

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Scott Sprouse, Presiding Judge

Case No. 2021- 000416

Seth Fleury,

Petitioner,

vs.

State of South Carolina,

Respondent.

REPLY

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S.C. SUPREME COURT

ARGUMENT IN REPLY

Petitioner's trial counsel was constitutionally ineffective when he recommended Petitioner enter an open plea in light of the fact that the assistant solicitor, law enforcement, and the victim were demanding a high sentence and where trial counsel erroneously and unreasonably advised Petitioner that he would get either house arrest or a short prison sentence which was not plausible given the circumstances.

In its return, the State misconstrues Petitioner's claim of ineffective assistance of counsel. Petitioner has not alleged that his lawyer failed to inform him of the maximum sentence he could face if he pleaded guilty. Return, p. 9, 12. Petitioner also disagrees with the State's argument Petitioner has not shown he would have proceeded to trial but for his counsel's ineffective advice. Because the PCR court committed an error of law, Petitioner asks this Court to grant his petition for a writ of certiorari.

Petitioner raised the following claim which the PCR court addressed in its order: "Applicant has failed to prove that plea counsel was constitutionally ineffective for advising Applicant that, if Applicant pleaded guilty, the worst possible outcome that Applicant could expect would be for him to be sentenced to imprisonment for two or three years."

App. 209.

The Order then states Petitioner failed to prove any deficiency "in plea counsel's advice to Applicant about the maximum possible penalty to which [Petitioner] would be exposed by pleading guilty." App. 211.

To be clear, Petitioner's claim is not that trial counsel misadvised him as to the possible penalty to which he could have been subjected in this case. His claim is that trial counsel *led him to believe*, even in light of the assistant solicitor's asking for a 15-year sentence and the outrage of the victim's family, that he would likely only receive a minimal sentence. Given trial counsel's unreasonable advice, Petitioner was unable to meaningfully consider whether to plead guilty or

exercise his constitutional right to a trial. Trial counsel's advice was unreasonable and his performance was ineffective.

The PCR record shows plea counsel rendered ineffective advice by affirmatively telling Petitioner and his family that he was likely only looking at home incarceration¹ or three years in prison at the most. The PCR court errs in holding this is not ineffective assistance of counsel:

“This Court finds that Applicant has failed to prove that plea counsel’s advice to Applicant that Applicant’s sentence likely would consist of three years in prison at the most was deficient. Applicant testified that plea counsel told him that the sentence imposed upon him would likely fall between a lengthy period of home incarceration and three years in prison. Banks’ (Petitioner’s mother) testimony confirmed that this was her expectation, too, based upon plea counsel’s advice. Plea counsel’s testimony was that he told both Applicant and Banks that, in his professional judgment, the sentence imposed upon Applicant would likely fall between a lengthy period of home confinement and three years in prison. There is no dispute between the three witnesses that this was plea counsel’s advice to Applicant about the expected outcome of the guilty plea hearing.”

App. 213-214.

The State’s argument appears to be that, so long as a Petitioner knows the statutory range for a particular sentence, plea counsel cannot render ineffective assistance even if he expressly leads his client to believe his punishment will be minimal compared to the statutory exposure. With all due respect, that argument is without merit.

Defendants have counsel precisely so they can obtain reasonable advice. A criminal defendant relies on counsel to do more than simply inform him of the statutory range of the penalty. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) (recognizing the criminal defendant's need for the "guiding hand of counsel at every step in the proceeding against him."). While it is true that neither

¹ It is not at all clear that home detention would even have been a legal sentence in this case. *S.C. Code Ann.* §16-3-600(B)(1)(2) states "a person who violates this subsection is guilty of a felony and, upon conviction, *must be imprisoned* for not more than twenty years" (emphasis added). ABHAN is designated as a "violent crime" in South Carolina. *S.C. Code Ann.* §16-1-60.

Petitioner, nor any other criminal defendant, is entitled to know exactly what his ultimate sentence will be, counsel still has an obligation to offer advice that is not wholly, and unreasonably, inaccurate. This is not a case where counsel informed his client he would likely receive a 5-year sentence and then Petitioner received 10 years. Here, counsel led his client to believe that he would most likely receive **home detention**, even though he knew the assistant solicitor would be requesting a 15-year sentence and the victim's family was extremely vocal and upset about the crime.² Plea counsel described how he came up with his opinion:

“Again, based on everything that my experience, his lack of a prior record. The fact that this was, you know, other than the injury itself, I didn’t think it was an aggravated crime in the sense that he wasn’t stalking her, you know, it wasn’t a burglary attempt. It wasn’t a kidnapping. It literally was a ten second incident. Ten seconds. Of a mistake. And he was a good—he was a great employee. He had 20 people or so there on his behalf telling what a good person he was. And setting up the context of how he had never been violent towards her. That he had always spent time with her at his house, his grandparents house. And that nobody had ever seen anything like that. Even remotely close to that. In fact, the opposite. He was—he would give the shirt off his back. And I thought with all those things, despite her injury, because I’d seen, like I said, many cases where injuries are terrible, awful and a long lasting and repeat offenders and they don’t get anything close to that. So that was my—how I came up with my professional opinion.”

App. 138, l. 14 -39, l. 8.

Counsel further testified that he told his client he should not accept a plea offer for 15 years, “[b]ecause I thought, and I told him this multiple times, I think if you go to trial and you’re found guilty, you’re going to get, you know, not much worse than 15 years, maybe even less.” App. 140, ll. 12-15.

² The victim's mother recounted to the Court that her daughter, at the time of the plea, was still unable to eat food whole, and that she was forced to withdraw from college. She lost her scholarships. The mother also described how her daughter has to struggle to get out of bed every morning and that she has nightmares and flashbacks of the incident. Her mother said, "She live[s] in constant fear." App. 15. The victim told the court she would never "wake up living a normal life again." App. 20. At the end of the victim's colloquy, the solicitor indicated the State believed a 15-year sentence was appropriate. App. 26-27.

Again, he testified it was his professional opinion that Petitioner would get a “light” sentence. App. 142, l. 3. While it is true there were a number of mitigating factors on Petitioner's behalf, trial counsel's leading Petitioner to believe that the presiding judge was likely going to sentence Petitioner to home detention was shockingly unreasonable under the facts of this case. But for trial counsel's unreasonable advice, Petitioner would have elected to exercise his right to a jury trial.

“[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 (2017) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Petitioner testified that, had he known he would receive a 12-year sentence, after his lawyer told him he might get home detention or two to three years, he would have taken his case to trial. App. 98. He explained why he pleaded guilty:

I was advised to go in there [audio distortion]. Mr. Bondurant told me to do everything that the Judge [audio distortion]. Said go in there, say yet to everything, just own up to it. The reason why I did all these things is because my lawyer told me not—he told me that going to trial, that it would look terrible. How I just tried to explain it to you. And he said just own up to it, I don’t see any Judge giving you any time. Worst case scenario two to three years. That’s why I went into it. That is why I went into that plea deal. Was because in my mind, I’m like, okay, worst case scenario is two to three years. And they’re saying 15. He told me they do that. They just do that to scare you.

App. 107, l. 23, 108, l. 10.

Trial counsel's advice to Petitioner to plea guilty in exchange for a "minimal sentence" which likely would have involved home detention but two to three years in prison *at the most* was demonstrably unreasonable under the facts of this case. While Petitioner was not entitled to know his precise sentence before entering a guilty plea, he was still entitled to rely on the advice of a

lawyer who could provide reasonable advice. That did not occur in this case, and Petitioner was prejudiced by his counsel's substandard performance.

This Court should grant certiorari in this case to provide additional guidance to the bench and bar relating to adequate advice in the context of guilty pleas. Given the centrality of guilty pleas in our current criminal justice system, it is hugely important for the courts to more carefully scrutinize the performance of counsel in these cases. It is now well-documented that criminal jury trials are virtually disappearing and guilty pleas are replacing them. According to one study, in 2015, only 0.78% of criminal cases in California resolved by way of a jury trial. In Florida, that number was 1.83%; in Texas, .097%; and in Pennsylvania, 1.17%. Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, Volume 101, No. 4, Winter 2017, *Judicature* at 32. This being the current state of affairs, this Court should carefully scrutinize the performance of plea counsel in this case to ensure conformity with prevailing professional norms in South Carolina and grant Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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