No. _____

In The

Supreme Court of the United States

JOEY ROGERS
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for Writ of Certiorari to
The Louisiana Supreme Court and Louisiana Court of Appeal, Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.Were the Due Process rights of Joey Rogers ignored by the Louisiana Courts when they maintained a plea made by the vulnerable, illiterate, hearing impaired, eighteen year old with an IQ of 63 and no experience with the judicial system, who was totally reliant on appointed, unprepared and overwhelmed counsel who admitted her incompetence and acknowledged using misrepresentation of facts and intimidation to coerce his plea? Was it error for Louisiana Courts to deny the motion to withdraw a guilty plea that was premised upon the violation of fundamental Constitutional rights of the mentally challenged defendant, thereby denying him justice, fairness and effective assistance of counsel on a plea that was not knowingly and voluntarily entered?

2. The incompetence and ineffectiveness of counsel who procured Joey Rogers' plea surpasses the defects in representation previously addressed by the Court[1] and casts a shadow on the efficacy of all appointed counsel. Where a defendant who is incompetent to assist counsel is represented by counsel who is incompetent to assist him because she had not met with him for two years, was unfamiliar with the State's evidence, did not know that there was substantial exculpatory evidence, and did not move to suppress the State's only evidence, are Joey Rogers' Sixth and Fourteenth Amendments right to counsel violated where his counsel then pressured him to plead guilty so that she could avoid trial?

3. Were the Petitioner's Due Process rights to a fair proceeding honored where the Louisiana courts let stand the State's violation of a plea agreement that increased the minimum sentence by twenty years and his counsel admittedly provided ineffective counsel under Sixth Amendment standards by failing to object to the violation?

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[1]See Table of Authorities and the many cases cited in Footnote 41, Page 17, *infra,* for examples.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page:

State of Louisiana, through the Office of the Attorney General for the State of Louisiana

Joey Rogers, an individual incarcerated in the State of Louisiana

No other cases are directly related.

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The opinion of the State of Louisiana Court of Appeal, Third Circuit, in this matter, *State v. Rogers*, No. 2020-KA-0504, 319 So. 3d 405, 2021 La. App. LEXIS 827, 2021 WL 2133185 (La.App. 3 Cir. 05/26/21), is attached as Pet. App. "A." The 4 to 3 opinion of the Supreme Court of Louisiana denying the defendant's application for a Writ of Certiorari for discretionary review, *State v. Rogers*, No. 2021-K-0885, 2021 La. LEXIS 1785, –So.3d– (La., Oct. 1, 2021), is attached as Pet. App. "B."[2] The transcript of the hearing on the Petitioner's motion to withdraw the plea for ineffective assistance of counsel and the ruling by the Sixteenth Judicial District Court for the Parish of Iberia, State of Louisiana denying the motion, are available on request but were too voluminous to attach to this Application.

JURISDICTION

The four of the seven members of the Louisiana Supreme Court entered judgment against the Petitioner, denying discretionary review, on October 1, 2021. This petition is filed within 90 days of that date. Accordingly, this Court has jurisdiction to review the judgment of the Louisiana Supreme Court, declining to review the decision of the Louisiana Court of Appeal, Third Circuit. SUP. CT. R. 13(1); 28 U.S.C. § 1257(a).

[2]Hereafter, citations to the appendices will be cited as "Pet. App. A or B." Citations to the record below will be cited as "R.__" according to the designations set for the appellate record filed with the Louisiana, Third Circuit Court of Appeal.

CONSTITUTIONAL PROVISIONS AND AUTHORITIES INVOLVED

1. *The Fifth Amendment to the United States Constitution* provides in relevant part: "No person shall . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. *The Sixth Amendment to the United States Constitution* provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy and public trial;. . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. *The Fourteenth Amendment to the United States Constitution* provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Eighteen year old Joey Rogers had been living with Robert Butler for about two years to escape a neglectful and abusive childhood. On August 9, 2011, Joey was at Mr. Butler's house when an unknown man in a red shirt and cap entered, shot Mr. Butler, and left. Neighbors confirmed seeing the red shirted man. Joey Rogers, in shock and fear, first went to Mr. Butler's nearby relatives, then went to get his brother, before immediately returning and cooperating with police. During fifteen hours of questioning, in which the hearing impaired, mentally deficient youth gave seven taped statements denying involvement, he allegedly gave one untaped statement in which he confessed. There were no witnesses or forensic evidence that implicated Joey Rogers.

On December 9, 2011, Joey Rogers was charged by bill of information with manslaughter, in violation of La. R.S.14:31, concerning the August 9, 2011 death of Robert Butler. (R.22) Then, on December 16, 2011, a grand jury indictment was filed, raising the charge to second degree murder, in violation of La. R.S. 14:30.1.(R.23). Joey sat in jail for over two years, sometimes in isolation for mental health issues, without any contact from an attorney. No pre-trial motions were heard. Without exploring the evidence or the facts of the case, a month before the case looked like it was going to trial, the public defender, Nancy Dunning, began plea negotiations with the district attorney. The gunshot residue and DNA testing excluded Joey Rogers, but she misrepresented the results. On July 29, 2015, the State offered Joey Rogers a written agreement for an open-ended plea of zero to forty years for manslaughter. (R.24)

As she had not prepared for trial at all, Ms Dunning misrepresented the State's case to his family to gain their support and also allowed the prosecutor to speak to Joey Rogers alone to further scare him. She promised to get him the least sentence possible. Joey eventually succumbed to her

ineffectiveness and coercive tactics and agreed to plead. On August 4, 2015, after Joey signed the plea form, as they prepared to put the plea on the record, the State surprised the defense with a discretionary motion under La.C.Cr.P. Art. 893.3 to increase the sentencing exposure to a twenty to forty year range. (R.25-26) Without objection to the violation from Ms Dunning, the Court proceeded with taking the plea. Then, Ms Dunning herself reneged on her promise to assist Joey with mitigation of the sentence. Ms Dunning withdrew and resigned from the public defender's office, based in part on her mishandling of this case.

The newly appointed attorney, Cecilia Bonin, filed a Motion to Vacate the Plea before sentencing, based on the insufficient, ineffective and uninformed representation by Ms Dunning and the defendant's intellectual, mental and hearing deficits that prevented him from fully understanding the plea. Other grounds for withdrawal included the failure to file a motion to suppress the State's only evidence, an alleged statement, and the State's violation of the plea agreement. (R.15,27-38)

In a September 2017 hearing on the withdrawal, board certified psychiatrist Dr. Sonnier testified without contradiction as to Joey Roger's deficits and inability to understand and assist counsel. In the same hearing, Ms Dunning acknowledged many of her failings but the 16th Judicial District Court for the Parish of Iberia denied the motion to withdraw the plea. On February 14, 2018, the 16th Judicial District Court for the Parish of Iberia sentenced Mr. Rogers to twenty years at hard labor. (R.20-21,48).

On May 26, 2021, the Third Circuit Court of Appeal affirmed the denial of the motion to withdraw the plea and affirmed the sentence. *State v. Joey Rogers 2021 La. App. LEXIS 827; 20-504 (La.App. 3 Cir. 05/26/21);2021 WL 2133185,* 319 So.3d 405. (Pet. App. A). On October 1, 2021, a divided Supreme Court of Louisiana denied the defendant's application for a Writ of Certiorari for

discretionary review in a 4 to 3 decision. *State v. Rogers*, No. 2021-K-0885, 2021 La. LEXIS 1785, –So.3d– (La., Oct. 1, 2021). (Pet. App. B)

REASONS FOR GRANTING THE WRIT

Joey Rogers entered a guilty plea on August 4, 2015. Joey Roger's plea was not knowingly or voluntarily made due to his mental deficiencies, exacerbated by hearing loss and severe conditions in the jail. Further, his decision to enter into the plea agreement and make the plea was the result of inadequate, non-informed advice and the coercive influence of his attorney. Joey Rogers was induced to enter the plea by the promise of an open sentence in the zero to forty year range. Then the State violated the agreement by filing a motion immediately after the plea was signed that narrowed the range to twenty to forty years. The writ application should be granted, the plea should be vacated, and the case remanded for trial or for resentencing as per the terms of the agreement.

Criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas,[3] making plea bargaining "an essential component of the administration of justice"[4] that culminates with the waiver of several federal constitutional rights in a state criminal trial: the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth;[5] the Sixth Amendment right to trial by jury;[6] and the Sixth

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[3]*Missouri v. Frye*, 566 U.S. 134, 143-144,132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

[4]*Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed. 2d 427, 432 (1971); *State v. Louis*, 94-0761 (La. 11/30/94), 645 So. 2d 1144, 1149; *State v. Karey*, 16-0377 (La. 6/29/17), 232 So. 3d 1186, 1190, reh'g denied, 16-0377 (La. 9/6/17), 224 So. 3d 959.

[5]*Malloy* v. *Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1965)

[6]*Duncan* v. *Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)

Amendment right to confront one's accusers.[7] The question of an effective waiver of federal constitutional rights in a proceeding is of course governed by federal standards.[8] The fairness of the proceeding leading to the plea, the ineffectiveness of an attorney who counsels an accused to waive these significant constitutional rights, and the State's violation of offered inducements, should be strictly considered by the Court.

A. Due Process Violated Without Intelligent and Voluntary Plea

A criminal defendant has to make the significant decision whether to exercise his constitutional right to trial or to waive his right to trial and his presumption of innocence in favor of a guilty plea.[9] A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.[10] Joey Rogers had just turned 18 years old when he was arrested for this offense in 2011. He had never been to district court. Although he completed ninth grade, after the third grade he had been only socially promoted,(R.243). He was hearing impaired. He read at third grade level, which did not include cursive handwriting (R.234). With an IQ of 63, he lacked understanding of the plea and its consequences. Joey Rogers's vulnerability was compounded by his age, isolation, mental illness and years of neglect. He was incompetent and his plea was not knowingly and voluntarily entered.

The police and attorneys acknowledged that it was obvious he was "slow" or impaired (R.321, 337-338) yet Joey's first attorney failed to raise his incompetency. It was raised in the

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[7] *Pointer* v. *Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)

[8] *Douglas* v. *Alabama*, 380 U.S. 415, 422, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)

[9] *Boykin v. Alabama*, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)

[10] *Boykin*, supra, citing *Kercheval* v. *United States*, 274 U.S. 220, 223.

Motion to Withdraw his plea filed by new counsel on June 28, 2017, prior to the February 14, 2018 sentencing. Even when a defendant does not explicitly make his competence at issue, the trial judge must consider competency where the evidence or observations raise a doubt.[11] Louisiana law allows the withdrawal of the plea where it is deficient, constitutionally or otherwise.[12] For a plea to be valid, Due Process requires it to be a voluntary and intelligent relinquishment of known rights.[13] Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats can render a plea unconstitutional.[14]

The defense's Motion to Withdraw the plea specifically alleged Joey Rogers' incapacity. In support of the motion, the defense presented Dr. Loretta Sonnier, a board certified forensic psychiatrist, whose career has focused on competency evaluations (R.216-219,259-262). She reviewed Joey Rogers' school records, Boys Village records (R.236), videos of police interviews, and the plea transcript (R.266), in addition to personally interviewing and testing him. (R.219). Dr. Sonnier's testing found no evidence of malingering (R.220-221). Consistent with IQ results in records of an overall score of 63, Mr. Rogers' results on the MacCAT-CA (the best test of youthful offenders' competency) put him only in the one percentile for being able to understand the plea, indicating a significant intellectual deficit (R.236, 273-274). Dr. Sonnier's conclusion was that Joey

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[11] *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996);*State v. Snyder 750 So. 2d 832; 98-1078 (La. 04/14/99).*

[12]La.C.Cr.P.Art. 559A states that "Upon motion of the defendant and after a contradictory hearing, ... the court may permit a plea of guilty to be withdrawn *at any time before sentence*."

[13]*McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

[14]*Boykin*, supra.

Rogers had no understanding of the plea or waiver of his *Miranda*. He also lacked capacity to assist his attorney at the time of the plea (R.231,234, 240, 243,269-270).

The Louisiana district court and reviewing courts failed to apply the correct standard for determining competency to plead guilty. The district court judge questioned Dr. Sonnier as to Mr. Rogers' ability to understand the plea as of the day of the withdrawal hearing, not on the date the plea was entered when he was novice to the criminal proceedings (R.263, 264-265). The district court acknowledged Mr. Rogers' IQ and his "diminished capacity," but found that "he was culpable" despite his deficits (Suppl.R.3,7). The State did not offer any evidence of competency or expert testimony at the hearing.

The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent[15] and he may not waive his right to counsel or plead guilty unless he does so "competently and intelligently."[16] A defendant must have the capacity to participate in his defense and understand the proceedings against him.[17] The relevant question is whether the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense.[18] A trial court must satisfy itself that the defendant who seeks to

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[15]*Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975); *Pate v. Robinson*, supra.; *Medina v. California* 505 U.S. 437; 112 S. Ct. 2572; 120 L. Ed. 2d 353.

[16]*Johnson* v. *Zerbst*, 304 U.S. 458, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); *Brady v. United States*, 397 U.S. 742, 758, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Drope* v. *Missouri*, supra.

[17]*Dusky v. United States*, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960) *(per curiam)*; *Medina*, at 449.

[18]*Dusky*, supra; *Pate*, at 384 n.6, 86 S. Ct. at 841 n.6. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991); *Lokos v. Capps*, 625 F.2d 1258, 1261(5th Cir. 1980), citing *Drope*, 420 U.S. at 174, 95 S. Ct. at 905); State v. O'Brien 2020 La. LEXIS 2311; 2020-00477 (La. 10/14/20); 2020 WL 6054903

plead guilty is competent to make a waiver of his constitutional rights that is knowing and voluntary.[19]

In *Godinez v. Moran*,[20] the Court found that the standard for measuring a criminal defendant's competency *to plead guilty* is not higher than, or different from, the competency standard for standing trial but clarified that in addition to determining competency to enter a plea, a trial court must also consider whether the waiver of his constitutional rights is knowing and voluntary.[21] The Court in *Godinez* noted that a competency inquiry is whether the defendant has the *ability* to understand the proceedings whereas the purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.[22] In this sense there *is* a "heightened" standard for pleading guilty, but it is not a heightened standard of *competence*.[23]

The district court erroneously applied the *McNaughton* test[24] as to competency at the time of the offense, found it was not satisfied, and mistakenly applied only the *Bennet* test as to competence to stand trial.[25] (R.241-243,270; Suppl.R.7-8) The *McNaughten* test of ability to

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[19]*Parke v. Raley*, 506 U.S. 20, 28-29, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992)

[20]*Godinez v. Moran* 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1983)

[21]*Parke* v. *Raley*, supra.; *Westbrook* v. *Arizona*, 384 U.S. 150, 16 L. Ed. 2d 429, 86 S. Ct. 1320.

[22]*Boykin* v. *Alabama*, 395 U.S. at 244: defendant pleading guilty must have "a full understanding of what the plea connotes and of its consequence."

[23]*Godinez v. Moran*, supra, at Footnote 9.

[24]La.R.S. 14:14 is the codification of the well known test in McNaughten's Case, 1 Car. & K. 130, 10 Clark & F. 200, 8 Eng. Repring. 178 (1843).

[25]*State v. Bennett* 345 So.2d 1129 (La.1977); *Dusky* v. *United States*, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960) *(per curiam)*, the Court held that the standard for competence to stand trial

determine right from wrong is an inappropriate standard for assessing understanding of the proceedings (R.264, 266,277-280). The district court erred in finding that Joey Rogers had diminished capacity[26] but that he was "culpable." (Suppl.R.3,7) Culpability has nothing to do with competency.

The Third Circuit Court of Appeal sanctioned the district court's use of the wrong standard for determining competency for a plea. (Pet. App. A) Where the circumstances and facts support Dr. Sonnier's conclusion as to Joey Rogers' incompetence to understand the waiver of his constitutional rights and the State provided no contrary evidence, the Court of Appeal erred in affirming. The Louisiana Third Circuit incorrectly relied on the district court's mistaken conclusion that the colloquy cured any problems with the plea because Mr. Rogers gave appropriate responses. (Pet. App.A) The Court of Appeal erred in failing to consider external factors outside the plea colloquy to determine if they render the plea involuntary or unintelligent.[27]

Dr. Sonnier said Mr. Rogers was embarrassed or ashamed when he did not understand, so he would not ask questions or admit his deficits. (R.224,227,244) Dr. Sonnier noted that Mr. Rogers' deficits may not have been readily apparent as he gave agreeable answers to avoid embarrassment. He could understand basics until things get complicated (R.221-222). Dr. Sonnier said the few visits that the attorney had with Mr. Rogers in the three weeks before the plea would

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is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."

[26]Diminished capacity is not a recognized standard in Louisiana law.

[27]*Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977);*State v. MacDonald*, 390 So.2d 1276 (La.1980); *State v. Langendorfer*, 389 So.2d 1271 (La.1980);*State ex rel. LaFleur v. Donnelly*, 416 So.2d 82 (La. 1982); *State v. Galliano*, 396 So.2d 1288 (La. 1981).

not have been enough to gain Mr. Rogers' understanding of the proceedings, the options or the pleas. (R.256-257, 264) Nor did she gain his trust. Joey Rogers never told Ms Dunning of his problems and did not tell her that he could not read her letters. (R.119)

Ms Dunning had prepared Joey for the Boykin questioning in one word answers. (R.215) But later, Mr. Rogers could not answer hypothetical questions, define the words used in a plea or the charges, or explain his rights. (R.223-226, 228-230,233,234) When pressed to answer with more than one word, he repeated the questions. (R.226) Joey Rogers was confused about the charges as there was both a bill of information for manslaughter and an indictment filed. (R.109-110,111) His knowledge of the court system was based on a juvenile case; he had never been in district court. (R.146) He just wanted to go home. (R.145) Mr. Rogers had been kept in jail for four years, with four months in solitary confinement on suicide watch wearing a paper gown, without a mattress or decent food (R.298-299), which most certainly exacerbated his pre-incarceration deficits. He had two years with no visitors at all.Under these circumstances, the Court cannot expect Joey Rogers himself to have uttered "I don't understand" during the plea colloquy.

In *Padilla* v. *Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298, (2010) a plea was set aside because counsel had misinformed the defendant of its immigration consequences. The Court made clear that ineffective assistance is not corrected by a finding that a knowing and voluntary plea was entered. Dr. Sonnier's testimony refutes Joey Rogers' ability to make a knowing plea. Even if he could have understood, the evidence shows he did not. Thus, his attorney's ineffectiveness in failing to raise his incompetency is not cured by the colloquy.

Mr. Rogers' lack of ability to understand the plea despite the colloquy is illustrated by the his responses in the colloquy to questions about the State's last minute motion. Ms Dunning had no

opportunity to explain it (R.170,173,199,202-203,213) and even the Court and attorneys expressed confusion as to its effect. Yet Mr. Rogers pretended and professed to understand. Later during Dr. Sonnier's testing, he could not even form a question about the sentencing motion.

The State failed to demonstrate Mr. Rogers' understanding of the plea when they did not present their own expert and did not call witnesses who knew him. Their police officers noted his slowness. They called no one from the jail where he had been held and observed him for four years. Nancy Dunning, the first defense attorney, was defensive and combative in the hearing, believing her own reputation at stake. She had no records or files that showed any degree of attention had been paid to Mr. Rogers. Ms Dunning knew Joey had a hearing problem, had intellectual deficits and had not gone far in school, but she admitted that she had not finished exploring his background and had no records or testing on him. (R.117) Yet she persisted in sending him complex legal, written documents. She only later learned that he was unable to read cursive handwriting. Based on her background as a former educator, she believed he understood their few discussions if she went slow and was repetitive and simplistic. (R.115,116,198,199,209) Her lack of record keeping puts much of her recollection and conclusions in doubt.

Based on the totality of evidence and circumstances, the State did not rebut the defense evidence that Joey Rogers could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense at the time of his plea. It violates Due Process to allow his continued incarceration based on the incompetent plea. The plea, which could not have been knowingly or voluntarily made by this impaired defendant, must be vacated. The writ should be granted and the case should be remanded to re-assess his present competency. When he is competent

and assisted by competent counsel, Joey Rogers should have the opportunity to make the decision to plea or go to trial.

B. Counsel's Coercion and Ineffectiveness

Joey Roger's counsel was not merely ineffective, she actively and knowingly worked to the detriment of the Petitioner. The attorney did not have a command of the facts, law or defenses. She gave insufficient and uninformed advice while unduly pressuring the vulnerable defendant to plead. In this case, the information provided by Ms Dunning to Mr. Rogers was misleading, incomplete and coercive. He could not have made any informed or voluntary decision. At the hearing to withdraw his plea, Joey adequately demonstrated a reasonable probability that, but for counsel's erroneous advice and ineffective representation, he would not have waived his right to trial and entered a plea.

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," applicable to the States through the Fourteenth Amendment. In today's criminal justice system the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.[28] Defense counsel have responsibilities in the plea bargain process[29] and defendants are "entitled to the effective assistance of competent counsel."[30]

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[28]As noted in *Frye*, supra: "The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions further removed from immediate judicial supervision." *Premo* v. *Moore*, 562 U.S. 115, 125, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649, 661 (2011).

[29]ABA Criminal Justice Standards, Part III, Standard 14-3.2. regarding responsibilities of defense counsel in plea discussions and plea agreements, in pertinent part, states:
(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.
(c) Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately

"Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[31] The Court in *Lafluer* noted that pretrial stages where defendants make critical decisions require counsel's competent advice. Effective counsel to ensure the fairness and regularity of the processes that preceded trial is necessary where the defendant could lose Constitutional benefits.

The Louisiana Third Circuit noted that ineffective assistance of counsel claims were made and cited in the footnotes of the appeal (Pet. App. A) as the district court had not wanted the withdrawal hearing to become a "PCR (post conviction relief) hearing" on ineffective assistance (R.159,175). The constitutional standard for effectiveness of counsel is the same in guilty plea cases as in cases which have gone to trial, to-wit whether counsel's performance "fell below an objective standard of reasonableness"and made the outcome unfair or suspect.[32] The question is whether an

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made by the defendant.
(d) Defense counsel should not knowingly make false statements or representations as to law or fact in the course of plea discussions with the prosecuting attorney.....
(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

[30]*McMann* v. *Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Lee v. U.S.* – U.S.–, 137 S. Ct. 1958; 198 L. Ed. 2d 476 (2017); *Lafler* v. *Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Padilla* , supra, 559 U.S. at 364; *Frye*, supra; *Hill* v. *Lockhart*, 474 U.S. 52,58,59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *LaFleur*, supra.

[31]*Massiah* v. *United States*, 377 U.S. 201, 204,84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), quoting *Spano* v. *New York*, 360 U.S. 315, 326, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (Douglas, J., concurring).

[32]*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hill v. Lockhart*, supra; *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, supra; *Roe* v. *Flores-Ortega*, 528 U. S. 470, 482, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), quoting *Strickland*, 466 U. S., at 694; U.S. Const. amends. VI and XIV; see also La. Const. art. I, § 13; *State v. Harris* –So.3d–; 2020 La. LEXIS 1348; 2018-1012 (La. 07/09/20)

attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.[33]

The Court refined the *Strickland* standard in regard to representation at guilty pleas in *Garza v.Idaho* – U.S. –, 139 S. Ct. 738; 203 L. Ed. 2d 77 (2019), where an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions and in *Lee v. U.S.,* where the defendant was repeatedly, but incorrectly, informed by his retained counsel that he would not be deported as a result of pleading guilty. Lee's concern about deportation was primary and he would have risked trial, although his prospects of acquittal at trial were grim, if he was correctly informed of the mandatory effect of the plea. In both cases, the Court found that the motions to vacate the convictions and sentences should have been granted.

In *Lee,* the Court noted that when considering effectiveness of counsel for a plea, no strong presumption of reliability applies "to judicial proceedings that never took place."[34] Where an attorney's erroneous information induced a plea or affected the defendant's understanding of the consequences of pleading guilty, the defendant is prejudiced by the denial of the right to a trial and forfeiture of a judicial proceeding.[35] Regardless of possible trial outcomes, in a plea situation the defendant shows prejudice because of the "denial of the entire judicial proceeding . . . to which he had a right."[36] The Court in *Lee* said the test is whether there was an adequate showing that the

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2020WL 3867207.

[33]*Strickland* v. *Washington*, at U.S. 668, 690 and *Hill*, supra.

[34]*Lee,* at 482-483, 120 S. Ct. 1029, 145 L. Ed. 2d 985.

[35]Citing *Flores-Ortega*, 528 U. S., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985

[36]*Lee,* at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985.

defendant, properly advised, would have opted to go to trial.[37] The defendant must show special circumstances that he emphasized in deciding whether or not to plead guilty.[38]

Right up to the day of trial, Joey Rogers insisted to Ms Dunning that he did not want to plead guilty. Ms Dunning had met him for the first time only two weeks earlier. Discovery had been provided and the case was on the brink of trial but she had not reviewed the State's evidence. Ms Dunning was not prepared for trial and never intended to go to trial with Joey Rogers. Ms Dunning flat out, but wrongly, advised Joey Rogers that he would lose at trial. She advised him to focus on possible sentences and pulled out all the stops to coerce his plea. He denied making an untaped statement to police after seven taped denials and wanted to go to trial.

In *Hill* v. *Lockhart*, the Court held that when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant 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."[39] The Court in *Lee*, rejected the standard that a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[40] Nonetheless, in this case, that standard is easily met. It would have been rational for Joey Rogers to go to trial where there were no witnesses and no forensic

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[37]The Court in *Lee* distinguished *Frye*, supra, and *Lafler* v. *Cooper*, supra, where the defendants alleged that, but for their attorney's incompetence, they would have *accepted* a plea deal.

[38]In *Lee,* it was misinformation as to deportation that was a major factor in the plea. In *Hill*, it was misinformation as to parole eligibility, but it was not shown to be the factor that induced the plea. *Hill* id., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203

[39]474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203.

[40]*Lee*, at 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284, citing *Padilla v. Kentucky*.

evidence. The State's sole evidence was the alleged untaped confession after fifteen hours of questioning in which he made seven taped denials that he committed the crime.

Mr. Rogers was arrested in August of 2011 and jailed. He was represented by another public defender, until counsel Nancy Dunning was assigned on June 25, 2012. (R.85-86) She made no contact with him until February of 2014, when she sent Joey Rogers 98 pages of documents with a handwritten cover letter which he could not read. (R.102-103) She did not visit him for three long years from June 2012 until July of 2015, because she "could not focus on him" (R.97,112).[41] Meanwhile, the youthful, vulnerable Joey Rogers, sat alone in jail without any information as to what was going on. Dunning frequently expressed how busy and overwhelmed she was while representing Mr. Rogers (R.98-99, 165).[42] Her health was bad (R.102-103). She had serious felony cases in

[41]ABA rules on client-lawyer relationship require competence, "preparation reasonably necessary for the representation" Rule 1.1 and diligence Rule 1.3. For examples of abdominal behavior by defense counsel where the Court has had to intervene, see *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (per curiam) (concluding the defendant's counsel provided constitutionally ineffective assistance by inadequately investigating mitigating evidence, providing evidence that bolstered the state's case, and failing to scrutinize the state's aggravating evidence); *Buck v. Davis*, No. 15-8049, slip op. at 17 (U.S. Feb. 22, 2017) (concluding that "[n]o competent defense attorney would introduce" evidence that his client was a future danger because of his race); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam) (holding an attorney's hiring of a questionably competent expert witness because of a mistaken belief in the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance); *Sears v. Upton*, 561 U.S. 945, 952 (2010) (concluding that the "cursory nature" of a defense counsel's investigation into mitigation evidence was constitutionally ineffective); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (holding an attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); *Rompilla v. Beard*, 545 U.S. 374, 385 (2005) (concluding that a defendant's attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate); *Wiggins v. Smith*, 539 U.S. 510, 526–28 (2003) (holding an attorney's failure to investigate defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable).

[42]A heavy workload was an insufficient excuse for constitutional violations in plea agreements noted in *Santobello*, supra, where the Court said, "The heavy workload may well explain these

several parishes (R.112). She said that her poor representation of Mr. Rogers and four others eventually led to her resignation (R.165), after the plea but before sentencing in this case. Mr. Rogers' next attorney filed a Motion to Withdraw the plea. It was set for hearing before sentencing.

Joey Rogers' motion to withdraw the plea and his appeal complained of attorney Nancy Dunning's ineffectiveness in five respects, proven by her testimony and admissions in the hearing on the motion. **First**, although she had the case for three years, she had not reviewed the evidence and was unable to accurately assess the State's case so as to advise Mr. Rogers and allow him to make a knowing, informed choice of his options. **Second**, she did not challenge the State's only evidence, the alleged untaped confession, in a motion hearing, despite seven taped interviews denying involvement during a fifteen hour custodial interrogation. **Third**, after nearly two years of having no contact with Joey, realizing her failures and inability to proceed to trial, she strong-armed the vulnerable defendant into entering a plea, subjecting him to pressure from the prosecutor and his family, despite his repeated requests for a trial. **Fourth**, to get a plea, she promised to get him the least possible sentence then failed to object to the State's violation of the agreement that increased the minimum sentence and failed to prepare for mitigation while abandoning him by resigning. **Fifth**, she excused her gross ineptness by claiming that the defendant had confessed to her. For each of these reasons or any combination of them, Ms Dunning provided ineffective assistance that so tainted the plea that the writ application should be granted and the plea vacated to allow Mr. Rogers to make a rational, informed decision with competent counsel.

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episodes, but it does not excuse them."

1. Failure to Review of Evidence and Misjudgment of State's Case

Ms Dunning did not make a reasonable determination that there was a sufficient factual basis to support a plea. Where she had not accurately assessed the case, in turn, Joey Rogers certainly did not have the information about the strengths, weaknesses and defenses that would allow him to make an intelligent waiver of his right to trial. Although she was assigned in June of 2012, Ms Dunning documented her first meeting with Joey Rogers on July 15, 2015 (R.105). She did not review the limited discovery that she had with Mr. Rogers (R.107). On July 17, 2015, she announced to the court that discovery was complete and she was ready for trial, but knowing that she was not going to trial (R.4,6). She was convinced that she would get Mr. Rogers to change his plea.

In fact, discovery was incomplete. She never talked to the previous attorney and had read no notes(R.99). Ms Dunning did not have the gun shot residue (GSR) testing results, and relied on the prosecutor's misrepresentation that the GSR test was positive. She misrepresented to Mr. Rogers that it was inculpatory evidence against him without considering the fallibility and limited use of GSR evidence. She never saw the report indicating that the testing for gun shot residue on the defendant's waist revealed no residue. In fact, it was exculpatory evidence. (R.141-142).

In seven statements to police, Mr. Rogers said that an unknown black male in red cap and tee shirt came to Mr. Butler's house that morning and shot Butler several times. It was his defense. Ms Dunning was unaware that there were police radio and dispatch reports looking for the man in red (R.301-302). Ms Dunning did not talk to witnesses who saw a man, fitting that description, in Mr. Butler's yard shortly before hearing shots.(R.308-313).

She did not know what she did not know, so Joey Rogers could not make an informed plea decision. The State had no witnesses to the incident. There was no blood evidence on Mr. Rogers.

The DNA on the shell casings excluded Mr. Rogers as a donor. She said she told Joey that the State did not have a gun or any DNA (R.135). Ms Dunning did not talk to the previous attorney about the case, even though there was little to nothing in the file (R.89-90, 98-99). The previous attorney allowed Mr. Rogers to testify before the grand jury (R.108), but there is no indication that Ms Dunning got or read Joey's grand jury testimony (R.305)

Ms Dunning knew Mr. Rogers had been sexually abused for over two years by Mr. Butler (R.147), but claimed there was no evidence of sudden passion or heat of blood (R.137). She apparently did not research the application of a prolonged abuse defense in this case. More than suffering the sexual abuse itself, Joey was very afraid of revealing it and having other people know about it. She discounted using it as a defense or mitigation because of his unwillingness.

Ms Dunning incorrectly told the defendant that leaving Mr. Butler's house rather than calling 911 was inculpatory evidence. She did not explore where he went or what he did when he left. In fact, he went to Mr. Butler's relatives' nearby house to tell them what happened. They said he was in shock and fear (R.352-354). He then ran to Wal-Mart to get his brother, before *returning* to Mr. Butler's house (R.140-141). His return to the scene and cooperation with police was exculpatory.

Dr. Sonnier said Ms Dunning did not understand the extent of Mr.Rogers deficits and how ineffective her communication was. (R.243,244,247,248,253) He could not read or understand her letters. (R.249-250) Ms Dunning claimed an expertise in recognizing cognitive problems, yet she did not appreciate Joey Rogers' inability to understand her. She did nothing to investigate Mr. Rogers' background, mental state or intellectual deficiencies. She had an inaccurate view of his disabilities and had taken no steps to have him professionally assessed (R.248). She plowed ahead without any idea that he could not understand her or the court (R.248).

Prejudice was presumed with no further showing required from the defendant "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[43] Ineffectiveness may be the diminishment of a defendant's prospects of success because of the attorney's error, for instance, the failure to investigate potentially exculpatory evidence.[44] Ms Dunning's utter failure to address the evidence and defenses before persuading Mr. Rogers to plead created a void that prevented a knowing plea. Mr. Rogers' incorrect understanding of the State's case, specifically that its only evidence was the purported confession that is discussed *infra*, resulted in a plea that was not knowingly made.

2. Failure to Challenge Alleged Untaped Confession

Ms Dunning was not aware that there was a fifteen hour, video taped interrogation of the impaired, youthful defendant, by at least six law enforcement officers. (R.176). The videos show that *Miranda* rights were not given to Joey Rogers until six hours into the interrogation. There is no evidence that he understood those rights, given his mental limitations. The deputies observed that he was "slow" or that there was something wrong with him. (R.321, 337-338) Joey made eight statements during the fifteen hours, 7 taped statements denying involvement and one alleged, untaped inculpatory statement to Deputy Salvo during a break. (R.330,335,338)

Joey Rogers alleged that Salvo punched him, resulting in the untaped "confession" at 8:30 p.m. after seven hours of questioning. Yet the deputies continued to question him until 3:00 a.m. when he was booked. The district court judge did not believe Joey was hit by Salvo, but a jury may

[43] *United States* v. *Cronic*, 466 U. S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[44] *Hill*, 474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203; cf. *Premo* v. *Moore*, 562 U. S. 115, 118, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) where his lawyer should have but did not seek to suppress an improperly obtained confession but there was other sufficient evidence to convict.

have. Ms Dunning was unaware that Deputy Salvo was himself under federal criminal investigation for abusing the rights of defendants. The police did not have any corroborating information for Joey's purported confession. They tried to have Joey take them to the gun, but he could not because the alleged confession was false and he did not know where the gun was.

Even when a defendant has not expressly invoked his rights under *Miranda*, "the courts must presume that a defendant did not waive his rights."[45] It is well-settled that a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[46] In order for a statement made during a custodial interrogation to be admissible,[47] the State must prove that the statement was freely and voluntarily given and was not a product of threats, promises, coercion, intimidation, or physical abuse.[48]

Ms Dunning had already formed an opinion that Mr. Rogers should take a plea bargain before she even met him. Ms Dunning did not subject the alleged untaped statement to judicial scrutiny before the plea. In *Kimmelman* v. *Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), the Court held that an attorney's failure to timely move to suppress evidence could be the basis for

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[45]*North Carolina v. Butler,* 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979); *State v. Vigne* 01-2940 (La. 06/21/02); 820 So. 2d 533.

[46] *Tague v. Louisiana,* 444 U.S. 469, 470, 100 S. Ct. 652, 653, 62 L. Ed. 2d 622 (1980).

[47] *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed. 2d 293 (1994); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966); *State v. Manning*, 885 So. 2d 1044, 1074 (La. Oct. 19, 2004).

[48]La. R.S. 15:451; In *Bram v. United States*, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L. Ed. 568 (1897) the Court said a confession is not voluntary if "obtained by an direct or implied promises, however slight, nor by the exertion of any improper influence . . . ."; *Miranda v. Arizona*, supra; *State v. Seward*, 509 So.2d 413 (La. 1987).

a Sixth Amendment violation because the evidence "is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'"[49] Here, the purported statement was the only evidence the State had.[50] Yet Ms Dunning said she never considered filing a motion to suppress (R.173-174, 175).

Ms Dunning acknowledged that the "confession" was the State's only evidence against Mr. Rogers (R.158), yet no Motion to Suppress was filed or heard (R.171,173), before she pressured Joey to plead.[51] Ms Dunning did not get all eight statements in discovery. (R.92) Ms Dunning said that she did not show Mr. Rogers any of the videos or go over any of the interrogation. (R.107,114) In the videos, he looks and acts like a child, wanting the approval of the officers. He told the sheriff that he wished the sheriff had been his daddy. Remarkably, without considering all of factors surrounding the alleged confession, on July 17, 2015, only two days after meeting Mr. Rogers for the first time, at a pre-trial conference, Ms Dunning stipulated to the admissibility of an inculpatory statement! The filing of a motion to suppress was not discussed with Joey Rogers before Ms Dunning stipulated to the admissibility (R.159,207).

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[49]*Kimmelman*, at 379, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (quoting *Stone* v. *Powell*, 428 U.S. 465, 490, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)).

[50]Distinguish *Premo v. Moore* 562 U.S. 115; 131 S. Ct. 733; 178 L. Ed. 2d 649 (2011), where Moore and one accomplice told the police that they had accidentally shot the victim. Moore agreed to plead no contest to felony murder in exchange for the minimum sentence. Moore later argued that his counsel should have moved to suppress the confession to the police. The Court found no ineffectiveness where the State's case against Moore included two non-police witnesses to confession which would have been admissible even if the confession to police had been ruled inadmissible.

[51]Joey Rogers' post plea attorney, Ms Bonin, took limited testimony from two of the six deputies and introduced the videos during the hearing on the withdrawal of the plea, just to show Ms Dunning's ineffectiveness, not to address suppression itself. The district court erred in ruling on the admissibility of the statement under these circumstances.

It is more than Ms Dunning's failure to file to suppress the purported confession that rendered her ineffective. It was also her purposeful stipulation to the admissibility of the statement, without fully examining the circumstances of the interrogation and without consultation with Joey Rogers. She forfeited Joey Rogers right to remain silent without his consent. When she made the stipulation, the district court did not ask Joey Rogers whether he authorized the stipulation. Ms Dunning unilaterally, without consent, dismissed his defense as to the alleged confession. Minimally, there should have been a colloquy with Joey on the record before his attorney was allowed to stipulate to admissibility of the "confession."

But for Ms Dunning's stipulation, the State would have had to prove the admissibility of the confession to the jury.[52] The alleged confession that resulted from the custodial interrogation in this case was not reliable, admissible evidence. Joey's plea is based on misinformation about the State's ability to use the alleged confession. Ms Dunning allowed the State to use an improperly obtained confession to persuade Mr. Rogers to plead. Ms Dunning was caught, not only failing to file a motion to suppress, but deliberately stipulating to a purported confession without the client's consent and without full investigation. To defend herself, she made an appalling claim. The Third Circuit wrongly excuses the attorney's neglect and misuse of the confession issue (Pet. App. A) because of Ms Dunning's claim, in violation of the attorney-client privilege and without factual basis, that Joey confessed to her.[53]

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[52]La. R.S. 15:451 provides, "Before what purports to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

[53]Ms Dunning later claimed that the reason she did not challenge the confession was that Joey made an admission to her, discussed *infra*. The district court believed her even though she had not documented the alleged attorney-client admission and remembered little else about the case. The

3. Defense Attorney's Coercion and Inducements

Joey Rogers was worn down by the coercive tactics of his attorney. The influences exerted by Joey Rogers' attorney, in addition to her lack of investigation and misleading, insufficient advice, improperly caused him to plead without making a rational, independent decision.[54] She used both direct and subtle tactics that made the plea involuntary. She never acted as the counsel required by the Sixth Amendment. Ms Dunning's performance was worse that ineffective assistance. The only assistance she provided was to coerce, scare, and intimidate Joey Rogers into entering a plea.

Ms Dunning noted that she felt some pressure in regard to the plea (R.152-153). She told him the plea was in his best interest (R.160-161,207). She admitted her focus was to persuade Joey Rogers to plead guilty (R.199). She did not prepare for trial. Without a full understanding of the evidence, she believed a plea was in his best interest (R.210).

Joey Rogers had just turned 18 years old when he was arrested for this offense in 2011. He was in jail for four years, some in solitary confinement on suicide watch under harsh conditions with no support, before Ms Dunning came to see him, about three weeks before he was set to go to trial. At their first meeting on July 15, 2015, Ms Dunning began talking to Mr. Rogers about a plea. After not having visited him for three long years, just three days after the July 15 meeting, Ms Dunning returned on July 18 to renew her push for a guilty plea. Ms Dunning met with Mr. Rogers at jail again to convince him to plead. He was not interested, particularly when she could not explain possible sentences. There were two weeks until trial.

Third Circuit mistakenly accepted this conclusion and did not directly address the atrocious circumstances of the alleged untaped confession.(Pet. App. A)

[54]*Lee*, supra; *Montejo* v. *Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955; *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)

Although Joey adamantly told her he was not interested in a plea, eleven days later Ms Dunning returned, this time with the prosecutor in tow. On July 29, 2015, *the prosecutor* presented him a signed written deal for an open ended sentence (R.25-26,128-129). Ms Dunning allowed the prosecutor to scare Mr. Rogers. The discussions with the State presumed that Mr. Rogers was the shooter and ignored his protestation of innocence and his defenses (R.149). Joey's victimization by Mr. Butler's sex abuse was discussed (R.145), but Ms Dunning supported the prosecutor's diminishing of its significance and his direction to Joey that Joey would have to take responsibility for his actions (R.145).

Shockingly, when she thought Joey was getting closer to a plea, Ms Dunning left him alone with the prosecutor for twenty minutes. (R.146-147)[55] Ms Dunning said that Joey did not object to the meeting with the prosecutor, (R.148) as if he was capable of overruling his attorney's abandonment. Ms Dunning testified that she strongly recommended the plea in the July 29, 2015 meeting, but Joey was not ready. Instead, Joey asked Ms Dunning to talk to the prosecutor about a counteroffer of an agreed sentence of ten to fifteen years, which she relayed to the State. The prosecutor did not respond to Ms Dunning's request initially. (R.152-153)

Ms Dunning admitted that she felt pressure to convince Joey to plead. She did not have time to look into other evidence and defenses because the State wanted an immediate agreement. (R.148)

[55] Later, Ms Dunning was "shocked" to learn that the prosecutor claimed Joey Rogers said that he got a gun on the street (R.147,149), a statement that could not be used as State's evidence if he had chosen to go to trial, but now limited his decision on whether to testify as it could be used for cross examination. *State v. Lewis* 539 So. 2d 1199 (La. 1989); 90 A.L.R.4th 1117. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 347, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963); U.S. Const. amend. V; La. R.S. 15:451.

After the July 29, 2015 meeting, she did not start preparing for trial. Ms Dunning "forgot" to talk to the district attorney about a continuance to finish discovery and preparation.

Still trying to get a plea, on July 30, 2015, Ms Dunning met with Joey's family to gain their cooperation (R.151). When Ms Dunning spoke with them on the phone, they were confused by the charges and believed Joey was coming home (R.155-156,200). Ms Dunning relied heavily on Joey's aunt and mother to persuade him to plead guilty (R.151,168), not knowing or not caring that Joey's mother also had mental deficits and had horribly neglected him, contributing to his present situation (R.208,360-361). His whole family had drug problems. They were not capable of understanding the circumstances anymore than he was, and were not suited to advising him. Using them was not to have Joey better informed; it was meant to increase the emotional pressure and fear.

Ms Dunning brought Joey's mom and aunt to a meeting with the prosecutor (R.201) on July 30, where the prosecutor persuaded them to convince Joey to plead guilty. Joey's mom and aunt were susceptible to the same pressures from the attorney and prosecutor. Ms Dunning gave the family her mistaken appreciation of the facts (R.154-156). After the meeting with Joey's family, the prosecutor refused Joey's counteroffer. (R.152-154) Ms Dunning sent a letter about the refusal by hand delivery to Joey Rogers at jail. (R.160)

By August 4, 2015, Joey Rogers had been in jail for six and a half years. He just wanted to go home. (R.145) His pre-incarceration deficits were exacerbated. He had spent four months in solitary confinement on suicide watch wearing a paper gown, without a mattress or decent food (R.298-299). The periods of isolation, with no understanding of the proceedings or when they would end, compounded his feelings of despair. He was most certainly suffering and willing to do anything to gain release. Dr. Sonnier testified that Joey felt defeated, like he was not getting any help. He

made the plea decision without understanding of facts or evidence (R.244, 246). He was susceptible to influences from the strident prosecutor and his own harried, neglectful attorney. He was at the mercy of Ms Dunning.

The case was set for *trial* on August 4, 2015, and his attorney had not prepared him for trial in any way. (R.133) Ms Dunning herself was unprepared for trial, still counting on a plea. She told him that he should not go to trial (R.245). She gave him no assurance that she was ready and able to defend him. There had been no motion hearings. Ms Dunning did not explain possible trial outcomes to Mr. Rogers, but persisted in telling him that if he went to trial, he would get life in prison (R.249).

This is not a case where counsel gave Mr. Rogers all of the scenarios, good and bad, then let him decide whether to waive his constitutional right to trial and enter a plea. Ms Dunning only made dire predictions of life imprisonment. It is constitutionally permissible to use the threat of more severe punishment to encourage a guilty plea, but that threat should come from the State, not one's own attorney.[56] It is not "intimidation" for an attorney to advise his client of the sentencing risks as long as the decision to plead guilty was not coerced by any misrepresentation or misstatement by counsel.[57] Ms Dunning's threat of a life sentence was a misrepresentation as she did not explain the possibility of lesser verdicts or acquittal. She told Mr. Rogers that trial had only one result: life imprisonment.

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[56]*Frank v. Blackburn*, 646 F.2d at 883 (5th Cir. 1980), citing *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

[57]*State v. Youngblood*, 32,003 (La. 2 Cir. 5/5/99), 740 So.2d 687, 691; *State v. Celestine* 20-170 (La. 5 Cir. 11/04/20); 2020 WL 6480843; *State v. Bouie*, 00-2934 (La. 5/14/02), 817 So. 2d 48.

So on the day that he had hoped to go to trial, Joey Rogers instead agreed to sign the plea after Ms Dunning left him alone with his family. His family's advice to take the plea so that he could *go home* (R.244,246,249,256). He believed that if he went to trial, he would get a life sentence, and did not understand defenses, acquittal, or responsive verdicts (R.249,255). The decision made was not freely Joey Rogers'. He was heavily intimidated or coerced by his counsel's tactics that predicted doom at trial.

In addition to Ms Dunning's pressure tactics, she also made promises to Joey Rogers to induce his plea but then failed to keep them. Ms Dunning admitted that she had given up and was instead focusing on mitigation the sentence. Her strategy was to get Mr. Rogers to plea and then put her energy into mitigation of his sentence (R.116). On August 4, Ms Dunning advised him that the sentencing range was zero to forty years. Mr. Rogers was always asking for a better sentence (R.148). His basic understanding of the plea was that the maximum sentence was forty years, but believed he could get ten (R.202,254,257). She assured Joey and his family that if he pleaded guilty, she would work to keep the sentence in the lower range. Her promise was key to coercing Joey to enter the plea.

Yet, after the plea was entered, the quality and effectiveness of Ms Dunning's representation did not improve. She claimed that she was going to get a sex abuse expert for mitigation (R.149). Ms Dunning did not see Joey Rogers from August 4 to November 1, 2015 when they met regarding the sentencing hearing, but she still had not identified or hired an expert (R.164). She continued the sentencing twice (R.9-14), but did not meet with Joey Richards again. She withdrew from the case and resigned from the public defender's office in February of 2016 (R.89), without telling him (R.164). She resigned because she felt she neglected four clients, including Mr. Rogers (R.118).

There were plenty of mitigating factors if Ms Dunning had tried to find them. Joey Rogers had a horrible upbringing which caused him to seek refuge in Mr. Butler's home. Things were so bad at home that he endured two years of sexual abuse by Mr. Butler, rather than return. Yet he was embarrassed and ashamed about the sexual abuse, not wanting it exposed. Ms Dunning did not get evidence, such as the texts on Mr. Rogers' phone from Mr. Butler. (R.92). Mr. Butler's family was aware of abuse and did not believe that Joey killed Mr. Butler (R.150). Mr. Butler's history of abusing teenage boys was known to others in his family (R.355-357). There was evidence that Joey was always polite and courteous to Mr. Butler. He helped Mr. Butler (R.356-357). Trial counsel's failure to effectively develop the mitigation case resulted in the Third Circuit turning the evidence of abuse against the defendant, instead of seeing it as a basis for withdrawal of the guilty plea.(Pet. App. A) It should have resulted in granting the withdrawal of the plea.

It was Ms Dunning's intention to file a Motion for Downward Departure to allow sentencing below any mandatory minimum (R.172), but even that did not get done. By her own admission, she "fell short" in preparing for sentencing (R.164). She did not file discovery for any school or medical records (R.120). She did not get a mitigation specialist (R.117, 166). None of her promises that induced the plea were fulfilled. New counsel was appointed in 2016 who tried to correct the multitude of appalling mistakes in this case. Joey Rogers was sentenced February 14, 2018 (R.20-21). With seemingly no one on his side, under these grim circumstances, Mr. Rogers felt the pressure and was susceptible to influences from the prosecutor, his own attorney, and his family. Under these circumstances, Joey Roger's plea could not be voluntarily entered. The motion to withdraw should have been granted.

4. Failure to Object to State's Violation of Agreement

The prosecutor signed the written plea agreement at the meeting on July 29, 2015, for an open sentence in the 0 to 40 year range after a pre-sentence investigation (R.24-25). Joey Rogers signed the plea agreement in court on the prosecutor's desk on August 4, 2015. Ms Dunning was then handed the State's La. C.Cr.P. Art. 893.3 motion, a motion within a prosecutor's discretion, that invokes a minimum sentence of twenty years.[58] (R.168-169). Ms Dunning was sandbagged by the prosecutor's filing of the motion that created a mandatory minimum, just as they were entering the plea on the record (R.203). Her response was inappropriate and unprofessional, even by her own standards. She was "not happy" with herself for going forward with the plea (R.169, 205). It was not part of their plea deal (R.205). At the hearing on the motion to withdraw the plea, the district court erred by ignoring Ms Dunning's testimony and finding that the Art. 893.3 motion must have been part of the agreement because Ms Dunning did not object (Suppl.R.6-7).

The State's La. C.Cr.P. Art. 893.3 motion, which the State is not required to file, violated the plea agreement with Joey Rogers for an open-ended sentence in the zero to forty year range, by creating a mandatory minimum of twenty years and added the restriction that the sentence be served without benefit of parole. The State offered Joey Rogers a plea, gained the benefit of his plea, and then violated the stipulation of the plea of a zero to 40 year sentence. "[P]lea bargains are essentially

[58]La. C.Cr.P. Art.893.3 requires either proof "beyond a reasonable doubt that a firearm was actually used or discharged by the defendant during the commission of the felony for which he was convicted, and thereby caused bodily injury" or an admission. Where the offense is manslaughter *and* the firearm is proven to be discharged, La.C.Cr.P. Art. 893.3(E)(1)(a) , "the court shall impose a minimum term of imprisonment of not less than twenty years nor more than the maximum term of imprisonment provided for the underlying offense." The sentence is "without benefit of parole, probation or suspension of sentence."La.C.Cr.P. Art. 893.3(E)(2) and (G).

contracts."[59] Plea agreements must be construed in light of the rights and obligations created by the Constitution[60] in the Due Process Clause which imposes fairness standards between criminal defendants and the State. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[61]

On February 14, 2018, the district court denied Joey Rogers' motion to withdraw the plea, despite the State's violation of the plea agreement because Ms Dunning had not objected. After noting that the Court was constrained by the minimum sentence (R.365), Mr. Rogers was sentenced to twenty years at hard labor, allowing credit for the six and a half years he was in jail, and recommending education and training services. (R.20-21,48). His Motion to Reconsider was denied the same date (R. 20-21).

It is well settled that whenever a guilty plea rests in any significant degree on an agreement or promise by the prosecutor, which is part of the inducement or consideration, such promise must be fulfilled or the plea vacated.[62] If the State's obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement and in others specific performance (i.e., requiring the government to fully comply with the agreement). Joey Rogers' motion to withdraw should have been granted because the State failed to comply with the material

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[59] *Puckett* v. *United States*, 556 U. S. 129, 137, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

[60] *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 2689, 97 L.Ed.2d 1 (1987)

[61] *Evitts* v. *Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

[62] *Santobello v. New York*, supra; *State v. Dixon,* 449 So. 2d 463 (La.1984); *United States v. Weiss*, 599 F.2d 730 (5th Cir.1979); *State ex rel LaFleur* 416 So.2d 82 (La. 1982); *State v. Jones*, 398 So.2d 1049 (La. 1981).

representation or promise for an open ended sentence range by instead mandating a 20 year minimum, without parole.[63]

Ineffective assistance of counsel can result in *Strickland* prejudice in regard to sentencing because "any amount of [additional] jail time has Sixth Amendment significance."[64] As held in *Lafleur*, a defendant has the right to effective assistance of counsel in entering a plea bargain and enforcing it. Prejudice can be shown if it results in the denial of a right to trial or the imposition of a more severe sentence. The State's motion here raised the minimum sentence of 0 years to a minimum of 20 years, despite the State's plea agreement to an open sentence in the zero to forty

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[63]ABA Criminal Justice Standards WITHDRAWAL OF THE PLEA Standard 14- 2.1. Plea withdrawal and specific performance:

(a) After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance on the defendant's plea.

(b) After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. A timely motion for withdrawal is one made with due diligence, considering the nature of the allegations therein.

(i) Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that:

(A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;.....

(C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;

(D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement;.... or

(c) As an alternative to allowing the withdrawal of a plea of guilty or nolo contendere, the court may order the specific performance by the government of promises or conditions of a plea agreement where it is within the power of the court and the court finds, in its discretion, that specific performance is the appropriate remedy for a breach of the agreement.

[64]*Glover* v. *United States*, 531 U.S. 198, 203-204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Mempa* v. *Rhay* , 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967).

year range. "Any amount of [additional] jail time has Sixth Amendment significance."[65] Yet Ms Dunning took no action to object or protect Joey Rogers from the State's violation.

In *Santobello*, with his first attorney and prosecutor, the defendant pleaded guilty to a lesser offense with a minimum sentence recommendation. The next prosecutor recommended the maximum sentence, which the trial judge imposed. The Court granted certiorari and said that because a plea is adjudicative, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The Court remanded the case to the state courts for further consideration.

Ms Dunning knew Joey Rogers did not understand the impact of the State's sentencing motion. (R.167,169,199,213,297). She had no time to explain the impact of Art. 893.3 to Joey Rogers (R.202-205). Instead of refusing to enter the plea that day or calling the violation to the judge's attention, Ms Dunning allowed Mr. Rogers to go forward with the plea. In the colloquy, Mr. Rogers claimed to understand the motion that was sprung on him after he signed the plea. The district court accepted the plea. (R.7-8) Ms Dunning did not object.

Joey Rogers waived fundamental constitutional rights in order to receive the terms of the deal to an open ended sentence of 0-40 years, not a sentence range of twenty to forty years. His focus on making the plea was on sentencing. He believed he could get less than 20 years because of his youth, his lack of criminal record and the mitigatory factors. He would not have pled guilty if he was aware there was a twenty year minimum sentence.

The State knew it had discretion to use the motion to require a mandatory minimum sentence during plea negotiations because a firearm was used, but they never revealed their intent to file.

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[65] *Glover*, *supra*, at 203, 121 S. Ct. 696, 148 L. Ed. 2d 604.

Instead, they offered a zero to forty year range. The correct information as to possible penalties is information that an accused should possess to enter a knowing and intelligent guilty plea. In *LaFleur, supra,* the record supported the defendant's assertion that he would not have pleaded guilty to simple burglary and possession of a firearm had he known he would be ineligible for probation or parole under the firearms statute. The *Jones* guilty plea was induced in part by the State's promise that the defendant would receive no jail or prison time and was set aside. In the case at bar, there is a written agreement (R.24-25) documenting the *State's* promise of an open sentence to manslaughter.

Ms Dunning's ineffective assistance and failure to object to the State's filing of the Art. 893.3 motion that violated the plea agreement resulted in the prejudicial Due Process violation of Mr. Roger's rights. She convinced him to waive significant Constitutional rights by entering the plea and then did nothing to protect or enforce the agreement. Mr. Rogers was entitled to withdraw his plea. The plea should be vacated and the case remanded.

5. Alleged Confession to Attorney Does not Excuse Ineffectiveness

At the hearing on the withdrawal, Mr. Rogers was required to waive his attorney-client privilege in order to call Ms Dunning to testify as to her perceptions and observations concerning his capacity at the time of the plea (R.83-84). Whether Mr. Rogers could waive any right, including the attorney-client privilege, in a hearing where the issue was his competency to waive his rights and enter a plea is a conundrum. He was quickly counseled by Ms Bonin, his new attorney, on what to say (R.83-84). Mr. Roger's purported waiver was limited to "Ms. Dunning can testify as to what Ms. Bonin asks her." (R.84). He did not waive the privilege to allow Ms Dunning to volunteer information, insert her opinions or enter her own objections.

Ms Dunning asked to represent herself, although she was only a witness, and tried to assert a right to object to questions she did not like (R.82). Several times, she noted that she was being attacked for her incompetency (R.111, 112,141,143,175). Ms Bonin had Ms Dunning's file which contained scant information. Ms Bonin met with Ms Dunning in advance of the hearing. During the hearing, after questions concerning her miscalculations of possible release dates (R.82-83), the following exchange occurred between Ms Bonin (Q) and Ms Dunning (A):

Q. Did you, at all, discuss going to trial or trial procedures in these times that you visited him thus far?
A. Yes.
Q. You did? Because it's not in these letters. Wasn't he interested in going to trial?
A. Yes, he was.
Q. And didn't he always assert his innocence to you?
A. No.
Q. No? And when would that be?
A. No.
Q. And when would that be that he did not assert --
A. I don't write things like that down in my notes. I had a discussion with Joey, probably before I got to this point. I asked Joey early on about -- and I kind of couched my question in terms that wouldn't indicate the answer that I wanted, but I asked him well, first, he told me that he shot Mr. Butler.
Q. And you didn't put that in any notes?
A. No, I don't.
Q. Go ahead.
A. And then I asked him, I said, ` Joey, had you just had --" Joey told me he had made a sexual advance to him after they wanted (sic) the movie. I said, Joey, had you just had enough of the abuse? Is that why you did it?" And he said no. Because I was trying to do a heat of blood manslaughter defense, okay. I thought if I got the right answer he'd be a pretty good show if I could get him tried on a manslaughter. Still the second degree was hanging out there. He said to me, no, I went there to kill him.
Q. And you did not put that in your notes?
A. I did not put that in my notes.
Q. And you did not tell me that either?
A. No, you didn't ask me if I ever talked to him about it.
Q. We went over what you talked to him about.
A. Beanie, Beanie, we went over what you wanted me to testify to and you never mentioned anything about my having to recall dates and all this other stuff.
Q. Okay. The bottom line is, you didn't put it in although you take copious notes?
A. I did not put it in my notes. I do not put exculpatory shit like that in my notes.

Q. Inculpatory stuff like that you don't put?
A. Inculpatory, yes.
Q. You do not put inculpatory notes in there even though someone else may have to take over your case and be unaware of what a defendant tells you?
A. If they wanted to talk to me about it, I would have told them. (R.125-126).

The Third Circuit put undue weight in the undocumented claim of a confession to Ms Dunning and discarded Mr. Rogers' legitimate issues with the plea. (Pet. App. A)

Ms Dunning's testimony crossed the line when she volunteered undocumented confidential information on alleged communications that were not relevant to Joey Rogers' competency and were blurted out for the first time in a hearing. Despite Ms Dunning's lack of memory of most other significant events in the case and her lack of notes, she claimed to remember this unrecorded statement. Mr. Rogers disputes her allegation that he made a confession. He has consistently maintained his innocence to all of his attorneys. Moreover, this testimony was irrelevant. It was not part of the waiver or plea. It was protected by the attorney client privilege. The former defense attorney should have confined her testimony to perceptions, observations, and the mental, emotional, or physical condition of Mr. Rogers at the plea, without revealing an alleged, unrecorded, confidential communications.[66]

Mr. Rogers maintains his innocence and emphatically states that he did not confess to Ms Dunning or anyone else. Even if he had, he still had the constitutional right to a trial. In *Kimmelman* v. *Morrison*, 477 U.S. 365, 380, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), the Court said "The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs

[66]*State v. O'Brien* 2020 La. LEXIS 2311; 2020-00477 (La. 10/14/20); 2020 WL 6054903; LSA-C.E. art. 506(B), 507.

solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." Even if a defendant is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance.

In totality, the misinformation and lack of information that Ms Dunning provided to Joey Rogers, a youth with hearing, social, and intellectual impairments, rendered his plea unknowing and unintelligently made. Moreover, in at least five respects, Ms Dunning provided drastically ineffective assistance of counsel for the plea. Most egregious was Ms Dunning's failure to challenge the alleged untaped confession, the State's only evidence, that resulted from a fifteen hour custodial interrogation. The attorney exerted undue influences and pressure on him to plead, such that the decision was not his own. Joey Rogers' plea was not free and voluntary. The overwhelmed attorney gave inadequate, non-informed advice and lacked the courage or ethics to withdraw *before* the plea. The writ application should be granted and the plea vacated.

CONCLUSION

This case presented the perfect storm of a defendant who lacked the capacity to assist his counsel and an attorney who lacked the capacity or interest to assist him. His attorney's atrocious ineffectiveness deprived him of his Constitutional right to remain silent and his right to trial. Nothing that occurred in procuring Joey Rogers' plea satisfied the fairness standards of the Due Process Clause. The Louisiana Third Circuit Court of Appeal's decision to uphold the plea (Pet. App. A) made with grossly ineffective counsel runs up against settled constitutional principles that a majority of the Louisiana Supreme Court declined to address. (Pet. App. B) The lower courts did not follow this Court's well-marked precedent of *Strickland, Santobello, Lee, Garza*, and subsequent cases. This Court should grant review, find that the Louisiana Third Circuit erred in upholding

district court's denial of the Motion to Withdraw the plea, and remand to the state courts for further proceedings. Minimally, the Court should find that the State of Louisiana violated the plea agreement for an open sentence and remand to allow the plea to be withdrawn or the agreement to be enforced.

Respectfully submitted,

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