

**In The
Supreme Court of the United States**

SHONGO LECARR OWENS, a/k/a G.O., a/k/a Chuck
(Federal Prisoner: 59029-037),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court abused its discretion by denying Petitioner Shongo Owens' motion to withdraw his unknowing and involuntary plea of guilty as a result of receiving constitutionally ineffective assistance of trial counsel?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shongo LeCarr Owens respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit issued February 16, 2018.

OPINIONS BELOW

On February 16, 2018, the United States Court of Appeals for the Fourth Circuit entered a judgment and opinion affirming the decision of Honorable Catherine C. Blake, District Court Judge for the District of Maryland to deny Shongo Owens' motion to withdraw his guilty plea. *United States v. Shongo Owens*, No. 1:15-cr-00468-CCB-1 (4th Cir. Feb. 16, 2018) (unpublished) (mem. op.). A copy of that opinion has been attached as Appendix A. The corresponding Order is likewise attached as Appendix B.

JURISDICTION

On February 16, 2018, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the District of Maryland, at Baltimore. *See*, Appendix A, *United States v. Shongo Owens*, No. 1:15-cr-00468-CCB. This petition has been filed in a timely manner within 90 days of that order. Sup. Ct. R. 13.1. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issue on appeal is whether the plea of Shongo Owens should be vacated because of ineffective assistance of counsel. The right to effective assistance of counsel is guaranteed by the Sixth Amendment of the United States' Constitution. U.S. Const. Am. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Powell v. Alabama*, 287 U.S. 45 (1932). Further, Federal Rule of Criminal Procedure § 11(d) provides that "[a] defendant may withdraw a plea of guilty ... after the court accepts the plea, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P § 11(d)(2)(B).

PRELIMINARY STATEMENT

Petitioner Shongo Owens received ineffective assistance of counsel because, among other things, his trial attorney, Joshua Treem, Esq., and Mr. Treem's co-counsel, Emily Levinson, Esq., admittedly failed to provide complete and/or accurate advice concerning the effects of his coram nobis petition in Anne Arundel County, Maryland. *State of Maryland v. Shongo Owens* (02-K-00-000565 (September 21, 2017)) (Order). A copy of which is attached as Appendix C, and its corresponding Memorandum Opinion is likewise attached as Appendix D. Due to trial counsel's constitutionally defective representation, Mr. Owens is currently serving a 240-month sentence. At his sentencing hearing on May 11, 2017, Mr. Owens moved to withdraw his guilty plea because it was not entered knowingly and voluntarily. The Court denied Mr. Owens' motion to withdraw the guilty plea apparently finding that Mr. Owens' plea was knowing and voluntary. The Court then proceeded to sen-

tence Mr. Owens. The record clearly shows that Mr. Owens did not knowingly and voluntarily enter his guilty plea. Trial counsel's failure to provide Mr. Owens with effective assistance of counsel directly resulted in Mr. Owens' unknowing and involuntary plea.

STATEMENT OF THE CASE

Mr. Owens was indicted on August 26, 2015, on the charge of conspiracy to distribute and possession with intent to distribute cocaine and heroin in violation of 21 U.S.C. § 846, among other charges. *See*, Appendix A. Mr. Owens was represented by Joshua Treem, Esq., and Emily Levinson, Esq. throughout his pretrial hearing, plea and sentencing. Pursuant to a written plea agreement signed on September 19, 2016, Mr. Owens pled guilty to Count 1, conspiracy to distribute and possession with intent to distribute more than five kilos of cocaine and more than one kilo of heroin, and Count 20, unlawful possession of specific firearms. *See*, Dist. Ct. Docket No. CCB-15-00468 filed Oct. 17, 2016.¹

Placed under oath, Mr. Owens was questioned by the Court as to his understanding of the terms of the agreement. *See*, Dist. Ct. Dkt. Oct. 17, 2016. The Court confirmed that Mr. Owens knew the Court could impose a sentence greater than he had anticipated, *Id.* at p.17; that the maximum possible penalty for the crimes was a life sentence in prison, a period of five years supervised, a \$100 special assessment each, and a fine of up to Ten-Million Two-Hundred Fifty Thousand dollars (\$10,250,000.00), *Id.* at pp. 6-7; the rights Mr. Owens was giving up in regard to a

¹ Hereafter, citations to documents from Mr. Owens' District Court proceedings will be indicated by "Dist. Ct. Dkt." and the date on which the document was filed.

jury trial and appeal, *Id.* at pp. 8-11, 18; and ultimately Mr. Owens' understanding of the proceedings and willingness to go forward, *Id.*

At the Plea Hearing, the Court specifically asked if Ms. Levinson and Mr. Treem should have provided anything further with regard to their representation, and Mr. Owens responded, "I don't know. Is there?" *See*, Dist. Ct. Dkt. Oct. 17, 2016 p. 12:8-13. This inquiry should have raised concerns for the Court because it clearly showed that Mr. Owens did not fully understand the question, and the question itself asked Mr. Owens to contemplate and analyze legal theories despite not having a legal education. The Court went on to point out that with regard to Count 20, Mr. Owens' base offense level was 24 based on at least two prior felony convictions for controlled substance offenses. *See, Id.* at p. 16:20-22.

Mr. Owens was sentenced on May 11, 2017. *See*, Dist. Ct. Dkt. May 11, 2017. Prior to Sentencing, the Honorable Catherine Blake reviewed the Presentence Report, listened to both parties, and heard the statement of Mr. Owens. *See*, Dist. Ct. Dkt. Oct. 17, 2016. Mr. Owens' Counsel, Joshua Treem, Esq., alerted Judge Blake to his firm's "failure to appropriately advise him of the full panoply of consequences that could result from his pending coram nobis petitions ... and even perhaps whether or not he would seek to withdraw his plea" and requested a continuance to allow Mr. Owens to consult with independent counsel. *See*, Dist. Ct. Dkt. May 11, 2017 pp. 2:25-3:25.

After the Court denied the request for continuance but before sentencing, Mr. Owens sought to withdraw his guilty plea based on ineffective assistance of

counsel because of his Counsel's failure to advise Mr. Owens regarding how his criminal history would change if the coram nobis proceedings were successful. *See*, Dist. Ct. Dkt. May 11, 2017 pp. 12-14. Mr. Owens testified that he did not have a full and clear understanding of the plea and sentencing guidelines. *See, Id.* at p. 34:17-18. Mr. Owens clearly stated that the primary reason he accepted the plea was because he was incorrectly advised that he would be facing life imprisonment based on his status as a career offender. *See, Id.* at p. 34:20-24. In fact, he could not have faced life imprisonment because a life sentence was not supported by the sentencing guidelines.

This Court has interpreted the Sixth Amendment right to counsel to include the right to effective assistance of counsel. U.S. Const. Am. VI; *Strickland*, 466 U.S. 668; *Powell*, 287 U.S. 45.

The test for establishing an ineffective assistance of counsel claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U. S. 684-87 (1984). Prejudice stemming from ineffective assistance of counsel can be shown by establishing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Here, Mr. Owens took a guilty plea because of the deficient advice of his counsel and was thus denied a proceeding altogether. In this context, the test for ineffective assistance of counsel is whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." *Roe v. Flores-*

Ortega, 528 U. S. 470, 483 (2000). Mr. Owens' Counsel informed the Court that he had ineffectively advised Mr. Owens after failing to research the effects of a pending coram nobis petition that would lower his criminal history and take him out of the life imprisonment. *See*, Dist. Ct. Dkt. May 11, 2017 pp. 2:25-3:12, pp. 7:13-8:18. By failing to thoroughly advise Mr. Owens, Trial Counsel deprived him of a full opportunity to make a knowing decision on whether to plead guilty. *See, Padilla v. Kentucky*, 599 U.S. 356, 130 S. Ct. 1473. Nevertheless, Judge Blake inexplicably denied Mr. Owens' Motion to Withdraw his guilty plea. *See*, Dist. Ct. Dkt. May 11, 2017 p 18:16-17.

Judge Blake then proceeded to sentence Mr. Owens to Two-Hundred Forty (240) months of active incarceration for Count 1 and concurrently One-Hundred Twenty (120) months of active incarceration for Count 20. *See*, Dist. Ct. Dkt. May 11, 2017 pp. 41:19-42:17. When imposing this sentencing, the Court factored in Mr. Owens' criminal history. *See, Id.* at pp. 22:18-23:3, 27:12-14, 31:11-20, 41:1-42:17. When arguing for the sentence, Government's counsel also compared Mr. Owens' criminal history to that of his co-defendants despite the Court's position that his criminal history would not affect his sentence. *See, Id.* at pp. 27:12-14, 41:1-42:17.

Mr. Owens' coram nobis petition in Anne Arundel County was granted on September 21, 2017 Appendix C, *Maryland v. Owens, supra*. The Court held that Mr. Owens did not knowingly and voluntarily enter his guilty plea in 2000 and granted coram nobis relief. *Id.* As a result, the Court nullified Mr. Owens' 2000 guilty plea. *Id.* Mr. Treem and Ms. Levinson should have known that the coram

nobis petition could change Mr. Owens' sentencing parameters. By taking the coram nobis petition into account, prior counsel should have advised Mr. Owens of the potential effects as a contingency. Not advising Mr. Owens of a significant and very possible change to his sentencing parameters clearly prejudiced Mr. Owens' ability to enter a knowing and voluntary plea.

REASONS FOR GRANTING THE PETITION

The trial court abused its discretion when it denied Petitioner Owens' motion to rescind his guilty plea, set aside, or correct defendant's sentence and judgment on the basis of ineffective assistance of counsel. For the reasons set forth below, this Court should grant the writ, vacate the February 16, 2018 judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the decision of the United States District Court for the District of Maryland, at Baltimore and vacate Mr. Owens' guilty plea.

A. SHONGO OWENS' TRIAL COUNSEL'S CONDUCT FELL BELOW AN OBJECTIVELY REASONABLE STANDARD OF CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

The two-prong standard for establishing ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The first prong requires a showing that an attorney's conduct in representing his or her client falls below an objectively reasonable standard. *Id.* at 694-95. The second prong requires that the defendant demonstrate prejudice resulting from trial counsel's failure to reasonably perform his or her duty. *Id.* at 694. As discussed below, the Record

shows that Mr. Owens' counsel's conduct meets the requirements for both Strickland prongs.

Federal Rule of Criminal Procedure § 11(d) provides that “[a] defendant may withdraw a plea of guilty...after the court accepts the plea, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal.” Fed R. Crim. P. § 11(d)(2)(B). Motions to withdraw a guilty plea filed prior to sentencing should be granted “if for any reason the granting of the privilege seems fair and just.” *Kercheval v. United States*, 274 U.S. 220, 224, 71 L.Ed. 1009, 47 S.Ct. 582 (1927). Although, the Kercheval standard is flexible, several factors can be identified that bear on the court's exercise of its discretion: (1) Whether the defendant has asserted legal innocence; (2) Length of the delay between entry of plea and desire to withdraw; (3) Whether the defendant had the benefit of competent counsel. *United States v. Nicholson*, 676 F.3d 376, 384 (citing *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991)).

Ineffective assistance of counsel is proper grounds for withdrawal of a guilty plea. *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994). The defendant must show that the plea was motivated by advice received from counsel which fell short of the range of competence demanded of attorneys in criminal cases. See, *Hill v. Lockhart*, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985) (defendant must show deficient performance and prejudice). Where defense counsel's incorrect legal advice rose to level of ineffective assistance of counsel and induced defendant's plea of

guilty, the plea is involuntary and unintelligent. *Id.* at 367. If a plea is not knowing and intelligent, it should not be accepted.

When voluntariness is challenged, the court must examine the entire plea record and the totality of the circumstances surrounding the plea. Although Rule 11 violations are serious because of the due process concerns inherent in the waiver of constitutional rights, they justify withdrawal only if they affect substantial rights and are not purely technical. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). An appeal waiver does not bar review of denial of a motion to withdraw plea when motive to withdraw the plea “incorporates a colorable claim” of ineffective assistance. *Attar, supra*, at 733.

B. THE LOWER COURT ABUSED ITS DISCRETION IN ITS ANALYSIS OF THE MOORE FACTORS.

The Court reviews denial of a plea withdrawal motion for abuse of discretion. *United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012). Here, the Court abused its discretion in denying Mr. Owens’ motion to withdraw in the face of his constitutionally defective assistance. To withdraw a guilty plea prior to sentencing, a defendant must “show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B). “The defendant bears the burden of demonstrating that withdrawal should be granted.” *United States v. Thompson-Riviere*, 561 F.3d 345, 348 (4th Cir. 2009) (alteration and internal quotation marks omitted).

The Fourth Circuit considered the following nonexclusive list of factors when deciding whether a defendant has met this burden:

(1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion to withdraw the plea; (4) whether the defendant had the close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether [withdrawal] will inconvenience the court and waste judicial resources. *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991).

The first factor is the most important, as “the fairness of the Rule 11 proceeding is the key factor in the review of the denial of a motion to withdraw a guilty plea.” *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996). The district court's inquiry is thus ordinarily confined to whether the underlying plea was counseled and voluntary, because “a properly conducted Rule 11 guilty plea colloquy leaves a defendant with a very limited basis upon which to have his plea withdrawn.” *United States v. Nicholson*, 676 F.3d 376, 384 (4th Cir. 2012).

C. BECAUSE SHONGO OWENS’ TRIAL COUNSEL ADMITTEDLY RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ADVISE MR. OWENS OF THE EFFECTS OF HIS ANNE ARUNDEL CORAM NOBIS PETITION, MR. OWENS’ PLEA WAS NOT ENTERED KNOWINGLY OR VOLUNTARILY, AND HE SHOULD HAVE BEEN PERMITTED TO RESCIND HIS GUILTY PLEA.

Mr. Owens should have been permitted to withdraw his guilty plea because it was not made knowingly as it was the product of ineffective assistance of counsel. At the sentencing hearing, Mr. Owens showed that he lacked close assistance of competent counsel by demonstrating that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there was a reasonable probability that, but for counsel's error, he would have insisted on going to trial rather than

plead guilty. *See, United States v. Bowman*, 348 F.3d 408, 416 (4th Cir. 2003); Dist. Ct. Dkt. May 11, 2017 pp. 13:19-14:16, 34:12-35:10.

Mr. Owens testified that he did not have a full and clear understanding of the plea and sentencing guidelines. *See*, Dist. Ct. Dkt. May 11, 2017 p. 34:17-18. The Record clearly shows his testimony stating that the primary reason he accepted the plea was because he was incorrectly advised that, if he did not, he would be facing life imprisonment based on his status as a career criminal. *See, Id.* at p. 34:20-24.

Mr. Owens' Counsel, on his own accord, admitted that his client was not fully, completely, and properly advised of the consequences of a C plea. *See*, Dist. Ct. Dkt. May 11, 2017 p 14:8-14. Mr. Owens' Counsel even informed the Court of that he had ineffectively advised Mr. Owens and failed to research or advise Mr. Owens of the effects of a pending coram nobis petition that would absolve him of any prior criminal record. *See, Id.* at pp. 2:25-3:12, 7:13-8:18. The failure to provide this information was crucial and prejudicial because it changed the entire landscape of the plea offer. It was incumbent upon trial counsel to advise him to merits of the coram nobis proceedings and advise Mr. Owens of the affect of the guidelines for Anne Arundel conviction be vacated.

It is clear that Mr. Owens' Trial Counsel failed to advise his client of all parameters of the plea and that his failure to do so resulted in a lack of full and complete understanding of the plea and sentencing guidelines. *Id.* Specifically, Mr. Owens' Counsel failed to inform him how the outcome of a successful coram nobis petition would have meant Mr. Owens had less points on his criminal record,

and would therefore receive more lenient sentencing guidelines. *See*, Dist. Ct. Dkt. May 11, 2017 p. 14:8-14; Appendix C, *Maryland v. Owens*, *supra*. Failing to investigate a significant potential development in a client's case that affects the decision to enter a guilty plea is conduct that falls below an objectively reasonable standard. *See*, *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007); *Holland v. Jackson*, 542 U.S. 649 (2004); *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Bowman*, 348 F.3d 408 (4th Cir. 2003). Mr. Owens' Counsel did not advise his client of "the potential results of a favorable decision in the coram nobis proceedings that [were] pending in state court." *See*, *Id.*

Mr. Owens testified that he entered into the plea because he believed, through the advice of counsel, that it would receive much greater leniency than proceeding to trial. *See*, Dist. Ct. Dkt. May 11, 2017 p. 34:20-24. Failure to inform Mr. Owens of the impact a positive coram nobis petition would have on his sentencing deprived him of information needed to enter a knowing, voluntary, and intelligent plea. *See*, *Id.* at p 14:8-14; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Strickland v. Washington*, 466 U.S. 668 (1984). Under these circumstances, it is evident that Mr. Owens would have, but for Counsel's error, foregone a guilty plea in favor to proceeding to trial. In this case, in line with the Moore factors, there was no significant delay in Mr. Owens' decision to withdraw the plea, and there would be no prejudicial delay to the government or waver of its resources. *See*, *Moore*, *supra*, at 248.

The Court, therefore, and without reviewing the Rule 11 transcript, assumed that the proceeding thoroughly discussed the sentence that Mr. Owens faced, con-

cluded that his guilty plea was not based on his criminal history, and abused its discretion by disregarding the pressure that Mr. Owens was entitled to accurate and complete legal advice concerning his plea offer. *See*, Dist. Ct. Dkt. May 11, 2017 p. 17:9-20. Mr. Owens' successful coram nobis petition in Anne Arundel County is critical here because, had trial counsel properly advised Mr. Owens of its effects, Mr. Owens would have been in a better position to weigh the pros and cons of proceedings to trial and would have, in fact, proceeded to trial.

Surprisingly, the Court dismissed Mr. Owens' Counsel's own admission of ineffective assistance in a conclusory manner, stating "it would not have mattered in general." *See*, Dist. Ct. Dkt. May 11, 2017 P. 18:4-7. The Court simply denied Mr. Owens' Motion to Withdraw his guilty plea because it "would inconvenience the Court" to allow withdrawal without citing any basis for reaching this conclusion. *See, Id.* at p. 18:10-15.

Faced with Mr. Owen's counsel's admission that his own legal advice and representation was ineffective, and despite Mr. Owens' testimony affirming this, the Court stated there was no credible evidence that the plea was not knowing or voluntary. *See*, Dist. Ct. Dkt. May 11, 2017 p. 17:8-9. However, when, as shown by the Sentencing Transcript, defense counsel's constitutionally ineffective assistance clearly induced Mr. Owen's guilty plea, the plea clearly is involuntary and unintelligent. *See, Id.* at 34:22-25. P. 35:1-10; *United States v. Bowman*, 348 F.3d 408, 416 (4th Cir. 2003); *Hill v. Lockhart*, 474 U.S. 52 (1985).

CONCLUSION

Due to significant errors and failures described above, it is clear that prior counsel's representation violated Petitioner Owens' constitutional right to effective assistance of counsel. Prior counsel's trial errors, misinformation, failure to sufficiently and completely advise, and various other grave missteps severely prejudiced Mr. Owens' defense and precluded Mr. Owens from entering a knowing and voluntary guilty plea as required under the Strickland standard. The record leaves little doubt that, but for prior counsel's mistakes, the outcome of the proceeding could have been different – the crucial part of the *Strickland* test.

Due to Counsel's numerous errors, Mr. Owens' constitutional right to effective assistance of counsel was denied. For the foregoing reasons, Petitioner Shongo Owens respectfully prays that this Court grant certiorari and reverse the February 16, 2018 judgment of the United States Court of Appeals for the Fourth Circuit.

Date: May 5, 2018

Respectfully submitted,

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**In The
Supreme Court of the United States**

SHONGO LECARR OWENS, a/k/a G.O., a/k/a Chuck
(Federal Prisoner: 59029-037),

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Filed July 21, 2017 App-9

Appendix A

No. 17-4319 *U.S. v. Shongo Lecarr Owens*

Unpublished Opinion of the U.S. Court of Appeals
for the Fourth Circuit in

Decided February 16, 2018

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-4319

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHONGO LECARR OWENS, a/k/a G.O., a/k/a Chuck,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge. (1:15-cr-00468-CCB-1)

Submitted: February 15, 2018

Decided: February 16, 2018

Before WILKINSON, FLOYD, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bruce A. Johnson, Jr., BRUCE A. JOHNSON, JR., LLC, Bowie, Maryland, for Appellant. Stephen M. Schenning, Acting United States Attorney, Seema Mittal, Christopher J. Romano, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Shongo LeCarr Owens pleaded guilty to conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(b)(1)(A), 846 (2012), and possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (2012), and the district court sentenced him to a total of 240 months' imprisonment. Owens appeals his convictions, arguing that the district court abused its discretion in denying his motion to withdraw his guilty plea. We affirm.

This Court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012). A “defendant has no absolute right to withdraw a guilty plea.” *Id.* at 383-84 (internal quotation marks omitted). The defendant, rather, has the burden of showing “a fair and just reason” for withdrawal. *Id.* at 384 (internal quotations marks omitted); *see United States v. Vonn*, 535 U.S. 55, 72 (2002). “[A] fair and just reason . . . is one that essentially challenges . . . the fairness of the [Fed. R. Crim. P.] 11 proceeding.” *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995) (internal quotation marks omitted). In determining whether a defendant has met his burden, courts consider multiple factors:

(1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion to withdraw the plea; (4) whether the defendant had the close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether it will inconvenience the court and waste judicial resources.

Nicholson, 676 F.3d at 384 (citing *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991)). “The most important consideration in resolving a motion to withdraw a guilty plea is an evaluation of the Rule 11 colloquy at which the guilty plea was accepted.” *Id.* (internal quotation marks omitted). Thus, where the district court substantially complied with the requirements of Rule 11 in accepting a guilty plea, the defendant must overcome “a strong presumption that [his guilty] plea is final and binding.” *Id.* (internal quotation marks omitted); *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) (en banc) (same).

We have reviewed the record on appeal and the parties’ briefs and conclude that the district court did not abuse its discretion in denying Owens’ motion to withdraw his guilty plea. The district court addressed the *Moore* factors and properly concluded that the Rule 11 plea colloquy established that Owens knowingly and voluntarily pleaded guilty. Furthermore, considering the doubtful effect, if any, the coram nobis proceeding may have had on Owens’ sentence, he fails to explain how any error by counsel in this regard amounted to ineffectiveness of constitutional magnitude. See *United States v. Dyess*, 478 F.3d 224, 237-38 (4th Cir. 2007). Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

No. 17-4319 *U.S. v. Shongo Lecarr Owens*

Judgment of the U.S. Court of Appeals
for the Fourth Circuit in

Filed February 16, 2018

FILED: February 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4319
(1:15-cr-00468-CCB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SHONGO LECARR OWENS, a/k/a G.O., a/k/a Chuck

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix C

No. 02-K-00-000565 *State of Maryland v. Shongo Lecarr Owens*,

Order re November 23, 2016 *Coram Nobis* Hearing

In the Circuit Court for Anne Arundel County,

Filed July 21, 2017



Circuit Court for Anne Arundel County
Courthouse, 8 Church Circle, P.O. Box 71
Annapolis, MD 21404

State of Maryland v. Shongo Lecarr Owens

Case No. 02-K-00-000565

ORDER

On November 23, 2016 a *Coram Nobis* hearing was held and both parties were heard. Upon consideration of the arguments presented, and applicable law the Court will hereby GRANT the Petition for *Coram Nobis* Relief and will also STRIKE the Petitioner's 2000 guilty plea. A Memorandum Opinion is attached to this Order.

Signed: 7/21/2017 09:30 AM

Judge Stacy W. McCormack

DATE

JUDGE

Filed 07/21/17 IMB

Appendix D

No. 02-K-00-000565 *State of Maryland v. Shongo Lecarr Owens*,
Memorandum Opinion re November 23, 2016 *Coram Nobis* Hearing

In the Circuit Court for Anne Arundel County,

Filed July 21, 2017

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND	*	
v.	*	
SHONGO LECARR OWENS	*	02-K-00-000565
	*	

02-K-00-000565

MEMORANDUM OPINION

On November 23, 2016 the Petitioner came before this Court for a *coram nobis* hearing in which he asked the Court to invalidate the guilty plea for possession with intent to distribute a controlled dangerous substance that he entered into on July 19, 2000 before the Honorable Ronald A. Silkworth. At that hearing, the Petitioner claimed he did not enter the plea knowingly and voluntarily because no one explained that the State needed to prove every element of his crime beyond a reasonable doubt. The Petitioner, who was facing federal charges at the time of this hearing, further contended that his plea from 2000 categorized him as a “career offender” which caused an increase in his criminal history category and base guideline range pursuant to the Federal Sentencing Guidelines.¹

At the time of the November 23, 2016 hearing, Counsel for the Petitioner represented to this Court that the Petitioner had agreed to plead guilty in Federal Court pursuant to the Fed. R. Crim. Pro., R. 11. The plea agreement in that case included an agreed upon sentence of two-hundred and forty (240) months. It was also represented to this Court by Petitioner's counsel that the Petitioner was set to officially plead guilty to federal possession with intent to distribute

¹ U.S.S.G. § 4B1.1, 18 U.S.C.A. (2016). At the hearing both State and Defense agreed that without the career offender designation the Petitioner would have a criminal history category of four (4), and a base guideline range of thirty-two (32) which would give him a sentence range of 168-210 months, rather than his current category of six (6) and base range of thirty-seven (37) which placed him in a sentence range of 360 months to life.

charges in January 2017, and that his plea is binding unless rejected by the court. Counsel for the Petitioner further represented that a modification of sentence, or a similar motion, could be filed in federal court if this Court were to grant the petition for *coram nobis*. Such a motion would seek a re-calculation of the federal sentencing guidelines and a decrease in the agreed upon sentence.

This Opinion will address the following issues raised in the petition and argued at the November 23, 2016 hearing: (1) whether the Petitioner demonstrated that his plea was not made knowingly and voluntarily; (2) whether the Petitioner has demonstrated that his designation as a career offender has caused him significant collateral consequences; (3) whether the petition for *coram nobis* is now moot based on the already agreed to federal plea; and (4) whether the doctrine of laches should apply because there has been undue delay in bringing this *coram nobis* and that delay has caused the State prejudice. The issues will be addressed in order.

ANALYSIS

A petition for writ of error *coram nobis* is an independent, civil action that a convicted person, who is neither serving a sentence nor on probation or parole, may bring to collaterally challenge a conviction. Skok v. State, 361 Md. 52, 65, (2000). It is not a belated direct appeal. Coleman v. State, 219 Md. App. 339, 354 (2014). As recently explained by the Court of Appeals in Jones v. State, “[a] convicted petitioner is entitled to relief through the common law writ of error *coram nobis* if and only if: (1) the petitioner challenges a conviction based on “constitutional, jurisdictional or fundamental” grounds, whether factual or legal; (2) the petitioner rebuts the “presumption of regularity [that] attaches to the criminal case”; (3) the petitioner “faces significant collateral consequences from the conviction”; (4) the issue as to the alleged error has not been waived or “finally litigated in a prior proceeding, [absent] intervening

changes in the applicable law”; and (5) the petitioner is not entitled to “another statutory or common law remedy. ” Jones, 445 Md. 324, 338 (2015) (quoting Rivera v. State, 409 Md. 176, 191 n.6 (2009)). It is petitioner who bears the burden of proof in a *coram nobis* proceeding, Skok, 362 Md.at 78. Under the circumstances in this case, this Court finds that the petitioner has satisfied his burden.

I. The Petitioner’s due process rights were violated as the record establishes that his guilty pleas were not voluntarily and knowingly given.

Initially, it must be noted that the Petitioner has demonstrated that he is eligible to petition for *coram nobis* relief. The Petitioner is not incarcerated in this State or serving a term of probation or parole for the challenged convictions, and has no alternative remedies to pursue. The stated ground for relief is of a constitutional nature, and the Petitioner has not already ligated his claims, nor did he waive them. Thus, the issue is simply whether the record establishes that the Petitioner’s guilty plea was not voluntarily and knowingly given.

The law is clear that when a defendant pleads guilty the record must reflect that he did so voluntarily and with intelligent understanding. Boykin v. Alabama, 395 U.S. 238 (1969). In order for a plea to be entered into knowingly and voluntarily the defendant must be told, among other things, that the State has the burden of proving each and every element of the crimes charged beyond a reasonable doubt. The record must also establish that the judge explained the “nature of the charge and the elements of the crime” to the defendant or the judge must be assured by the defense attorney that the defendant was “properly informed of the nature and elements of the charge to which he is pleading guilty.” Abrams v. Maryland, 176 Md. App. 600, 631 (2007). Maryland Rule § 4-242(c) requires an on the record showing that the information and elements of the offense is affirmatively reflected. Maryland v. Daughtry, 419 Md. 35 (2011);

Miller v. Maryland, 970 A.2d 332 (Md. App. 2009). The trial judge cannot merely ask whether the defendant talked the matter over with his attorney. Graves v. Maryland, 81 A.3d 516, 525 (Md. App. 2013).

When determining whether a defendant makes a guilty plea knowingly and voluntarily the Court looks at the totality of the circumstances and considers factors such as the complexity of the charge, the characteristics of the defendant, and the factual basis proffered to support the court's acceptance of the plea. Daughtry, 419 Md. at 72, quoting State v. Priet, 289 Md. 267, 277 (1981). Notwithstanding the fact that a charge of Possession with Intent to Distribute has been noted as "straight forward and simple" (Coleman v. State, 219 Md. App. 339, 357 (2014); Gross v. State, 186 Md. App. 320, 342 (2009)), and that Petitioner himself faced similar charges before this case, the record in this case simply fails to establish that the Petitioner understood the "nature of the charge and the element of the offense."

At the time of the Petitioner's plea in this case, the following exchange took place between the Court and the Petitioner:

[THE COURT]: All right. Would you state your name, Mr. Owens, please?

[THE PETITIONER]: It's Shongo Owens.

[THE COURT]: All right. You don't have to lean over. I'll be able to hear you, sir. How old are you sir?

[THE PETITIONER]: Twenty-three

[THE COURT]: And how far did you go in school?

[THE PETITIONER]: Junior College.

[THE COURT]: Okay. So obviously you can read and write the English language?

[THE PETITIONER]: yeah.

[THE COURT]: Okay, sir. Now have you received a copy of both the charging document against you in the case that ends in 565 that charges you with possession with intent to distribute? Have you received a copy of the actual charging document?

[THE PETITIONER]: Yeah.

[THE COURT]: Have you had enough time to go over it with your attorney?

[THE PETITIONER]: Yeah.

[THE COURT]: Are you satisfied with his services up to this point?

[THE PETITIONER]: Yeah.

State v. Owens, Plea Transcript, pp.4-5; 12-13 (July 19, 2000)(emphasis supplied).

After a brief discussion about the violation of probation case that the Petitioner was also admitting to as part of a global plea, the Court continued:

[THE COURT]: Now my understanding is that part of the plea negotiation is that in exchange for a plea to generally saying that those are true, that I would sentence you to an 18 months' concurrent sentence with the sentence that I would impose in the previous case, the possession with intent to distribute. Both would run together so at the end of 18 months, when I bring you back, you'll be finished the one sentence, and we can see about an inpatient treatment. Do you understand that sir?

[THE PETITIONER]: Yes, sir.

[THE COURT]: Now is that what you want to do today?

[THE PETITIONER]: Yes, sir.

[THE COURT]: Okay. Alright. I think I asked you, are you under the influence of any alcohol, drugs, pills, medication, narcotics today?

[THE PETITIONER]: No, sir.

[THE COURT]: And you're not under the care of a psychiatrist?

[THE PETITIONER]: no.

[THE COURT]: You've never been a patient in a mental institution?

[THE PETITIONER]: No, sir.

[THE COURT]: You are on probation ...Judge Ricks will do what he wants. He can either run it – I mean he can either give you the whole year and run it concurrent. He can give you the year and run it consecutive. And there's no guarantee what he's going to do. Do you understand that, sir?

[THE PETITIONER]: Yes, sir.

[THE COURT]: Okay. And you still wish to proceed in this way?

[THE PETITIONER]: Yes, sir.

The Court then advised the Petitioner of the maximum penalty of possession with intent to distribute and the backup time he was facing on the violation of probation. The Court further asked the standard questions regarding whether anyone threatened or coerced the Petitioner to take the plea, whether the Petitioner was promised anything to take the plea, whether he understood the trial rights he was given up including his right to a public and speedy trial. The Court then continued:

[THE COURT]: Okay. In the case that deals with possession with intent to distribute, you are entitled to a jury trial. A jury trial is made up of 12 people chosen at random by you, your attorney and the assistance state's attorney, all 12 of who would have to agree that you were guilty before you could be found guilty. But by pleading guilty today, you give up that jury trial right. Is that what you want to do, sir?

[PETITIONER]: Yes, sir.

[THE COURT]: All right, sir. In both of these cases, if you elected a trial, either a jury or a court trial, you would have a right to confrontation of witnesses. That means that witnesses would have to be brought in; they would be sworn in; they would sit in the witness box; they would testify in front of you. That's called confrontation of witnesses. But since you pled guilty, we're not going to do that. Is that what you want to do today, sir, and do you understand that?

[PETITIONER]: Yes, sir.

[THE COURT]: Okay, sir. Next you would have a right to cross-examine those witnesses and in fact to call witnesses in your own defense in both of these cases. But by pleading guilty in both these cases, you're waiving or giving up that right. Do you understand that?

[PETITIONER]: Yes, sir.

[THE COURT]: in both of these cases, sir, you would have a Fifth Amendment privilege not to testify. You could remain silent throughout the entire trial on either the violation of probation or the possession with intent to distribute a controlled dangerous substance. And if it was tried before me or any other judge, we could not infer anything at all from your silence. We couldn't say well, you have to be guilty just because you didn't say anything, nor could a jury do that. Do you understand that?

[PETITIONER]: Yes, sir.

[THE COURT]: But by pleading guilty, you're giving up that Fifth Amendment privilege. Do you understand that?

[PETITIONER]: Yes sir.

[THE COURT]: Lastly, sir, on both of these cases, you are presumed to be innocent of all these charges, and that presumption would stay with you unless and until a judge or jury found you guilty or you pled guilty. So by pleading guilty today, you're giving up that presumption of innocence right. Do you understand that?

[PETITIONER]: Yes, sir.

State v. Owens, Plea Transcript, pp.4-5; 12-13 (July 19, 2000)(emphasis supplied).

It is clear from this exchange that the Petitioner was never expressly told that the State, and the State alone, was required to prove each and every element of the crime charged beyond a reasonable doubt. Moreover, the record fails to establish that the Petitioner had a full understanding of the nature of the charges against him as required. Henderson v. Morgan, 426 U.S. 637, 645 (1976); McCarthy v. U.S., 394, U.S. 459, 466 (1969). Under the totality of the circumstances in this case, the Court is not satisfied that the record demonstrates that Petitioner made a knowing and voluntary plea.

II. The collateral consequences are significant enough for the granting of *coram nobis* relief.

A *coram nobis* petition must do more than theorize possible collateral consequences of a prior conviction, the consequences must be real, and they must be significant. Smith v. State, 219

Md. App. 289, 292 (2014) (citing Graves v. State, 215 Md. App. 339, 353 (2013)). To show the existence of collateral consequences the Petitioner must demonstrate two things: 1.) the existence of an impending consequence, based on a new charge, which is enhanced or altered by a previous case 2.) the judgment causing the consequence must be a conviction. Md. Rule § 15-1202(b)(1)(F).

In this instance, the Court finds that Petitioner met the burden of showing real and significant consequences stemming from a prior conviction. Without the guilty plea entered in 2000, on possession with intent to distribute charges, Petitioner would not be labeled a career offender. However, being labeled a career offender enhanced Petitioner's guideline range from between one hundred and sixty-eight (168) and two hundred and ten (210) months incarceration to three hundred and sixty (360) months to life incarceration. As stated previously, Petitioner took a C-Level Plea of two hundred and forty (240) months.

In Parker v. State, 160 Md. App. 672 (2005), the petitioner argued that an increase of twenty-eight (28) months to his guideline range was a significant collateral consequence. The Court of Special Appeals agreed and held that the possibility of an enhanced sentence in a later criminal action because of a prior conviction constituted "significant adverse consequence." Parker, 160 Md. App. at 687-88. The collateral consequences in this case are far harsher. As a career offender the Petitioner faces, for the bottom of the guideline range, an increase of one hundred and ninety-two (192) months- or sixteen (16) years. Even his agreed to federal plea increased the top of the guideline by thirty (30) months. Based on the ruling in Parker, this Court finds the increase in possible sentence satisfies the significant collateral consequences prong.

III. The *coram nobis* petition in this case is not moot.

As previously noted, at the time of the November 23, 2016 hearing, counsel for the Petitioner represented to this Court that the Petitioner had agreed to a guilty plea in Federal Court pursuant to the Fed. R. Crim. Pro., R. 11. The plea agreement in that case included an agreed upon sentence of two-hundred and forty (240) months. It was also represented to this Court by Petitioner's counsel that the Petitioner was set to officially plead guilty to federal possession with intent to distribute charges in January 2017, and that his plea was binding unless rejected by the court.

Counsel for the Petitioner further represented that a modification of sentence, or a similar motion, could be filed in federal court if this Court were to grant the petition for *coram nobis*. Such a motion would seek a re-calculation of the federal sentencing guidelines and a decrease in the agreed upon sentence. Because there is a remedy available to the Petitioner to seek a modification of sentence if this Court were to grant the *coram nobis* petition, the petition is not moot.

IV. The State did not demonstrate that the delay of this petition caused the State prejudice in re-prosecuting this case if the Court grants requested relief.

While laches is a permissible defense against *coram nobis* petitions the party claiming laches must prove more than a long passage of time. Jones v. Maryland, 445 Md. 324, 339-340 (2015). While significant times passed between the 2000 plea and this petition, the State's only arguments regarding prejudice were that previous defense counsel did not recall the case, and that all testimony would be based on reports and extrinsic evidence rather than actual knowledge.

While fading witness testimony would certainly be an issue, the State did not provide a witness at the hearing to explain issues with testifying today as opposed to in 2000. In Jones the Court of Appeals found prejudice after the State's only eye witness testified that he did not recall

anything about the Jones' case and he also lost a file that was pertinent to the prosecution. 445 Md. at 361 (2015). The State provided no such witnesses, nor did it allege a loss or destruction of key evidence. The mere fact that Petitioner's former defense attorney does not remember the case is not crucial to the prosecution regarding the facts of the case. Because the State did not meet its burden of proof in showing prejudice the Court will dismiss their argument on the doctrine of laches.

CONCLUSION

This Court does not believe the Petitioner knowingly and voluntarily entered his guilty plea in 2000, and as a result he now faces significant collateral consequences. Based on these findings, the Court hereby GRANTS the Petitioner's *Coram Nobis* Request and NULLIFIES the Petitioner's 2000 guilty plea.

Signed: 7/21/2017 09:29 AM

Date



Hon. Stacy W. McCormack Judge Stacy W. McCormack

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