THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2014-000694

Rikam Ikkesh Dozier, #334052 Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in the underlying proceedings by finding that the cumulative effect of trial counsel's errors in failing to establish neither counsel nor petitioner had a full understanding of the consequences of his plea and the charges against him, failing to provide full and fair representation of petitioner's rights under counsel's Constitutional obligation, and failing to investigate the petitioner's mental capacity which resulted in prejudice to petitioner?

STATEMENT OF THE CASE

On February 27, 2008, petitioner was arrested for Armed Robbery, Conspiracy and Kidnapping. On April 2, 2009, plead guilty to Armed Robbery and received a sentence of fifteen (15) years. On advice of counsel no direct appeal as filed. Petitioner then brought this action seeking post-conviction relief in March 2010. He alleged trial counsel's representation fell below a reasonable professional standard including multiple errors regarding his representation. A hearing was held before Judge Dickson on November 15, 2012, in Lexington County in which testimony, memoranda, case law, exhibits, and arguments of counsel were heard. The circuit court issued an email outlining its findings on July 1, 2013, and an Order denying the application on February 5, 2014, a motion to reconsider was filed on February 18, 2014, and subsequently denied on March 13, 2014. A notice of appeal was served on April 2, 2014. Petitioner new seeks a writ of certiorari to review this denial.

ARGUMENT

1. COUNSEL WAS INEFFECTIVE IN FAILING TO ESTABLISH NEITHER COUNSEL NOR PETITIONER HAD A FULL UNDERSTANDING OF THE CONSEQUENCES OF HIS PLEA AND THE CHARGES AGAINST HIM, IN FAILING TO PROVIDE FULL AND FAIR REPRESENTATION OF PETITIONER'S RIGHTS UNDER COUNSEL'S CONSTITUTIONAL OBLIGATION, IN FAILING TO INVESTIGATE THE PETITIONER'S MENTAL CAPACITY RESULTING IN CUMULTIVE ERRORS

"The Court is concerned that the cumulative effect of these errors of counsel may have prejudiced the Applicant. However, our Courts have not recognized cumulative errors of counsel as cognizable grounds for relief under the PCR Act." (App. p. 183) In his email, the PCR judge found numerous instances of ineffective assistance of counsel the combination of which prejudiced the Applicant." (App. p. 183) The PCR judge found counsel ineffective in failure of counsel and applicant to understand potential sentencing range at the time of his guilty plea, in failing to fulfill his Constitutional obligation to provide full and fair representation, including preparing for the possibility of trial, and to fully explore applicant's mental capacity combined with his age. (App. p.183)

The PCR judge applied the proper standard in granting post-conviction relief at the time of his decision because the South Carolina judiciary has not affirmatively adopted a cumulative analysis. The Court had the opportunity to address the issue in a recent decision, but declined to do so because the case was decided on other grounds. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). The PCR judge cited several cases wherein the issue has been in front of the Court, but yet to decide the issue. In Green the South Carolina Supreme Court wrote, "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), Compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation of errors warranted reversal, but Court also found each individual error caused

prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together)." 351 S.C. at 197, 569 S.E.2d at 324. The PCR judge incorrectly found that, in this case, the multiple errors by trial counsel denied respondent the right to adequate representation.

In Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002), the Court wrote, "While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors." In Green the Court found that multiple errors did not exist to support cumulative prejudice. In contrast, trial counsel in the present case committed multiple errors and also demonstrates prejudice based on the cumulative effect of counsel's other multiple errors, as incorrectly found by the PCR judge.

First, to find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. He must also have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E. 2d 391 (1991) (citing State v. Hazel, 287 S.C. 392, 271 S.E. 2d 602 (1980)). To ensure the defendant understand the consequences of his guilty plea, the court asks about the punishment imposed. Id., at 435, 405 S.E.2d at 392. The record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225, S.E. 2d 340

(1976). Here, Dozier was indicted for and plead to one count of armed robbery which carries 10-30 years. In the plea transcript, the Judge indicated he could have received a minimum of 30 years to a maximum of 90 years, even though he was never charged nor indicted for more than one armed robbery. (App. p. 29, lines 15-16) At the PCR hearing, when asked what the negotiations were, counsel testified that several kidnapping charges were dropped. (App. p. 66-67, lines 24-1) On cross when asked about Dozier's charges and subsequent indictments, counsel admitted that Dozier was only ever charged with armed robbery, conspiracy, and kidnapping, however the kidnapping charge was not true billed by the grand jury. (App. p. 71, lines 1-23).When questioned if Dozier understood his penalty, which Dozier understood in his mental evaluation to be 15 years, counsel "let the documents speak for themselves" (App. p. 74, lines 3-12). Counsel failed to provide an explanation as to why he didn't correct the plea Judge when he said Dozier was facing 30-90 years. (App. p.75, lines 7-22) Additionally, counsel could not explain why he wrote a letter to Dozier after the plea explaining he was facing 90 years. (App. p. 76, 84-85, lines 13-23, p.) Dozier testified that counsel told him the maximum he was facing was 15 years. (App. p. 83-84, lines 23-2) Dozier said that counsel encouraged him to take the plea which was 10 years or his case would go to trial. (App. p.84, lines 14-23) Dozier testified counsel advised him not to appeal because he was facing 90 years. (App. p. 85, lines 7-19, p. 86, lines 12-15) Dozier testified about his prejudice of not knowing what he was facing and was even told he would receive 10 years. (App. p. 88, lines 5-16) The U.S. Supreme Court has left no doubt that plea negotiations are important elements of client representation for purposes of the Sixth Amendment right to effective counsel. Missouri v. Frye, 132 S. Ct 1399, 1407 (2012), see, e.g., Hill v. Lockhart, 474 U.S. 52 (1985). Communicating the proper information to the defendant is critical to an intelligent plea. When counsel advises his client as

to any plea offers "on the table," his or her guidance and legal conclusions must be completely competent in order to reach the standard of effective assistance. In Lafler v. Cooper, decided the same day as Frye, the U.S. Supreme Court held that defense counsel's legal advice conveyed to a defendant during the plea process must be legally sound and accurate. Lafler v. Cooper, 132 S. Ct. 1376 (2012). While the Frye Court did not directly decide the prejudice issue, the S.C. Supreme Court held in Davie v. State that the petitioner was prejudiced by his plea counsel's deficient performance in failing to convey a 15-year plea offer from the solicitor. Davie, 381 S.C. at 617, 675 S.E.2d at 424. The petitioner received a sentence of 27 years and only learned of the 15-year plea offer two years after he pled guilty. The Court concluded that the petitioner had established prejudice because the solicitor and plea counsel both acknowledged the original plea offer. Here, the solicitor acknowledged in the plea that he did not oppose the minimum 10 years (App. p.9, lines 15-20, p.15-16, and lines 23-2) and that was communicated to Dozier who indicated that is what he understood the plea agreement to be. Had Dozier known he would receive more than 10 years, he indicated he would not have gone forward with the plea. (App. p. 85, lines 5-11) Sentencing questions are involved in all plea discussions between defendants and defense counsel. While the U.S. Supreme Court has not issued a formal opinion on the question of whether a defendant receives ineffective assistance if defense counsel provides incorrect sentencing information during a plea, the Court's holdings in related ineffective assistance cases indicate a willingness to expand the scope of the Sixth Amendment.

Second, counsel's approach to criminal representation conflicts with his Constitutional obligation to provide full and fair representation. The Sixth Amendment right to counsel requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." This is so whether the defendant's counsel

is appointed or retained. Am. Jur. 2d, Criminal Law § 1223. Another issue is how much factual discovery and investigation regarding the matter is needed before defense counsel can give competent advice and a defendant can make a knowing and intelligent plea? Chief Justice Toal has recognized this potential issue and discussed the same in a memorandum dated March 1, 2004. Justice Toal stated her belief that conditioning a plea agreement on relinquishing the right to discovery is unethical and "is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on a claim that the plea was not voluntary because the applicant did not have access to the solicitor's file." Memorandum from C. J. Jean Hoefer Toal on Plea Agreements and Discovery (March 1, 2004). This memorandum was directed to "All Solicitors," but it raises questions as to defense counsel's ethical obligations if such a plea agreement is proposed, and suggests that the failure to properly review the solicitor's file prior to advising a client regarding a plea deal could create issues as to future claims of ineffective assistance of counsel. The phrase "effective assistance of counsel" has been characterized as an elusive term, difficult if not impossible to define precisely or all-inclusively, which must be equated to the facts of each case. In offering definitions, the courts have tended to speak in terms of what effective assistance is not, rather than in terms of what it is. Thus, it has been said that effective assistance of counsel is not flawless, perfect, or error-free assistance, nor assistance that in hindsight is deemed ineffective, but is, rather, competent representation, that is, representation that is within the range of competence demanded of attorneys in criminal cases generally. A defendant has the right to make a decision to plead not guilty, he also has the right to make the decision to plead guilty, but an attorney must explain all the possibilities to the client for him to make an informed decision. Although due process under the 14th Amendment tolerates variances in procedure appropriate to the nature of the case, it is nonetheless possible to identify its core

goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266-67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S. Ct. 1579 (2000) (amendment of judgment to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute). The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

Here, counsel explains his unique approach to criminal cases which does not seem to comport with constitutional requirements. (App. p.65, lines13-22) Counsel stated that it was his job as a criminal defense attorney to "find a fair and just punishment." (App. p. 68, lines 16-22) He also admitted to Judge shopping. (App. p.67, lines 7-14) It is unclear from the record if Dozier understood what Constitutional rights he was waiving by agreeing to hire counsel.

Lastly, if there is any question of the mental competency of the defendant to plead, the court should make a specific finding of fact in that regard. Counsel was not aware that he could

petition the Court for a hearing to have Dozier's charges waived down to Family Court due to his age. Additionally, counsel requested that Dozier by evaluated because "the defendant's mental state at the time of the alleged crime will likely be at issue." (App. p 109) Counsel admitted to having "red flags" regarding Dozier's competency. (App. p. 24,lines 14-24) It is obvious that counsel did not read the report since it contained obvious errors as to Dozier's understanding of his crimes and penalties. (App. p.116) Counsel admitted that he did not raise Dozier's competency after having him evaluated. (App. p.78, lines 5-16) Dozier testified he did not understand the differences with Family Court and General Sessions. (App. p.83, lines 1-9)

The language of the Strickland opinion suggests that the Supreme Court anticipated that appeals would involve multiple claims of deficiency by counsel and that courts should review the resulting prejudice cumulatively. John H. Blume & Christopher Seeds, Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1165 (2005). Strickland provides an almost "insurmountable test" Martin C. Calhoun, Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 GEO. L.J. 413, 414-15 (1988) for criminal defendants attempting to prove ineffective assistance of counsel. Id.; see also Strickland v. Washington 466 U.S. 668, 687 (1984). The Strickland test is often criticized by legal commentators as being the "foggy mirror" test, under which "[if] you place a mirror in front of defense counsel during trial and it fogs, counsel is in fact effective." JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 1010-11 (4th ed. 2010) (quoting RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS, TEACHER'S MANUAL 148 (1995)) (internal quotation marks omitted). Giving credence to this criticism, a survey of over 37,000 cases that included

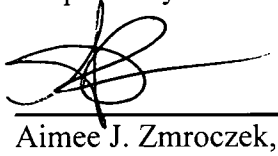
challenges to convictions for ineffective assistance of counsel shows that lower courts applying Strickland have found that almost all defendants (97%) have received constitutionally adequate representation. See Id. at 1015. The odds are against challenges for ineffective counsel primarily because of the U.S. Supreme Court's firm directive that "[j]udicial scrutiny of counsel's performance must be highly deferential" to the professional soundness of defense counsel's conduct at trial. Strickland, 466 U.S. 668, 689 (1984). Indeed, to prevail under Strickland, criminal defendants must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

The PCR judge incorrectly found that the cumulative effective of trial counsel's errors independently established prejudice and deprived Dozier of the right to adequate counsel. The PCR judge's finding that Dozier was not prejudiced by the cumulative effect of multiple errors committed by trial counsel is not supported by the record. The finding of the PCR judge must be reversed.

CONCLUSION

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

Respectfully submitted,



August 18, 2014.

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PROOF OF SERVICE

On this day, August 18, 2014, the undersigned did serve by placing a copy in the United States Mail with proper postage affixed a copy of Petitioner's Writ of Certiorari and Appendix on opposing counsel addressed as follows:

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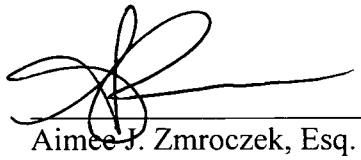

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August 18, 2014

The Honorable Daniel Sherouse, Clerk
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Post Office Box 11330
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RE: Rikam Ikkesh Dozier #334052 v. State of South Carolina
Case No.: 2014-000694

Dear Mr. Sherouse:

Enclosed please find an original plus six (6) copies of the petition of writ of certiorari, two (2) copies of the Appendix, and proof of service showing Petition and Appendix have been served on opposing counsel. Please clock in all copies and return one copy to this office.

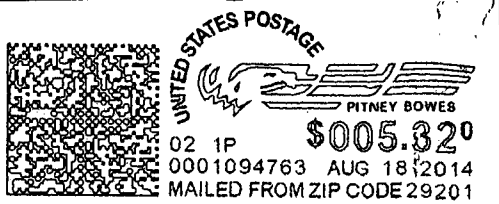
If you have any questions, please give me a call. Thank you for your assistance in this matter.

Best regards,

Aimee J. Zmroczek

Enclosures

cc: J. Walt Whitmire (with enclosures)



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