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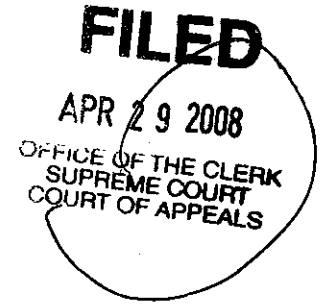
IN THE MISSISSIPPI COURT OF APPEALS

No. 2006-CA-01497-COA

AZIKIWE KAMBULE — APPELLANT



vs.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

Appeal from the Circuit Court of Madison County, Mississippi

Julie Ann Epps (MS Bar No [redacted])
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Azikiwe Kambule
Appellant/Defendant

Chokwe Lumumba
Robert McDuff
Trial attorneys for Kambule

Tonya McClary
Brian Roberts
Sandra Jaribu Hill
Post-conviction attorneys for Kambule

Julie Ann Epps
Appellate Attorney for Kambule

John Emfinger
Assistant District Attorneys

Jim Hood
Attorney General

The State of Mississippi
Appellee

Honorable Samac Richardson
Circuit Court Judge, Madison County, Mississippi.

SO CERTIFIED, this the 29th day of April, 2008.

Julie Ann Epps

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STATEMENT OF THE ISSUE

The trial court's determination that Kambule's guilty plea was voluntary and knowing was erroneous and should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Miss.R.App.P. 34(a), Appellant does not request oral argument in this case.

STATEMENT OF THE CASE

Azikiwe Kambule entered a plea of guilty to accessory after the fact to murder and armed car jacking on June 11, 1997. He was sentenced on June 16, 1997 to five years for accessory after the fact and thirty years for the car jacking. The sentences were to run concurrently. C.P. 1-2.

On June 16, 2000, he filed a motion for post conviction relief asking the court to set aside the guilty plea on the grounds that it was not voluntary. CP. 4. A hearing was held on May 23, 2005 before the Honorable Samac Richardson who denied the relief requested. CP. 34; R.E. 9. It is from that order that Kambule brings the instant appeal. - time-barred MRAP 4

SUMMARY OF THE ARGUMENT

Azikiwe Kambule was a seventeen-year-old black South African who had the misfortune to befriend a troubled older youth, Santonio Berry. Kambule was with Berry in January 1996 when Berry decided to kidnap and kill a woman for her car.

Berry pleaded guilty to capital murder and was sentenced to life without parole. Kambule was offered a deal whereby he could plead to accessory after the

fact to murder and armed car jacking. While the prosecution recommended that Kambule be sentenced to the maximum on each charge -- five years for accessory and thirty years for armed car jacking, Kambule's lawyers told him that based on their experience with the judge, they thought it likely that Kambule would be sentenced to less than the maximum on each charge. Kambule, as a black South African raised under apartheid, was not raised to question authority or, indeed, to believe that he had any rights under the law and, therefore, in every discussion with his lawyers, would ask them only what it is they would recommend. His lawyers, not realizing the vast cultural differences between a black apartheid-era South African youth and the average United States citizen, made no allowances for their client's extremely deferential attitude toward authority. Consequently, Kambule's guilty was neither knowing nor voluntary.

LAW AND ARGUMENT

The trial court's determination that Kambule's guilty plea was voluntary and knowing was erroneous and should be reversed.

Standard of review:

A claim of ineffectiveness of counsel is a mixed question of law and fact that is reviewed *de novo*. *Carter v. Johnson*, 110 F.3d 1098, 1110 (5th Cir.1997); *Salazar v. Johnson*, 96 F.3d 789, 791 (5th Cir.1996); *United States v. Faubion*, 19 F.3d 226, 228 (5th Cir.1994).

Law and argument:

Azikiwe Kambule was a seventeen-year-old from apartheid-era[1] South Africa who had never been in trouble with the law. He fell in with an older youth, Santonio Berry, who had had a troubled history. Berry had been kicked out of Millsaps after he was alleged to have exhibited some strange behavior including his having been accused of placing urine in his roommate's contact lens case.

Kambule was a passenger in Berry's car one evening in January 1996 when Berry spotted a car he desired. Berry followed the automobile to an apartment complex on County Line Road and when the driver of the vehicle, Pamela McGill,

[1] Apartheid in South Africa officially ended in 1994 when the first democratic elections were held. Kambule would have been approximately fifteen at that time.

got out of her car to check her mailbox, Berry kidnapped McGill and took her out into some woods off of North County Line Road. Berry, without Kambule, then marched McGill into the woods, had her kneel down, and shot her in the back of her head, killing her. *See Hearing on Petition to Plead Guilty, Ex. 1, p. 10.* Kambule has consistently maintained that he had no knowledge of what Berry was going to do and no one has claimed that Kambule participated in the killing of McGill. Indeed, when Kambule was arrested, he cooperated wholeheartedly with investigators. Unfortunately, because of his limited knowledge of Jackson, Kambule could not locate McGill's body for law enforcement although he attempted to do so.

Berry eventually pleaded guilty to capital murder. The state agreed to recommend a sentence of life without parole because there was some question as to whether the sheriff's office had violated Berry's constitutional rights by placing an informant in Berry's cell. After Berry received a sentence of life without parole, Kambule sought to have the death sentence removed as an option in his own case on the grounds that it would be disproportionate for Kambule to receive a death sentence when McGill's actual killer did not. The trial court granted Kambule's motion and the death penalty was removed as an option for Kambule. T. 28-29.

Thereafter, Kambule's lawyers, Chokwe Lumumba and Robert McDuff, got the prosecution to agree to allow Kambule to plead to accessory after the fact to murder and armed car jacking. The maximum sentence under Mississippi law

Kambule's Ls below

was five years for the accessory charge and thirty for the armed car jacking charge and the prosecution was pushing for the maximum punishment. T. 19, 34.

Kambule's attorneys encouraged him to accept the plea offer. In so doing, however, they told him that they believed that the judge would **not** impose the maximum sentence on him. T. 84. This was based on attorney Lumumba's previous experience before the judge as well as comments made to Lumumba by the courtroom bailiff. T. 84. Moreover, the defense called to the stand witnesses who testified that not only had Kambule never been in any trouble in the past but as to his general good character. His attorneys thought that this evidence would influence the judge to sentence Kambule to less than the maximum. But contrary to his attorneys' predictions, the trial court not only sentenced Kambule to the maximum sentence for each charge, he ordered that the sentences be served consecutively meaning that Kambule ended up with thirty-five years to serve.

At the hearing on Kambule's postconviction motion, Kambule's attorneys put forth evidence to show that as a black South African under apartheid, Kambule would have been hesitant to do anything but defer to his attorneys' recommendations. Indeed, Lumumba and McDuff testified that Kambule was exceedingly deferential. The only question he would ask of his lawyers was "what do you think". T. 46, 50. McDuff testified that he felt that Kambule was overwhelmed by his predicament. T. 47. He was much less engaged in the process than the many other defendants McDuff had represented over the years. T. 48. It seemed to Lumumba that Kambule was very dependent and, all along,

was merely acceding to his attorneys' recommendations without exercising any independent judgment or thought. T. 50.

The evidence demonstrated that as a young black South African whose entire life was spent under apartheid, Kambule was culturally conditioned to obey authority unquestioningly. T. 54-55. If his attorneys advised him to plead guilty, he would do so. T. 54. Psychological tests administered to Kambule showed that there were areas of weakness in his ability to fully appreciate all of the aspects of the American justice system. T. 59. For example, Kambule could not distinguish between a grand jury and a jury. T. 60. Moreover, Kambule believed that a person who pled guilty would still have an opportunity to convince the judge of his innocence. T. 61.

The testimony about Kambule's culture effecting his ability to not only comprehend the American legal system but to understand that that legal system gave him certain rights and choices is not surprising. "Social and behavioral norms of foreign-born persons are often outside the common-experience of native-born Americans." Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 CRIMLR 1395, 1401 (1999). The failure of his attorneys and other court personnel to adapt the proceedings to make up for Kambule's cultural deficits rendered his attorneys ineffective and Kambule's resulting plea involuntary.

The clearly established Supreme Court precedent governing ineffective assistance of counsel claims is the two-pronged standard enunciated by *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and its progeny. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Under the first *Strickland* prong, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Under the second *Strickland* prong, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's error the result would have been different." *Id.* at 687-96, 104 S.Ct. 2052. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* at 688, 104 S.Ct. 2052.

In the context of a guilty plea, a petitioner satisfies *Strickland's* prejudice prong by demonstrating that, but for counsel's error, there is a "reasonable probability" that he would have insisted on proceeding to trial instead of pleading guilty. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

"One of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a plea of guilty." *Reed v. United States*, 354 F.2d 227, 229 (5th Cir.1965). "For a guilty plea to represent an informed choice so that it is constitutionally knowing and voluntary, the [c]ounsel must be familiar with the facts and the law in order to advise the defendant of the options available." *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995) (alteration in original; internal quotation marks omitted).

> It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an "understanding of the law in relation to the facts." The advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level.

Herring v. Estelle, 491 F.2d 125, 128 (5th Cir.1974) (citations omitted).

" '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' " *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (citations omitted).

The standard by which a court determines whether a defendant was prejudiced by his attorney's misstatements is whether the defendant was "erroneously induced to believe that she would benefit from pleading guilty." *United States v. Fuller*, 769 F.2d 1095, 1098 (5th Cir.1985). If the defendant believes that his guilty plea reduces his chances for a longer sentence but in fact

receives the maximum sentence allowable, then prejudice occurs. *Id.* at 1096-98. *See also Cooks v. United States*, 461 F.2d 530, 532 (5th Cir.1972).

In *United States v. Rumery*, 698 F.2d 764 (5th Cir.1983), the defendant's guilty plea was vacated where his counsel erroneously advised him that he could receive a sentence of thirty years and that by pleading guilty he would get only five years when the defendant only faced a five year sentence in the first place. *Rumery*, 698 F.2d at 766. "[A] guilty plea lacks the required voluntariness and understanding if entered on advice of counsel that fails to meet the minimum standards of effectiveness derived from the sixth and fourteenth amendments." *Id.* *quoting Trahan v. Estelle*, 544 F.2d 1305, 1309 (5th Cir. 1977). Where the defendant is induced to plead guilty based on the erroneous advice of counsel, the plea is involuntary and unknowing. *Rumery*, 698 F.2d at 766. *See also Pettis v. State*, 212 S.W.3d 189, 194-95 (Mo.App. 2007) (defense counsel's affirmative statement during sentencing that defendant's release date would be "pushed back," did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and thus constituted ineffective assistance of counsel).

In this case, Kambule's guilty plea suffered from two deficiencies. First of all, no one, including his own attorneys, took into account Kambule's cultural background. As a black South African under apartheid, Kambule was wholly unaware that he had certain rights and that he alone had the responsibility to make choices vis-a-vis those rights. Instead, as the facts demonstrate, Kambule did as he was culturally conditioned to do and accepted unquestioningly his attorneys'

recommendation that he plead guilty. Furthermore, his attorneys advised Kambule that if he were to plead guilty, the judge was likely to sentence him to something less than the maximum sentence. Inasmuch as Kambule relied on this advice in pleading guilty and this advice turned out to be wrong, Kambule's plea was not knowing and voluntary and he should be allowed to withdraw that plea.

the advice

reliance

* the claim based on the advice & reliance

Conclusion

For the above and foregoing reasons, Azikiwe Kambule's guilty plea and sentence must be vacated and his case remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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This, the 29th day of April, 2008.

Julie Ann Epps