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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000966

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The state posits that the plea court's statements to Petitioner cured the deficient performance by plea counsel thereby preventing a finding of prejudice. In other words, the state suggests that although plea counsel (who was admittedly deficient) did not recognize the discrepancy and misunderstanding in sentencing, Petitioner, a layman, should have understood what the judge actually meant. It is axiomatic that because the PCR court concluded that the plea court's colloquy clarified the misunderstanding as to Petitioner's beliefs, plea counsel should have known to act to withdraw the plea. It cannot be true that 1) the plea judge's remarks cured the misunderstanding and deficient advice *and* counsel was not deficient for failing to move to withdraw the plea. It is illogical to suggest that Petitioner should have known about the sentencing discrepancy but his attorney was allowed to ignore the misadvice he had previously given. Additionally, the current conclusion that Petitioner is foreclosed from proving prejudice simply because he raised alternate grounds for PCR belies both reason and the law in this arena.

Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "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)(internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional

assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984).

"[W]hen a [petitioner] claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, [he] can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " Lee v. United States, 137 S.Ct. 1958, 1965, 198 L.Ed.2d 476 (2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

The state suggests that Robinson v. State, 422 S.C. 78, 810 S.E.2d 32 (2018) somehow prevents a finding of prejudice based on the alleged cure by the plea judge. In Robinson, this Court reversed the PCR court's denial of relief and held that 1) trial counsel's advice regarding a plea was deficient performance; 2) prejudice was suffered; and 3) the plea colloquy did not cure the deficiency or remove the prejudice. Id.

The following language from Robinson is equal parts noteworthy and applicable to Petitioner's case: "The record is clear that Petitioner placed particular emphasis on his potential sentencing exposure in deciding whether to plead guilty." Id. at 87, 810 S.E.2d at 37; App. 70 ll. 3 – 9. Additionally, as it relates to the state's suggestion that the plea judge's remarks cured the deficient performance, this Court held that the **brief** portion of the colloquy that mentioned sentencing "did nothing to clarify the proper sentencing range." Id. at 88, 810 S.E.2d at 37-8. The colloquy in Robinson as noted in the opinion read as follows:

> The Court: Okay. You're up here on this indictment. And it is 2013-674. It alleges that you did in Greenville County between July 1, 1998 and July 31 of 2000 commit a sexual battery on T.H., who was less than eleven years of age. CSC with a minor, first degree, twenty-five years to life.
>
> [Plea Counsel]: Judge,—

The Court: Do you understand that?

[Solicitor]: *Your Honor, this was pre the law changes back in '98 and 2000. The sentence was zero to thirty years.*

The Court: *Thirty years, okay.* Still considered a most serious offense.

[Solicitor]: Yes, sir.

The Court: If you get convictions for two or more most serious offenses you're eligible for life in prison without parole. It's a violent offense, which means you will basically do a minimum eighty-five percent of the sentence. You understand that?

[Petitioner]: Yes, Your Honor.

The Court: All right. Understanding the nature of the charge against you and the maximum possible punishment, how do you want to plead?

[Petitioner]: Guilty, Your Honor.

Id., 422 S.C. 78, 83, 810 S.E.2d 32, 35 (2018) (emphasis in original).

According to this Court in Robinson, "[a]t issue here is whether Petitioner truly understood the sentencing range and maximum penalty he faced for the charge." Id. at 88, 810 S.E.2d at 37. See Pittman v. State, 337 S.C. 597, 524 S.E.2d 623, 624-25 (1999). This Court held that in order for "a plea hearing to cure deficient advice, the plea hearing must **unambiguously address and resolve the correct advice.**" Id. at 88, 810 S.E.2d at 38 (emphasis added). See United States v. Akinsade, 686 F.3d 248, 255 (4th Cir. 2012) (recognizing, "in order for a district court's admonishment to be curative, it should address the particular issue underlying the affirmative advice"). That did not occur in Robinson, and it did not occur here, either.

In the instant case, Petitioner was told by the plea judge "this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison.: App. 7 ll. 14 – 16. The state correctly cites to additional language mentioned

by the plea judge although the undersigned disagrees with the characterization that it was "abundantly clear." Return at 17. The plea judge told Petitioner "if I impose the 35-year sentence you're going to have to serve the 35-year sentence." App. 8 ll. 12 – 14. This statement does not clarify that Petitioner is going to have to serve the entire sentence. That determination is never mentioned at the plea. The only information Petitioner was given regarding the actual duration of his confinement came from his attorney who the PCR court found deficient in that regard.

Additionally, Petitioner was advised of the various possibilities that could occur at the plea. The plea judge told him that he was "not obligated to accept this negotiated sentence." App. 7 ll. 2 – 12. Further, if Petitioner was to plead without a negotiated sentence or if he went to trial; Petitioner could be sentenced to life without parole or even the death penalty. Id.

Petitioner was provided with an abundance of information in a short timetable. He relied on the advice given to him by his attorneys leading up the plea. The PCR court noted that even plea counsel was bewildered:

> **At the evidentiary hearing, Hilliard acknowledged that the above exchanges and replied that he did not realize the statements of the plea court meant Applicant would have to serve "day-for-day" rather than 85% of the sentence.** Hilliard continued by explaining that the Department of Corrections habitually utilized "different languages" such that he believed that an 85% sentence was tantamount to a day-for-day sentence. Hilliard opined that the best practice was likely to not tell clients what percentage of their sentence they could realistically expect to serve.

App. 123-124 (emphasis added). Notably, the Order of Dismissal mentioned that the PCR judge "passed upon [witness'] credibility" but did not contain any credibility findings. App. 119.

The Order of Dismissal also contains a curious footnote regarding Petitioner's testimony. App. 125 n. 3. The PCR Court suggests that Petitioner offered three reasons for pleading guilty: 1) because he was guilty; 2) because he was told he would be eligible for early release after

service of 85% of the sentence; and 3) because Hilliard did not have enough time to prepare the case for trial. Id. The author of that footnote failed to recognize that all three reasons could be true at the same time. The law does not require that a criminal defendant plead guilty for only one reason, especially when multiple reasons are not mutually exclusive.

This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

Furthermore, counsel was deficient for failing to move to withdraw the Petitioner's plea. As mentioned, counsel was deficient for failing to advise Petitioner correctly about his sentence. The state would put the burden on Petitioner, therefore, to notify his admittedly deficient attorney of the discrepancy and to request a motion to withdraw the plea. Return at 19 ("Because Petitioner never raised his concerns to counsel, his counsel cannot be deficient for failing to move to withdraw his guilty plea.").

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the

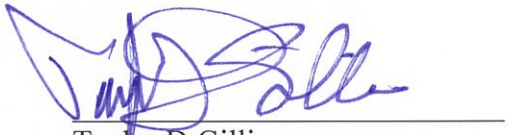
transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

In Rolen v. State, this Court held counsel was deficient in failing to move to withdraw Petitioner's guilty plea. 384 S.C. 409, 683 S.E.2d 471 (2009). Rolen requested a jury trial and only decided to plead guilty after counsel advised him that the impaneled jury would likely find him guilty. Petitioner repeatedly asserted his innocence during the plea hearing before the plea judge sentenced him. This court held that "at this point in the hearing, it was clear that Petitioner wanted to withdraw his guilty plea." Id., 384 S.C. 409, 413, 683 S.E.2d 471, 473–74 (2009).

Due to counsel's failure to move to withdraw the plea, the plea judge was not able to exercise his discretion. Further, even if the plea judge had denied the motion to withdraw, Petitioner could have raised the issue on direct appeal.

CONCLUSION

For the reasons set forth herein for in the Petition for Writ of Certiorari, Petitioner respectfully requests this Court grant certiorari to allow full briefing on the issues raised in his Petition.



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This 16th day of July, 2021.