No. _____

In The
Supreme Court of the United States

ASKIA CUFF,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Appellant's waiver of his Sixth Amendment right to trial, pursuant to a plea agreement, freely and voluntarily made or the product of coercion – thus invalid – where Appellant pled guilty to the charges after his trial counsel threatened Appellant that counsel would withdraw from the case and abandon Appellant and the case if Appellant did not accept the Commonwealth's plea offer?

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IN THE SUPREME COURT OF THE UNITED STATES

ASKIA CUFF,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Askia Cuff, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia, affirming his convictions in reliance upon the Memorandum Opinion of the Court of Appeals of Virginia, affirming the convictions upon the trial court's denial of Petitioner's Motion to Withdraw his pleas of guilty to rape, sexual battery, burglary, attempted robbery, use of a firearm in the commission of a felony, assault and battery by mob, assault and battery, brandishing a firearm, and two counts of attempted abduction.

Petitioner maintains that his pleas of guilty were not freely and voluntarily made. Rather, they were the product of coercion, where his trial counsel

threatened to abandon Petitioner and his case if he did not accept the plea offer of the Commonwealth. As a result, Petitioner's Sixth Amendment right to trial was violated.

OPINIONS BELOW

Memorandum Opinion of the Court of Appeals of Virginia, affirming the convictions, dated August 15, 2017. Order of the Supreme Court of Virginia, affirming the Opinion of the Court of Appeals, dated November 15, 2018.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, as this Petition for Writ of Certiorari is filed within ninety (90) days of the Order of the Supreme Court of Virginia, dated November 15, 2018, affirming Petitioner's convictions.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented in this case invokes Petitioner's Sixth Amendment right to trial and the validity of the waiver of that right, where Petitioner entered guilty pleas to the charges after his trial counsel stated to Petitioner that counsel would withdraw from the case if Petitioner did not accept the Commonwealth's plea offer and plead guilty to the charges.

STATEMENT OF THE CASE

On January 28, 2016, Cuff entered a plea of guilty to the charges, and the case was set for sentencing for February 18, 2016. Cuff's trial counsel, Peter Greenspun, Esq. [herein "Greenspun"], proposed that Cuff be sentenced immediately; however, the court continued the sentencing hearing to February 18, 2016 to consider a presentence report, which the court is required to do unless waived by both parties and the court. The Commonwealth and the court denied counsel's request for immediate sentencing, and the court ordered a presentence investigation report.

On or about February 9, 2016, Cuff wrote to Greenspun, requesting that he file a motion to withdraw Cuff's guilty pleas. At a hearing on the motion, Greenspun stated he did not remember receiving the letter. With the sentencing hearing date looming, on February 11, 2016, Cuff retained new counsel to file a motion to withdraw his guilty pleas prior to sentencing. On February 17, 2016, Cuff, by counsel filed a motion to substitute counsel and to withdraw Cuff's guilty pleas. The motion alleged that the guilty pleas entered were not freely and voluntarily entered; rather, they were the product of coercion and fear.

At the hearing on the motion on May 13, 2016, Cuff maintained that his trial counsel uttered a threat to Cuff, stating that counsel would withdraw from the case, thus abandoning Cuff and the case, if Cuff did not accept the Commonwealth's plea offer. Greenspun testified,

"One of the days leading up to the plea hearing on the 28th, I was -- became certain that Askia had spoken with William, with his father. We had spoken, both myself and Mr. Elsayed, with William Cuff about this. It was pretty clear he wasn't pleased with it, and I made clear to Askia, I'm pretty sure I used language like this, that nobody else here is going to serve a day of your sentence, and that they can all believe in you and want you to get less and be supportive of you, but that emotion really doesn't translate on -- into what's best for you to do under the circumstances. He asked at some point, about how strongly do I feel about this, and I believe that I said something to this effect. It wouldn't be the first time that I've said it. That I feel so strongly that if you don't take this deal, I'm going to withdraw as your attorney, and then within seconds of that, and he's like, 'Really,' and seconds of that said, 'No, not really. I don't bail out on people, but that's how strongly I feel about this.' I remember that particularly because the next morning or two days later when we were here for the plea, William Cuff and various family members were seated in that corner in the hallway out there, right by the central area, and they were merely challenging that this wasn't the right thing to do and so on, and why are you doing this, or why is he doing this, and I explained over and over again, my thoughts, and Mr. Cuff, Sr., William said something to the effect of, 'Well, what if he doesn't do it?' I said, 'Mr.

> Cuff, I hope you're not pressuring Askia not to take this agreement. This is what is best for him,' and I said my peace again. He said, 'Well, what would you do,' and I said, 'I'd get out of the case,' or words to that effect, and then again, that was to make a point said, 'No, I'm not going to get out of the case. We'll go to trial, but I think it is a,' whatever the words were, it very well could be a disaster, compared to this extremely favorable agreement. I didn't think this was just a good agreement. I thought this was a terrific agreement, even though there's a long sentence to serve."

Greenspun stated that in delivering the statement to Cuff, he did not scream, but he made his point. Greenspun stated he has more experience than Cuff, and the plea offer was in Cuff's best interest.

However, Cuff did not take Greenspun's statement as a joke, he took it as a threat and believed Greenspun would have abandoned him and his case. Cuff stated that at the time Greenspun made the statement regarding withdrawing from the case, Greenspun told Cuff that if he went to trial, he would be convicted and receive a substantial sentence if he did not accept the plea. Cuff, who had no criminal record, stated that Greenspun's statements frightened him. Cuff stated, Greenspun's statement struck fear in his heart. He was fearful that both his counsel would abandon him and the case; and, he was fearful regarding the sentence he could receive. Cuff stated Greenspun's statement made him very nervous and very hesitant,

and that if he didn't accept the plea offer, he would lose his lawyer and have no other possible defense or somebody to be in his corner for his case and his situation. Cuff stated he felt pressured to accept the plea offer. He felt as if his back was against the wall. Cuff stated he felt he had no other option. Cuff stated that if his attorney had not threatened to abandon him and the case, and had talked to him about defenses to the charges, he would have wanted to have a trial. He stated Greenspun's attitude toward his case was listlessness. Cuff stated he did not believe it was appropriate for Greenspun to "joke" in that manner and he did not believe Greenspun would have taken his case to trial and aggressively defend him if he did not plead guilty.

Subsequently, Cuff discussed the matter with his father, William Cuff [herein "Mr. Cuff"], who confronted Greenspun about a plea rather than a trial, and his statements to Cuff. Greenspun stated he knew Cuff's family was upset. Greenspun admitted that when confronted by Cuff's family he made the same threat to abandon the case and Cuff, if Cuff did not plead guilty; however, he stated that it was a joke as well. However, the family did not interpret Greenspun's statement as a joke either. Mr. Cuff testified that Greenspun told him that Greenspun would withdraw from the case if Mr. Cuff tried to talk his son out of taking the plea agreement and pleading guilty to the charges prior to Cuff pleading guilty and subsequently. Both of Cuff's sisters, Andrea Cuff and Akilah Cuff testified that each were present on one or more occasions when Greenspun stated he would quit the case if Cuff did not take the plea offer and plead guilty to the charges. Andrea Cuff stated when the family

confronted Greenspun about having uttered the statement after Cuff had pled guilty, Greenspun became irate that the family questioned him about it a second time.

Greenspun admitted that it is inappropriate for a lawyer to threaten a client with abandoning a case if the client does not agree to plead guilty; and, that it is the defendant's decision whether or not to plead guilty or go to trial. He stated he did not make the threat " . . . in any meaningful fashion. I was using the Peter Greenspun cliché, if you will, to make a point . . ."

Greenspun admitted he did not discuss the elements of the offenses with Cuff in preparation for a defense for trial, but only in terms of a plea agreement. Also, he did not discuss with Cuff the feasibility of securing a DNA or SANE expert witness at trial, knowing the evidence showed the presence of DNA semen samples not attributable to Cuff on the towel that one of the complainants stated she used to wipe off DNA deposited upon her by the assailant. He did not discuss the element of intent, necessary to prove the elements of the offenses; or, the fact that the Commonwealth did not have the out-of-state complainants, who were traveling prostitutes, under subpoena to secure their attendance at trial, as a possible defense to the charges. Greenspun did not explain the concept of being a "principle in the second degree" regarding the charges in which the Commonwealth had no direct evidence of Cuff's involvement and there was a co-defendant charged.

Cuff stated he was denied the opportunity to view all of the evidence in the case prior to accepting the plea. Greenspun stated his associate,

Muhammad Elsayed was tasked with going over the details of the discovery with Cuff. Greenspun stated he believes Cuff saw all the evidence, but doesn't know for certain. Cuff testified that when he requested to see the evidence, Elsayed asked, "For what?" Cuff stated, "He [Elsayed] said, 'It's really,' he told me basically, that it would make no difference. But I told him, I said I still would like to see it, just in case, I said because I wanted to go forward with whatever -- whatever decision in wanted to go forward with, I wanted to make sure that I made it having my head wrapped around everything that was going on within my case." Cuff stated he was not shown the file prior to entering the guilty pleas.

In denying the motion, the trial court stated, "I cannot find that Mr. Cuff's motion to withdraw his guilty plea is not an effort to impede the administration of justice." The court stated this case is distinguishable from the cases in which the defendants did not understand the substantive and affirmative defenses, because Greenspun explained these issues to Cuff. The court stated that given Greenspun's experience of more than 30 years as an attorney, the court could not believe that he would recommend that Cuff agree to plead guilty without having gone over the evidence in detail and discussed the defenses with Cuff. The court characterized Greenspun's threat to abandon Cuff and the case if Cuff did not plead guilty as a statement to impress upon Cuff how strongly Greenspun felt; and, the court stated that it is not unusual for an attorney to do the same. Further, the court found that Cuff did not have a reasonable defense; and, that the Commonwealth would be

prejudiced by granting Cuff's motion to withdraw his guilty pleas.

REASONS FOR GRANTING PETITION

Virginia Code section 19.2-296 states in relevant part, "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended . . ." In Johnson v. Anis, 731 S.E.2d (Va., 2012), the Virginia Supreme Court, stated that there is a difference between motioning to withdraw a plea prior to sentencing rather than thereafter. The Court, citing to Justus v. Commonwealth, 274 Va. 143, 153 (2007), and Parris v. Commonwealth, 189 Va. 321, 325 (1949) stated, "'Generally, however, it may be said that the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place." Parris, 189 Va. at 325. The Parris Court stated, "Leave should ordinarily be given to withdraw a plea of guilty if it was entered . . . through fear, fraud, or . . . was made involuntarily for any reason . . . " Id. After sentencing, however, the matter is within the breast of the trial court for 21 days, and a stronger showing of "manifest injustice" is required to withdraw the plea. Johnson v. Anis, 731 S.E.2d (Va., 2012).

In Parris, the Court stated,

> "The plea of guilty to a serious criminal charge should be freely and voluntarily made, and entered by the accused, **without a semblance of coercion, and without**

> **fear or duress or any kind**, and the accused should be permitted to withdraw a plea of guilty entered unadvisedly when application therefor is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty." Parris, 189 Va. at 325-326.

Here, Cuff filed the motion prior to being sentenced; therefore, the motion is timely made. The evidence shows that the pleas of guilty were entered into as a result of fear and coercion. Therefore, the evidence readily supports Cuff's request to withdraw his pleas of guilty. The finding by the Court of Appeals that Cuff's pleas were freely and voluntarily entered, where Greenspun stated he told Cuff he would withdraw from the case if Cuff did not accept the plea deal is erroneous. Also, the Court of Appeals reliance upon the plea colloquy as a basis for its finding that the plea was freely and voluntarily made is equally erroneous.

The Court characterizes Greenspun's statement that he would withdraw from the case if Cuff did not accept the plea as ". . . Greenspun, in strong terms, advised appellant to accept the plea agreement . . ." (App. 18). There is an appreciable difference in an urge, even a strong one, by counsel to accept a plea and an outright statement by counsel that whether or not he continues to represent appellant is directly related to whether or not appellant pleads guilty. (See Fields v. Gibson, 277 F.3d 1203, 1213-14 (10th Cir. 2002); United States v. Mitchell, 633 F.3d 997 (10th Cir. 2011), where counsel's strong urging that client should plead guilty or assertion that client would be a fool not to take the plea offer was not

coercion.). A suggestion places no condition upon appellant to plead guilty. Greenspun's statement did just that – as a condition of Greenspun remaining Cuff's counsel, Cuff was required to plead guilty.

Cuff stated he was coerced into entering the pleas based upon Greenspun's threat to abandon Cuff and the case if Cuff did not accept the plea offer and plead guilty. Greenspun admitted uttering the threat; however, he stated he then told Cuff he was only joking, and he made the statement to make his point about how strongly he felt that Cuff should plead guilty. However, Greenspun admits the decision to plead guilty rests with the client and not the lawyer. Even if Greenspun believed it was in Cuff's best interest to accept the plea offer that decision rested with Cuff, not Greenspun. Therefore, utterance of the threat to the client to induce the client to enter the plea is the embodiment of coercion and undermines any notion that the decision was freely and voluntarily made. Moreover, to utter the threat along with the statements regarding the severity of punishment Cuff stood to receive if he did not plead guilty to the charges, induced fear in Cuff, which serves to reinforce the coercive nature of the guilty pleas. Greenspun stated he knows more about these matters than Cuff. However, his knowledge and legal experience provides no legal basis for him to substitute his decision making for that of his client; or threaten to withdraw from the case if his client did not agree with his assessment of whether to plead guilty. The Sixth Amendment right to trial belongs to the defendant rather than his counsel.

The Court of Appeals found that Greenspun, upon admitting he made the statement to Cuff,

"Nonetheless, Greenspun testified, and appellant and [Mr.] Cuff admitted, that Greenspun also said he was joking and that he would remain in the case regardless of appellant's decision. Thus, there was no factual support for appellant's contention that his guilty pleas were the product of coercion from his attorney." (App. 18). On the contrary, the record is replete with factual support for appellant's contention that his guilty pleas were the product of coercion. The fact, that Greenspun felt the need to try to repair the damage he inflicted upon Cuff by the coercive statement, attributing it to a joke, in and of itself, suggests his recognition that there was something necessarily odorous and repugnant about the statement. Moreover, Cuff merely acknowledged Greenspun stated the statement was a joke, Cuff did not state that he received it as a joke. Cuff received it as a threat by Greenspun to abandon him and the case if Cuff did not accept the plea offer; and, he believed Greenspun would have acted upon the threat and abandon him and the case had he not accepted the plea offer. Greenspun's "joke" served to create a sense of fear and anxiety within Cuff. It caused him to believe that his back was against the wall and that he had no choice but to accept the plea offer. And, the "joke" caused Cuff to believe that Greenspun would not have adequately represented him at trial if he rejected the plea offer.

In reality, Greenspun issued the threat in a meaningful way. He stated that he did not yell, but he made his point clear. It was only after observing the expression of horror of the impact of Greenspun's words reflected upon Cuff's face, that Greenspun offered up an attempt to proverbially put the Genie back into the bottle. The fact that Cuff felt the need

to discuss the threat with his father and sisters even after Greenspun stated he would not abandon the case, shows that Greenspun's attempt to undue the threat did not remove the fear and concern Cuff had that Greenspun would not adequately represent him at trial if he rejected the plea offer.

Thereafter, Greenspun uttered the same "joke" to Cuff's father. Greenspun threatened Cuff's father, who paid Cuff's attorney fee, that he would abandon Cuff and the case if Cuff's father attempted to talk Cuff out of taking the plea offer. If the uttering of the "joke" to Cuff created such a negative reaction in Cuff, it is not reasonable to believe that Greenspun would have told the same "joke" to Cuff's father. Clearly, the evidence shows the statement was not uttered as a "joke." The statement was made to cause Cuff to do what Greenspun thought was best for Cuff – to force Cuff into accepting the plea agreement. And, if, in fact, Greenspun was joking, it's difficult to understand why the "joke" created such anger and upset with Cuff and Cuff's family.

Further support in the record that the statement was not a joke is Greenspun's threat to Mr. Cuff that he better not try to advise Cuff against accepting the plea. If, in fact, Cuff was entering the pleas freely and voluntarily, Greenspun would have had no concern about Cuff discussing the plea offer with his father. And, if Cuff was entering the plea freely and voluntarily, his father would not have been able to talk Cuff out of accepting the plea. Therefore, if, in fact, Greenspun did not exert undue pressure upon Cuff to accept the plea, there would have been no need for Greenspun to attempt to interfere with communication between Cuff and his father regarding such a life-altering decision. If the plea

was not coerced, no one or nothing could have influenced Cuff otherwise, because he would have been acting in his own best interest, freely and voluntarily. Additional support in the record that undermines the notion that the plea was freely and voluntarily made is the evidence of Greenspun's attempt to waive the presentence report and have Cuff sentenced at the time of entering the plea rather than at a subsequent sentencing hearing. Had Cuff been sentenced at that time, he would not have been able to motion to withdraw his plea based upon coercion without meeting the high standard of manifest injustice. And, if the pleas were freely and voluntarily made, there would have been no need to rush to sentencing, because there would have been no concern that in the month or so between the plea and sentencing hearing, Cuff would have requested to withdraw the plea. The record supports an inference that Greenspun's attempt to have Cuff sentenced immediately upon entering the plea may be some evidence that Greenspun was aware or should have been aware that Cuff's plea was not freely and voluntarily made. Likewise, Cuff's assertion that Greenspun refused to file the motion on Cuff's behalf to withdraw the guilty plea, forcing Cuff to hire other counsel to do so, is a fact from which it may be inferred that Greenspun knew or should have known that Cuff did not freely and voluntarily enter the plea. As such, there is ample independent evidence in the record, separate from Cuff's assertion and Greenspun's denial, that the pleas were the product of coercion. (See U.S. v. Estrada, 849 F.2d 1304 (10th Cir. 1988), where the Court held that coercion by a defendant's counsel can render a plea involuntary. See also, Iaea v.

Sunn, 800 F.2d 861 (9th Cir. 1986) and cases cited therein for the same proposition.).

The Court of Appeals asserted that Greenspun and Cuff discussed possible defenses to the charges (App 18). Actually, Greenspun stated he advised Cuff of defenses in terms of pleading guilty, but not in terms of going to trial. Because Greenspun was hired to try the case and Cuff wanted to proceed to trial, essentially Greenspun did not counsel Cuff on his trial defenses as Cuff asserted.

The Court of Appeals noted that Cuff made no claim of coercion and expressed no reservation about his decision to plead guilty (App. 18). However, every guilty plea withdrawn is replete with a colloquy, where the plea was determined to be freely and voluntarily made at the time it was entered. The Court in Justus stated that reliance on the "proposition that admissions made by a defendant in a guilty plea and the attendant colloquy are presumed to be valid and are not to be lightly set aside . . . is misplaced in the context of a Code § 19.2-296 motion to withdraw a guilty plea prior to sentencing for several reasons." Justus, supra. The Court stated, "When a defendant files a motion under Code § 19.2-296, he is necessarily seeking to repudiate the admission of guilt and some, if not all, of the admissions made in the guilty plea colloquy." Id. As such, a defendant's claim of coercion is not barred by the fact that he did not bring it to the trial court's attention at the time of the plea. The Court of Appeals points to the fact that Cuff did not make the claim of coercion until he retained other counsel (App. 18-19). The fact that Cuff had to engage other counsel to file the motion on Cuff's behalf raises an inference that Greenspun was insistent upon Cuff

accepting the plea. (See also, Bottoms v. Commonwealth, 281 Va. 23 (2011), affirming the Justus holding that the plea, colloquy, and adequate representation are not the proper legal standard applicable here.)

The Court of Appeals asserts that the record does not reflect that Cuff demonstrated he had a reasonable defense sufficient to withdraw his plea and proceed to trial (App. 19). As a threshold matter, there does not appear to be a requirement that a defendant demonstrate that he has a reasonable defense upon application to withdraw his pleas if the pleas are the product of coercion. Parris and Justus, infra. A guilty plea is a waiver of a defendant's Sixth Amendment right to have a trial. The waiver must be made freely and voluntarily, **without a semblance of coercion, and without fear or duress or any kind.** Parris, Justus *infra*. Otherwise, the waiver is not valid. Without a valid waiver, a defendant stands in the same position as he stood prior to entering the pleas, *ipso facto* and *ipso jure* – that he has a Sixth Amendment right to have a trial. The Sixth Amendment to the U.S. constitution imposes no duty upon a defendant to show that he has a defense, reasonable or otherwise, in order to avail himself of that right. A defendant has the right to proceed to trial and present no defense at all. Therefore, any requirement that a defendant shows he has a reasonable defense when coercion is alleged, would be burden shifting, and an unconstitutional interpretation of the statute.

However, contrary to the Court's assertion, there is evidence in the record which supports a defense to the rape charge. The Court stated that the presence of a foreign male DNA profile on a hotel towel did

not tend to disprove any element of the charged offenses (App. 20). The Court stated that the towel was in a room, which several days prior had been rented for prostitution. Therefore, the Court suggests, the presence of another male's DNA on the towel had no tendency to show that appellant was never present in the room or that he was not one of the perpetrators of the offenses (App. 20) However, the evidence goes beyond the presence of another male's DNA on the towel. The Court stated, the complainant "cleaned herself up with a towel from the floor" (App. 14, footnote 9). In the full statement, the complainant stated that the perpetrator of these offenses ejaculated on her hair and face, and that she used the towel [in question] from the floor to clean herself up. From this fact it can be inferred that the depositor of the DNA on the towel is the perpetrator because that is what the complainant testified to. Moreover, even though there were lots of towels in the hotel room, the Commonwealth submitted only one towel to the lab – the towel with the presence of DNA other than Cuff, which the complainant stated contains the DNA of the perpetrator. This evidence would produce a reasonable defense because it is not only impeachment evidence, which would serve to undermine the complaints other statements implicating Cuff in any other offense, it is evidence of actual innocence to at least the most serious charge of rape.

The Court of Appeals asserted that the complainants were under subpoena (App. 20, footnote 10); therefore, the trial court's finding of prejudice to the Commonwealth is supported by the evidence. However, the fact that subpoenas were

requested for the complainants without an address or location to serve them, and of course, no return on any service upon them, supports a rational finding that the complainants were not under the subpoena of the court – compelled to attend the trial as set. Therefore, the Commonwealth would not have been prejudiced by Cuff withdrawing his guilty pleas, because the Commonwealth would have been in the same position upon the withdrawal of the pleas a few weeks after entering them as it was before – setting a case for trial without its complaining witnesses under subpoena. The complainants were traveling prostitutes from California. Even with the trial date set, the Commonwealth had no return service on any subpoena issued for the complainants appearance at trial. A withdrawal of the guilty plea, which would have extended the trial date to a future date, actually would have helped the Commonwealth, rather than prejudice it, because it would have given the Commonwealth more time to locate its complainants, without who's presence at trial, the Commonwealth had no case.

Also, any concessions the Commonwealth makes in a plea offer cannot be the basis of prejudice, because all plea agreements require some concession from the Commonwealth. Therefore, using concessions given in a plea agreement as a basis to deny a motion to withdraw a guilty plea, would thwart all motions to withdraw a guilty plea. Such a broad brush stroke would be Overbroad and unconstitutional.

CONCLUSION

For these reasons and those previously stated in the record of this case, Petitioner, Askia Cuff, respectfully requests that this petition for a writ of certiorari be granted, that his convictions be set aside, and that this case be remanded with an order that he be allowed to withdraw his guilty pleas and proceed to trial.

Respectfully Submitted,

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