, 542 U.S. 74, 80-83 (2004).

Persuant to Plain error Review, these errors seriously affected the fairness integrity of public reputation of judicial proceedings in light of Rule 52(b) of the Fed. R. Crim. of Procedure. And that had he been properly advised, he would not have entered a guilty plea to criminal sexual conduct second degree with a minor. Further, trial counsel Jay Cooper was unprofessional and in error for failing to object, "petitioners sixth amendment right to challenge the constitutionality of section 16-3-655 of the South Carolina code, thereby rendering his guilty plea unknowing and involuntary; to the penalty enhancement value of his prior burglary and larceny at sentencing without proof beyond reasonable doubt to a jury. See in petitioners trial transcript Appendix page eleven, numbers twelve through sixteen, that Margaret Fent Attorney Solicitor mentioned also page nineteen, numbers eight through fifteen included a remark from petitioners attorney; Therefore constitutes deficient performance under Strickland v. Washington, 104, S. Ct. 2052. further, trial counsel was in error in advising and coerced defendant to pled guilty to criminal sexual conduct second degree to enhance penalties under 16-11-311 as a "repeat offender" which was improper,

Had his attorney prepared such a defense, then petitioner would not have pled guilty and would have proceeded to trial. "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). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010).

In addition to proving that counsel's advice was erroneous, the defendant must also prove that he was prejudiced by counsel's erroneous advice. Petitioner was prejudiced by his attorney's failure to research and prepare a defense based on the unconstitutionality of section 16-3-655 of the South Carolina Code as it applied to him. *Strickland v. Washington*, 466 U.S. 668 (1984). The prejudice to the defendant in this case is clear. The improper classification as a "repeat offender" at sentencing resulted in a significantly greater sentence; an eight year sentence. As the prejudice element of *Strickland*, is satisfied. Thus, these errors also effected petitioner's substantial rights. Pursuant to Plain Error review, these errors seriously affected the fairness integrity of public reputation of judicial proceedings in light of Rule 52(b) of the Fed. R. Crim. Proc. See petitioner's trial transcript page nineteen, numbers fourteen and fifteen. See *United States v. Dominguez Benitez* 542 U.S. 74, 80-83 (2004); See also *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); "A guilty plea.... cannot be truly voluntary if the defendant has such an incomplete understanding of the charge that his guilty plea cannot stand as an intelligent admission of guilt." (quoting, *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1975)).

Nevertheless, the allegation of the applicant not having pled guilty knowingly, voluntarily, and intelligently raises questions of fact which may not be conclusively refuted by the record. To correct these errors in this case, petitioner contends that the court should vacate his plea and convictions and remand for entry of a new plea. See *Puckett* 129 S.Ct. at 1429. See also *United States v. Hall*; 110 F.3d 1155, 1162 (5th Cir. 1997). Therefore, an evidentiary

hearing should be held to resolve this issue. *Shapper v. State*, 279 S.C. 264, 305 S.E. 2d 247 (1983).

Conclusion

For the foregoing reasons, the petition for certiorari should be granted to withdraw the plea with the ultimate relief of a new plea.

Respectfully Submitted,
Douglas Thompson
Douglas Thompson
Petitioner

SWORN to and subscribed before me this
21st day of April, 2014.
Ernie Hays (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

SCDC

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MAIL ROOM

State of South Carolina
County of Richland

Douglas Thompson
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Respondent

In the Supreme Court
Case# 2012-211296

Certificate of service by Mail

1. I am the above named Douglas Thompson in the above captioned action.
2. Regular communication by mail exists throughout the state of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Petitioner's second Motion to Amend.
4. In the above-captioned matter on the following person(s) by depositing in the United States Mail Postage Prepaid:

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Dated this 21 day of April 2014.

Respectfully Submitted,

Douglas Thompson
Douglas Thompson

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