Case No. 20180024-CA

In the Utah Court of Appeals

STATE OF UTAH,
Plaintiff/Appellee,

v.

ERNEST CLAYTON HARPER,
Defendant/Appellant.

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Katie Bernards Goodman, presiding
Defendant is incarcerated

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §§ 77-18a-1(1)(a); 78A-4-103(2)(j); and Utah R. App. P. 3(a).

INTRODUCTION

Mr. Harper submits that the prosecution misrepresented its position during the plea bargaining process, which, in turn, improperly influenced his decision to plead guilty and to forfeit his right to trial. The lower court erred in not granting his motion to withdraw his plea. He respectfully asks this Court to reverse the trial court's ruling and to allow him to withdraw his plea and to proceed to trial.

STATEMENT OF ISSUES, PRESERVATION, AND STANDARD OF REVIEW

1. Whether the trial court erred in not allowing Mr. Harper to withdraw his guilty plea? The issue was preserved in court filings and during evidentiary hearings and arguments (in Case 161911938 or 20180024-CA). R 184, 306, 323, 629, 708.

"We review the denial of a motion to withdraw a guilty plea under an abuse of discretion standard, incorporating a clear error standard for findings of fact and reviewing questions of law for correctness." *State v. Magness*, 2017 UT App 130.

2. Whether trial court performed deficiently and prejudicially in not clarifying the prosecution's position in the plea argument and/or in not raising a *Napue* violation due to the changed position of the prosecutor.

"To succeed on a claim of ineffective assistance of counsel, a defendant must

show that trial counsel's performance was deficient and that the defendant was prejudiced thereby." *State v. Martinez*, 2015 UT App 193, ¶ 30, 357 P.3d 27, 33 (citation omitted).

> Ineffective assistance of counsel is thought of as an exception to preservation because a claim for ineffective assistance does not mature until after counsel makes an error. Thus, while it is not typical exception to preservation, it allows criminal defendants to attack their counsel's failure to effectively raise an issue below that would have resulted in a different outcome. Such a claim can be brought in a post-trial motion or on direct appeal.

State v. Johnson, 2017 UT 76,23,416 P.3d 443 (citation omitted).

STATEMENT OF THE CASE

Case 131401036 has a number of different appellate case number designations. In one case on appeal, 20----------, this Court dismissed the matter due to lack of final appealable order.

In another appellate case designation, 20140030, for the same lower court case number (131401036), this Court already decided the appeal. See Addendum (containing Case 20140030-CA, "Order of Summary Dismissal," filed September 12, 2016 [dismissal due to lack of jurisdiction]). A notice of appeal was filed there on January 15, 2014.

Case 131401036 then received a different appellate case number, 20180250, following another notice of appeal, filed on April 3, 2018. A motion to consolidate was filed, which combined 20180250-CA with another case, 20180024-CA,

For the companion appeal, case 20180024 was the designated number for the appeal stemming from lower court case number 161911938. Following the consolidation of 20180250 and 20180024, both matters are now referred to as 20180024.

STATEMENT OF FACTS

The statement of the facts are more fully stated in the body of the briefs, with the Points therein factually incorporating and cross-referencing the other sections of the brief to the extent that they apply.

SUMMARY OF THE ARGUMENT

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ARGUMENT

POINT I. THIS COURT ALREADY DECIDED THE APPEAL STEMMING FROM CASE 131401036 (or 20140030-CA)

As reflected in this Court's prior opinion, *see* Addendum, no jurisdiction (or limited jurisdiction) exists for the appeal in Case 131401036. A notice of appeal was filed for case 131401036 on January 15, 2014, and it was designated as appellate case number 20140030-CA. This Court summarily disposed of the appeal due to the lack of jurisdiction. *See* Addendum (containing Case 20140030-CA, "Order of Summary Dismissal," filed September 12, 2016).

Another notice of appeal for the same lower court case (131401036) was filed on April 3, 2018, and it received a different appellate case number, 20180250-CA. This Court's prior order of summary dismissal for the same lower court case must be followed. In addition to the substantive and procedural reasons listed in the summary dismissal order, an appellant may not file two notices of appeal for identical issues within the same case, particularly since doing so would be to ignore the prior order of this Court.

With the exception of the (un)reasonableness (e.g. unlawful, illegal, or excessiveness) of the sentence from the order to show cause ("OSC") proceeding, this Court's prior order addresses the issues in case 131401036. In terms of the (un)reasonableness of the trial court's OSC sentence, issued on December 21, 2017, Mr. Harper is jurisdictionally entitled to appeal his OSC sentence, imposed on December 21, 2017, (but not his original [suspended] sentence, imposed on December 30, 2013, nor the

underlying proceedings including the validity of his guilty plea in case 131401036. *See* Addendum, this Court's "Order of Summary Dismissal," filed September 12, 2016).

For case 131401036, on December 21, 2017, the court sentenced Mr. Harper on his OSC sentence to an indeterminate term of 0-5 years at the Utah State Prison. The court imposed the prison term concurrently with Mr. Harper's other sentences for his companion cases [which also resulted in a term(s) of incarceration].

> The Court hereby orders defendant to serve 0-365 days jail with the option to serve at the Utah State Prison on case 151908678 and 171907138, 1-15 years at the Utah State Prison on case 161911938 and 0-5 years at the Utah State Prison on case 131401036 all to run concurrent to each other. The Court recommends the defendant receive credit for 283 days time served.

R 550.

The court's OSC sentence, which was imposed concurrently with the other cases together with credit for time served, cannot be legitimately deemed to be legally unreasonable or excessive under governing law. This court reviews sentencing decisions for an abuse of discretion. *See State v. Neilson,* 2017 UT App 7, 115, 391 P.3d 398; *State v. Valdovinos,* 2003 UT App 432, 114, 82 P.3d 1167 (such an abuse occurred only "if it can be said that no reasonable [person] would take the view adopted by the trial court.").

Accordingly, counsel moves to vacate the prior order of consolidation in order for this Court to separately rule on the duplicate appellate filing (Case 20180250 or 131401036). This Court's prior order for the same lower court proceeding is controlling and the lawfulness of the lower court's OSC sentence is not an abuse of discretion. *See*

Addendum (containing Case 20140030-CA, "Order of Summary Dismissal," filed September 12, 2016 [dismissal due to lack of jurisdiction]).

However, jurisdiction remains proper for the other part of the consolidated appeal (Case 20180024-CA or 161911938). In case 161911938, Mr. Harper filed a timely motion to withdraw and a hearing was held, although the court ultimately denied his motion. R 184, 306, 323, 629, 708. The withdrawal motion is addressed below.

POINT II. THE LOWER COURT ERRED IN NOT GRANTING MR. HARPER'S MOTION TO WITHDRAW HIS PLEA

The trial court erred in not allowing Mr. Harper to withdraw his guilty plea on the grounds that it was not knowingly and voluntarily made. For reasons similar to the principles announced by the United States Supreme Court in *Lee v. United States*, 582 U.S. ___ , 137 S.Ct. 1958 (2017), and by this Court in *State v. Magness*, 2017 UT App 130, Mr. Harper asks this Court to reverse the lower court's ruling and to allow Mr. Harper to proceed to trial on the involved charge.

A. Pursuant to *Lee v. United States,* A Defendant Must Be Properly Informed About the Parameters of the Plea Bargain In Order to Decide Whether to Forfeit His Right to a Trial

In *Lee v. United States*, 582 U.S. ___ , 137 S.Ct. 1958 (2017), the court emphasized the importance of a defendant being properly informed when he decides whether or not to enter into a plea bargain agreement.

> During the plea process, [Defendant] Lee repeatedly asked his attorney whether he would face deportation; his attorney assured him that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted a plea and was

> sentenced to a year and a day in prison. Lee had in fact pleaded guilty to an "aggravated felony" under the Immigration and Nationality Act, so he was, contrary to his attorney's advice, subject to mandatory deportation as a result of that plea. When Lee learned of this consequence, he filed a motion to vacate his conviction and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

Lee, 137 S.Ct. 1958, 1960 (citations omitted).

> The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison,

Lee, 137 S.Ct. at 1963 (citations omitted).

The issue there was "whether Lee can show he was prejudiced by [his prior counsel's] erroneous advice. With a focus on the decision making process by the defendant, the Court stressed that in order to live with the consequences of a plea bargain, he must be properly informed about the consequences of the plea bargain. *Id.* ("The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea"); *id.* ("assessing the effect of some types of attorney errors on defendants' decisionmaking involves . . . making a prediction of the likely trial outcome. But, . . . [s]uch a prediction is neither necessary nor appropriate where, as here, the error is one that is not alleged to be pertinent to a trial outcome, but is instead alleged to have affected a defendant's understanding of the consequences of his guilty plea").

But in this case counsel's "deficient performance arguably led not to a judicial

> proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place.".
>
> We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." As we held in Hill v. Lockhart, 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."

Lee, 137 S.Ct. at 1965 (citations omitted).

With the defendant's right to a trial now forfeited due to Mr. Lee's uninformed (or improperly informed) decision to enter into a plea bargain, such a forfeiture proved to be more compelling than the Government's claim that Mr. Lee could not establish prejudice in light of the consequences that flowed from his decision to plead guilty.

Indeed, the defendant's ability to prove prejudice seemed to be the Government's strong point. *See* 137 S.Ct. at 1964 ("Lee had 'no bona fide defense, not even a weak one,' so he 'stood to gain nothing from going to trial but more prison time'").

But the Supreme Court rebuffed the prosecution's contentions that after-the-fact consequences and the resulting lack of prejudice should govern. The *Lee* opinion noted that the Government emphasis on prejudice had "overlook[ed prior controlling case law that had] focuse[d] on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Id.* at 1966. The Court holding's repeated references

to the defendant's decision making (e.g. being uninformed or improperly informed about the consequences of a plea) made clear that initial wrongful advice about plea consequences outweighed subsequent prosecution claims that such advice did not matter in the long run due to the lack of prejudice. The initial wrongful advice did matter.

Such principles go to the heart of Mr. Harper's case. The inserted language in his plea agreement, which carried more force than the handwritten provisions that supplemented the typewritten standarized form paragraphs in the plea form, stated:

> I plead guilty to Count I in my Amended Information. Count II is dismissed. An AP&P presentence report is ordered and I am released today to AP&P supervision pending sentencing. The State agrees to a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of AP&P probation.

R 160, 631. This language not only induced Mr. Harper to enter the plea, it was a fundamental part of his decision making process that forfeited his right to a jury trial. The prosecutor literally signed off on the above acknowledged handwritten plea agreement statements by inserting his signature into the plea form as a means of both confirming the agreement while simultaneously preventing Mr. Harper from exercising his constitutional right to a trial proceeding.

1. Probation Was Part of the Plea Agreement

"The State agree[d] to a two-step 76-3-402 reduction if I [Mr. Harper] comply 100% with all terms and conditions of AP&P probation." R 160. Probation was part of the plea bargain, as agreed to by the State. The handwritten terms did not state, "if he gets probation" or "if the court orders probation"; rather, the parties' handwritten agreed

upon terms contemplated a two-step 76-3-402 reduction if he complied with probation.

Moreover, releasing Mr. Harper from jail at the time of the plea to AP&P pending sentencing on not just one, but two cases, R 605, further suggested the likelihood of probation – and not prison. Other than an improper taunt or a snide tease upon the defendant, it makes no sense to release a person from jail after 74 days, R 598, only to retake him into custody after 45 days or after his presentence report is completed without the likelihood of probation being agreed upon. Typical prison sentencing considerations include being a danger to the community or a flight risk – but such prison considerations do not exist for 74 days, then disappear after 45 days, and then magically reappear on day 46 or at the time of sentencing. If the prosecutor's true intentions for sentencing were, in reality, to advocate a 1 to 15 year term in prison, it should have resisted teasing him with a 45 day+ period of freedom. *See* R 192 (emphasis added) (in the State's own memo, the prosecution acknowledged, "Defendant was released at the *request of the parties* pending sentencing"); R 597, 605 (in no more than a few minutes during the plea colloquy, the State went from "we are not recommending his release" to it merely clarifying but not opposing the release by asking the court to "put him on a GPS monitor pending that sentencing").

To be fair, the State should have affirmatively withdrawn or striken the handwritten representations in the plea agreement (if they were untrue) prior to the entry of the plea. *See infra* Point III. Even with AP&P supervision (and GPS monitoring), the

agreement of probation in the plea agreement played a critical role in Mr. Harper's decision making.

It is important to separate the parties and their respective obligations. AP&P prepares a presentence report and makes its own sentencing recommendations to the court. Generally speaking, the prosecution may agree or disagree with AP&P or it may remain silent at the time of sentencing. In Mr. Harper's specific situation, however, the State was obligated to keep its word (e.g. agreeing to probation), which was reflected in the plea agreement. "[W]hen 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." *State v. Magness*, 2017 UT App 130, ¶ 18. Otherwise, the prosecutor's promises amounted to no better than a "bait-and-switch" tactic to trap a person through one enticement (e.g. parties' initial plea representation that they had agreed on probation) when he really wanted the person on the hook for something else (e.g. State's subsequent unilateral advocacy for prison).

Lee v. United States lends analogous guidance. "Lee alleges that avoiding deportation was the determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." 137 S.Ct. at ------.

According to Mr. Harper, "I thought that I would be placed on probation, and

maybe some jail. . . . Michael Peterson, my attorney at the time, told me I'll get probation and I should plead because of that. Mr. Peterson also told me I would never see my son again unless I plead." R 309. Mr. Harper's long-term freedom or probation was a determinative factor for him, as Mr. Harper assured the court at the time of the plea:

> I've had 74 days to think about this. Seventy-four days to think about this. I've prayed about it. I have done everything. I have – in 74 days I have realized the consequences of being locked up, away from my family, away from my friends. I have had time to put myself in the shoes of Jennifer.
>
> • • •
>
> Your Honor, I have no interest in contacting – the only person I want to see when I get out is my sister and my son. I don't want to have any interest in Ms. Galady. No offense, but I don't want to see you again until 45 days after.

R 598, 600.

The short-term freedom of 45 days (the time between the entry of his plea and his sentencing date) is a meaningless period when the longer promise of probation and the opportunity to be with his son (or his family and friends) is what drove Mr. Harper's decision making. In fact, the 45 day+ period necessary to prepare his presentence report is minuscule compared to the many months, if not years of freedom, that would have applied, had he not been misled into forfeiting his right to a trial. If the court and/or the State would not have agreed to Mr. Harper's entry of the plea, defense counsel was pointed and direct about the upcoming nature of the delays:

> The court: I can get you to trial by the 25th.
>
> [Defense counsel]: I can't do that, Judge. And I'm going to be filing extensive

> motions, motions in limine, motions to suppress, and a motion to reinstate the preliminary hearing. And all of which could be obviated if we could enter the plea and stick to the agreement.

R 599. Other than returning to court after about 45 days, where Mr. Harper expected to be sentenced to probation, the determinative factor for him was the State's agreement to probation. Mr. Harper's statement to the court, "No offense, but I don't want to see you again until 45 days after[,]" is not something that a defendant says to a judge with the knowledge that the prosecution was intending to ask for a 1 to 15 year prison term on day 46. Mr. Harper's plea bargain mindset was instead that he was not going to prison and that he would reappear on day 46 to receive his sentence of probation. Like in *Lee* where "avoiding deportation was the determinative factor for him," avoiding prison and receiving probation was fundamental to Mr. Harper's decision making process to spare the State and its witnesses of the time and resources necessary for trial.

Separating the parties and their respective obligations also extends to the trial court. In *Lee,* "the judge warned him [Jae Lee] that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not[.]'" 137 S.Ct at 1968. In other words, regardless of what Mr. Lee's attorney had said to him beforehand, the judge then and there at the time of the plea directly warned him about the possibility of deportation. However, the lower court's admonishment to Mr. Lee during the colloquy could not save the plea, as the Supreme Court placed greater prejudicial importance on Mr. Lee's decision making process.

"There is no reason to doubt the paramount importance Lee placed on avoiding deportation." *Id.* His attorney's wrongful advice, regardless of the court's standardized warnings during the taking of the plea, improperly impacted the defendant's decision making process. The attorney's earlier misinformation invalidated the defendant's knowingly and voluntarily entry of a plea.

In Mr. Harper's case, the lower court similarly warned him about the possibility of a prison sentence. *See* R 602 (the court noted "A potential one to 15 years at the Utah State Prison, a $10,000 fine with a 90 percent charge. Something less may be recommended, but I can sentence to the maximum if I choose")[1]; R 597 ("Your Honor, what I am right now is extremely nervous, of course, because I realize that the penalty of this guilty plea could – could put me in prison and I'm actually trying not to go"). Again, his plea mindset was focused on the State's agreement for probation. The prosecutor's earlier representations (or uncorrected omissions, *see infra* Point III) in the plea agreement was the basis upon which Mr. Harper had made the decision to forego his right to a trial.

The Supreme Court reversed the Sixth Circuit's decision and allowed Mr. Lee to vacate his conviction and sentence. Mr. Harper requests the same result.

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[1] "Something less" was a reference to the parties' agreement for probation, but the court's reference to the "maximum" was an inaccurate potential sentence if the court's reference was to a 15 year term at the Utah State Prison. Although the court could impose an indeterminate sentence of "one to 15 years at the Utah State Prison," only the Board of Pardons and Parole may establish the determinate term of the 15 year maximum time period in prison.

2. If Probation Was NOT Part of the Plea Agreement, the Prosecutor Was Obligated to Point That Out or Clarify His Position

The prosecution cannot have it both ways. If, as the State contended during the hearing on the motion to withdraw, "I can represent that we never talked about probation being agreed upon[,]" R 635, such a State position at the time of the plea would have obligated him to clarify that what was handwritten into the plea form was not what he had intended. *But see* R 599 (at the time of the 4/14/17 plea proceeding, the prosecutor said, "Judge, I made the agreement with Mr. Peterson. We talked about this days before today's hearing"); R 192 (in the State's own memo, the prosecution acknowledged, "Defendant was released at the request of the parties pending sentencing").

At the very least, the State was burdened to explain his position and to not let the plea colloquy continue nor to allow "false evidence . . . go uncorrected when it appears." *Napue v.* ---------, 360 U.S. 264, 269 (1959); *see generally* Point III. Just as the Supreme Court has cautioned prosecutors to guard against "[uncorrected] false testimony . . . affect[ing] the judgment of the jury[,]" 360 U.S. at 271 (Giglio cite ..... new trial granted for *Napue* violation), so too should prosecutors prevent plea agreement promises from going uncorrected when it affects the decision making process of the defendant.

What the prosecutor may not do is renege on his prior plea bargain representations. "[W]hen 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." *State v. Magness*, 2017 UT App 130, ¶ 18. If the defendant commits a violation or a concern arises after the plea, the prosecution may separately address and punish the newfound problem. No restrictions attach to the State for such new proceedings. Yet the old or existing plea bargain case resolution must be honored pursuant to its underlying agreement or the parties undo or modify the plea and move forward. Absent a clause in the original plea agreement that the prosecution can change its mind if situation XYZ arises (no such clause existed in Mr. Harper's handwritten plea bargain provisions), the representations that fueled Mr. Harper's decision making should have been maintained, but they were not. Mr. Harper should be allowed to withdraw his plea.

B. Pursuant to *State v. Magness,* A Defendant Must Be Properly Informed About the Parameters of the Plea Bargain In Order to Decide Whether to Forfeit His Right to a Trial

This Court's opinion in *State v. Magness*, 2017 UT App 130, is consistent with the holding in *Lee v. United States*, 582 U.S. ___ , 137 S.Ct. 1958 (2017). In *Magness,* Robert Magness "pled guilty to a lesser charge pursuant to a plea agreement. The circumstances of that waiver and plea are contested. Defendant claims that the preliminary hearing was not knowingly and voluntarily waived and his plea was not knowingly and voluntarily made because he relied on misstatements from the prosecutor." *Magness*, 2017 UT App 130, ¶ 2. Magness' decision to enter into the plea agreement relied in large part on the prosecutor who had "approached [Magness] and the defense

attorney and told them that the victim 'did not want [Magness] to go to prison.'" *Id.* at ¶4. Magness' plea statement provided, "In exchange for the Defendant's plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison." *Id.* at ¶ 7.

After Robert Magness had entered his guilty plea, he found out that contrary to the prosecution's representations the victim did in fact affirmatively want Magness to go to prison. "Defendant moved to withdraw his plea, claiming that his plea was not knowingly and voluntarily made. Specifically, Defendant claimed that due to the prosecutor's misrepresentations, he miscalculated the likelihood that the victim would ask the district court to sentence him to prison." *Magness*, 2017 UT App 130, ¶ 11. The opinion's analysis first set forth the law:

> Under Utah law, "[a] plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." "A guilty plea involves the waiver of several constitutional rights and is therefore valid under the Due Process Clause of the U.S. Constitution only if it is made 'voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.'" "[I]n order for a plea to be voluntarily and knowingly made, the defendant must understand the nature and value of any promises made to him." And "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."

Magness, 2017 UT App 130, ¶ 18 (citations omitted) (such standards apply in Mr. Harper's case); *see also* Utah Code Ann. § 77-13-6(2)(a). The *Magness* opinion expressly "determine[d] that the misstatements made by the prosecutor undermined the

voluntariness of Defendant's plea." 2017 UT App 130, ¶ 19. Elaborating, the opinion found that the lower court had focused too narrowly on whether the plea was entered in compliance with Rule 11. *Id.* at ¶ 20. In addition,

> The district court also primarily considered whether the prosecutor's misstatements constituted intentional prosecutorial misconduct. The district court found that the prosecutor did not intentionally make "knowing use of false evidence by misrepresenting the nature of the victim's wishes." The district court continued, "Rather, the prosecutor represented that, at the time he spoke with the victim, she was not seeking prison time." However, the district court should have considered and focused on all representations made by the prosecutor prior to the plea being entered. The problem with the district court's approach is twofold. First, it accepted a representation which was demonstrably false—the victim stated she never said she did not want Defendant to go to prison. Second, the district court focused on whether the misstatements were made intentionally. Whether the misstatements of the prosecutor were intentional is immaterial to the question of whether Defendant's plea was knowingly and voluntarily made. If a prosecutor makes misstatements and the defendant relies upon the misstatements, a substantial question arises as to whether Defendant knowingly and voluntarily entered into a plea. *See Brady v. United States*, 397 U.S. 742, 755 (1970) (reasoning that a plea should stand where a guilty plea is entered by someone "fully aware of the direct consequences, including the actual value of any commitments made to him" unless induced by, among other things, misrepresentation by prosecutors (citation and internal quotation marks omitted)).

Magness, 2017 UT App 130, ¶ 22.

i. Probation Was Part of the Plea Agreement in *Magness*

Separating the parties and their respective obligations is also helpful for analyzing *Magness.* Magness' plea statement provided, "In exchange for the Defendant's plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison." 2017 UT App 130, at ¶ 7. Accordingly, the party who signed

the plea agreement, the prosecutor, did not dispute that probation was part of its agreement with Robert Magness.

However, the prosecutor's representations "that the victim did not want Defendant to go to prison" "significantly affected Defendant's calculus as to 'the apparent likelihood of securing leniency should a guilty plea' be entered." *Id.* at ¶ 25. Moreover, "[g]iven the absence of an [prosecution] affidavit in opposition rebutting the affidavits of Defendant and his counsel, the only record before us establishes that the representations were made." 2017 UT App 130, at ¶ 25.

The above principles from *Magness* parallels the concepts from *Lee* and Mr. Harper's lack of a knowingly and voluntarily entered plea. *Magness*' statement, "significantly affect[ing] Defendant's calculus as to 'the apparent likelihood of securing leniency should a guilty plea' be entered" was much the same rationale as *Lee's* statement: "assessing the effect of some types of attorney errors on defendants' decisionmaking . . . [is] alleged to have affected a defendant's understanding of the consequences of his guilty plea." *Id.* at ¶ 25. In *Magness* and *Lee,* as well as with Mr. Harper, the prosecutor's (mis)representations directly affected the defendant's calculus or decisionmaking as to the consequences of his guilty plea.

> ¶26 The prosecutor's representations thus led Defendant to reasonably believe that the victim would likely not seek prison and that the prosecutor would follow suit. By misleading Defendant as to the victim's intent with respect to seeking a prison sentence in this case—whether intentional or not—the State precluded Defendant from knowingly assessing the likelihood of securing leniency. In other words, because of the "misrepresentation . . . made to him by the . . . prosecutor,"

Defendant was not "aware of the direct consequences, including the actual value of any commitments made to him." *Id.* at 755 (citation and internal quotation marks omitted); *see also Copeland*, 765 P.2d at 1275 (adopting the Michigan Court of Appeals's reasoning that a defendant should be allowed to withdraw his plea where he "surrendered his right to trial in apparent misapprehension of the value of commitments made to him" (quoting *People v. Lawson*, 255 N.W.2d 748, 750 (Mich. Ct. App. 1977))).

¶27 Under the terms of the plea agreement, Defendant had to assess the probability that the victim would seek a prison sentence. The primary information Defendant maintains he relied upon in calculating this risk was the representations of the prosecutor. Defendant's calculus of the likelihood that the victim would ask for prison was based on erroneous information concerning the victim's past expressions relating to whether she would ask the judge to impose a prison sentence. Being told that the victim had earlier stated that she did not want Defendant to go to prison, while not conclusive as to what might actually happen at sentencing, likely and reasonably gave Defendant reason to believe the recommendation at sentencing would be similar. But in reality, the victim never said she did not want Defendant to go to prison.

¶28 We conclude that because of the prosecutor's representations, "it is possible that [Defendant] was genuinely and legitimately confused about" the likelihood that the victim would ask the court to impose a prison sentence and easily could have miscalculated the likely punishment that would flow from his plea. *See Copeland*, 765 P.2d at 1274. Thus, Defendant's plea was not knowingly and voluntarily made. *See id.* at 1274–75. Accordingly, Defendant "should be allowed to withdraw his plea." *See id.* at 1276.

¶29 Had Defendant simply miscalculated the likelihood that the victim would make a sentencing request for prison, a basis for withdrawing the guilty plea would likely not exist. But here, Defendant's calculus in moving forward with the plea included representations by the prosecutor, which, upon the record presently before us, appear false.

Magness, 2017 UT App 130, ¶¶ 26-29.

In *Magness,* the presentence report ("PSR") from Adult Probation and Parole ("AP&P") recommended a term of imprisonment, which the State was not obligated to

follow under the plea agreement, but the PSR specifically indicated that the victim "wanted Defendant to go to prison for at least two years[,]" and the State said it would honor or advocate her sentencing wishes. 2017 UT App 130, at ¶¶ 7, 9. The victim's voice carries a significant level of influence on sentencing.

The trial court's role in Mr. Harper's case, as it was in *Magness* and in *Lee*, was to *not* make any promises to the defendant about sentencing. Notifying the defendant about potential maximum sentences is part of a court's standard warning. However, having received a standardized plea agreement with standardized constitutional provisions, the trial court's sentencing warnings during the plea colloquy do not take on a greater level of importance than the "defendant's calculus" or his "decisionmaking" process that he must fully and properly engage in before deciding whether to forfeit his right to trial. *See Lee,* 137 S.Ct at 1968 (high court vacated Mr. Lee's uninformed plea despite the trial "judge [having] warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not'"); *Magness,* 2017 UT App 130, at ¶¶ ------- (reversal required notwithstanding trial court warnings during the plea colloquy because "The prosecutor's representations thus led Defendant to reasonably believe that the victim would likely not seek prison and that the prosecutor would follow suit").

. In Mr. Harper's case, the prosecution's representations led him to reasonably believe that it would not likely seek prison. factoring in the prosecution's

representations [2]

2. The Prosecutor in *Magness* Was Obligated to Point Out or Clarify Any Falsehoods

The *Magness* opinion shared another similarity with the *Lee* opinion as to its intolerance for falsehoods. Although the opinion did not phrase the prison/no prison stance by the victim as a prosecutorial *Napue* violation, the opinion cited the falsehood as a misrepresentation and basis for reversal.

The opinion also accepted as true the unrebutted affidavits of the defendant and his

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[2] In Mr. Harper's case and in *Magness,* the same standardized plea agreement form was used, with the same standardized warnings including the defendant acknowledging that the Court was not bound by the prosecution's recommendations. In both Harper and in *Magness*, the "Trial judge not bound" language in the plea form was identical:

> Trial judge not bound: I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may ddo are not binding on the judge.

See R 160. The lower court's "Ruling and Order" in *Magness* also relied on the "not bound" cited provision as part of the basis for its ruling denying Robert Magness' motion to withdraw his plea, but this Court reversed the lower court's order. For reasons similar to the appellate ruling in *Lee* and in *Magness,* the trial court's plea colloquy warnings were trumped by the prior need to properly inform and protect the decision making process of the defendant.

counsel because no prosecutor affidavit said anything different. In Mr. Harper's case, the State neglected to call or subpoena Mr. Peterson for the motion to withdraw plea proceeding and Mr. Harper's unopposed affidavit should govern.

POINT III. THE PROSECUTOR'S FAILURE TO CORRECT THE FALSITY OF HIS SIGNED REPRESENTATIONS REGARDING PROBATION WAS A VIOLATION TO THE COURT, WHICH DEFENSE COUNSEL SHOULD HAVE RAISED AND CLARIFIED TO AVOID THE FORFEITURE OF MR. HARPER'S RIGHT TO A TRIAL

The nature of the court's error in not allowing Mr. Harper to withdraw his plea is reflected above. Alternatively, he submits that the prosecutor's *Napue* violation, together with his prior attorney's ineffective assistance of counsel ("IAC") argument, similarly should allow him to withdraw his guilty plea and to proceed to trial.

> It has long been established that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103,112 (1935)). In *Napue v. Illinois*, the United States Supreme Court announced that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. 264, 269 (1959). Accordingly, "[a] new trial is required if 'the [uncorrected] false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

See Carter, 2019 UT 12, at ¶ 107

If the trial court did not err in refusing to allow Mr. Harper to withdraw his plea,

see supra Point I (to the extent applicable, each Point is incorporated into the other), the prosecution committed a *Napue* error in failing "to correct testimony which he or she knew to be false" or through its involvement with the "deliberate deception of a court . . . by the presentation of known false evidence [that] is incompatible with 'rudimentary demands of justice.'" *See Carter*, 2019 UT 12, at ¶ 107 (citations omitted). In an overlapping manner, prior counsel performed ineffectively in not pointing out or clarifying the prosecution's *Napue* error. *State v. Martinez*, 2015 UT App 193, 30, 357 P.3d 27, 33 (citation omitted) ("To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced thereby.").

The *Carter* opinion cited *Napue* in the context of whether, *inter alia,* the prosecutor at his trial had failed to correct the testimony of a State witness who had received financial benefits from the police prior to trial. Fostering justice or preventing overzealous misrepresentations were cited rationales. Unlike the State witness's trial response "that he had only received his fourteen-dollar witness fee[,]" the contrary defense position was that "police provided them [witness's family] with numerous financial benefits including paying for rent, groceries, and utilities." 2019 UT 12, at ¶ 108. With the witness's credibility at stake and the impeachment value evident from the contrary point of view, our high court agreed with Carter. His *Napue* claim created a genuine dispute "as to whether there would be a reasonable likelihood of a different

outcome with respect to guilt and sentencing had [the prosecutor] corrected [the State witness's] false testimony." *Id.* at ¶ 112.

The *Napue* circumstances in Mr. Harper's case are even more egregious. When compared to the prosecutor in *Carter* who deceived the court by failing to correct another person's false statement, the prosecutor in Mr. Harper's case deceived the court by failing to correct his *own* false statement. The prosecution's plea agreement agreed to Mr. Harper's release pending sentencing and "a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of AP&P probation." R 160, 631. The burden of correcting his own alleged misstatement fell on the prosecutor, particularly because he disagreed with what was written or represented in the plea bargain document. Since the prosecution himself literally signed off on the above acknowledged written statements in the plea agreement, the prosecutor then should not have (but he did) attempt to go back on his word – the writing to which he attested – by later verbally claiming that's not what I agreed to. R 635.

During the 8/11/17 hearing for the plea withdrawal motion, the prosecutor stated, "I can represent that we never talked about probation being agreed upon." R 635. Yet, in the 4/14/17 written plea agreement, the prosecutor agreed to "a two-step 76-3-402 reduction if [Mr. Harper] compl[ies] 100% with all terms and conditions of AP&P probation." R 160, 631. Probation was agreed upon in writing in the plea. For the

prosecutor to then verbally deny having agreed to probation, R 635, when his signature attested to probation through the plain language of the plea writing, R 631, constituted a "presentation of known false evidence [that] is incompatible with 'rudimentary demands of justice.'" *See Carter*, 2019 UT 12, at ¶ 107.

> Under *Brady*, the relevant inquiry is whether the prosecution suppressed favorable evidence and, if so, whether prejudice ensued. Under *Napue*, the relevant inquiry is whether the prosecutor failed to correct testimony which he or she knew to be false. In neither inquiry is it required to first establish that the prosecutor knew that he or she had duties under *Brady* and *Napue*. In other words, a *Brady* or *Napue* violation can occur even if the prosecutor is unaware of his or her duties under *Brady* and *Napue*

2019 UT 12, at ¶ 132 n. 21 (citations omitted).

The prosecutor committed a *Napue* violation and defense counsel performed ineffectively in not pointing out the error or correcting it below. Such prosecutorial misstatements or falsehoods were enough to mislead Mr. Harper into pleading guilty when he would not have, had he known the prosecution did not intend to recommend a sentence of probation. R 309 ("I [Ernest Harper] thought that I would be placed on probation, and maybe some jail. . . . Michael Peterson, my attorney at the time, told me I'll get probation and I should plead because of that."). Prior counsel contemporaneously rendered ineffective and deficient perform when he failed to point out and/or clarify the lack of probation representation in the plea form to the court and the prosecution. In

regards to prejudice:

> A defendant raising such a claim [of attorney error] can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
>
> But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place.
>
> We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." As we held [previously], 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."

Lee v. United States, 582 U.S. ___ (2017) (citations omitted).

Prejudice resulted "by the 'denial of the entire judicial proceeding . . . to which he had a right.'" In the *Lee* opinion, like in Mr. Harper's case, counsel's deficient performance deprived him of a trial by causing him to accept a plea. Had prior counsel appropriately clarified the State's lack of probation recommendation in the plea agreement (if any, *see also supra* Point I), Mr. Harper would not have pleaded guilty and

would have insisted on going to trial. R 630. Mr. Harper asks this Court to allow him to withdraw his plea and to reinstate his right to a trial.

CONCLUSION

Mr.

trial.

DATED this 25th day of March, 2019.

/s/ Ronald Fujino

Attorney for Mr. Harper

CERTIFICATE OF SERVICE

I certify that on February 8, 2019, a true copy of the forgoing Brief of Appellant was served upon counsel of record at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

X was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

/s/ Ron Fujino

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,795 words, excluding the table of contents table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

X does not contain private controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

__ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Ron Fujino

RONALD FUJINO