No. 121681

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ANTHONY S. BROWN Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-14-0760. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 12-CF1460. Honorable Thomas J. Difanis, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

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E-FILED
7/19/2017 3:06 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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Post-conviction petitioner Anthony Brown made a substantial showing of a constitutional violation and demonstrated prejudice where he relinquished his right to trial and entered into a fully-negotiated plea agreement based on incorrect advice from his attorney regarding his eligibility for sentence credit.

Nowhere in its brief did the State dispute Mr. Brown's argument that defense counsel, William Laws, performed deficiently under the first prong of the *Strickland v. Washingon* test for ineffective assistance of counsel. As such, Brown rests on the arguments and authorities in his opening brief as it relates to that prong. In addition to the authorities and arguments in his opening brief regarding prejudice under the second prong, Mr. Brown adds the following.

The record does not rebut the allegations of ineffective assistance.

The State claims that the record rebuts Mr. Brown's allegations of ineffective assistance of counsel. In support, the State relies on Brown's

answers to the judicial admonishments at the plea hearing. (St. Br. at 5) At the hearing, the judge asked, "Is your guilty plea voluntary?" Mr. Brown said, "yes." (V.8, R.5) The judge recited the terms of the plea agreement and asked Mr. Brown, "Is that the agreement that you have with the State?" Brown said, "Yes, your honor." (V. 8, R. 5-6) Notably, he was not asked whether he *understood* the agreement. When asked whether anyone had promised him anything in exchange for the plea, he answered, "No, sir." The judge also asked, "Has anybody forced you or threatened you?" Brown replied, "No, sir." (V. 8; R. 6)

The State's argument that the above-exchange rebuts Mr. Brown's allegations is fundamentally flawed and should be rejected. First, nothing at the plea hearing contradicted his petition and affidavit, which are to be liberally construed and taken as true at the second stage of a post conviction proceeding. Neither the judge nor the parties nor the written judgment itself addressed sentencing credit. Second, the State confuses the word "promise" with "advice. Mr. Laws did not make any promises to Brown; he provided legal advice. Black's Law Dictionary defines promise as:

> The manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person's assurance that the person will or will not do something. A binding promise – one that the law will enforce – is the essence of a contract.
> PROMISE, Black's Law Dictionary (10th ed. 2014).

In contrast, the dictionary defines "advice" as: "Guidance offered by one person, esp. a lawyer, to another; professional counsel." ADVICE, Black's

Law Dictionary (10th ed. 2014). Specifically, "advice of counsel" is defined as: "The guidance given by lawyers to their clients. – Also termed legal advice. ADVICE OF COUNSEL, Black's Law Dictionary (10th ed. 2014).

Promises are not advice. Asking whether Brown had been promised anything in exchange for his plea is not an inquiry about the legal counsel his lawyer provided. Laws presented as legal fact blatantly incorrect information. He went so far as to show Brown the "proof" of his advice: "See – there is nothing in the paperwork about you doing 85%." (C. 171) Brown had no reason to doubt Laws's guidance or the accuracy of his information.

Third, the State's argument excludes a pertinent detail that likely impacted Brown's answers during the hearing. Laws told him, "Don't play with these people," right before the plea hearing. (C. 171) Essentially, he instructed Brown "not to rock the boat." If Brown did not understand the plea or had questions, Laws counseled him to keep those concerns to himself.

The State's attempt to frame as inapposite two analogous cases only highlights their relevance to Mr. Brown's case. (St. Br. at 8) Like in *People v. Hall*, 217 Ill.2d 324 (2005), Brown "was not given any admonition that specifically addressed the erroneous advice of his attorney." (St. Br. at 8,); *Hall,* 217 Ill.2d at 339-340. Despite the State's assertion, information stating the length of his sentence and an inquiry about promises made do not "specifically address" Laws' incorrect advice that Brown could be eligible for sentence credit that would result in his release after serving half his sentence. (St. Br. at 8) Like in *People v. Morreale,* 412 Ill. 528 (1952),

"hurried consultations" occurred here. *Morreale*, 412 Ill. at 532. Brown's affidavit states, "I met with Mr. Laws 2 times, once being right before the plea." (C. 171) His discussions with Laws appear to be rare and in haste, which "could not help to engender confusion and misapprehension in plaintiff in error." 412 Ill. at 532-33.

Lee v. United States

Since Mr. Brown filed his opening brief, the United States Supreme Court issued *Lee v. United States*, which strongly supports his argument that a static prejudice standard cannot be used to adjudicate all claims of ineffective assistance of guilty plea counsel. *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). In *Lee*, the Court differentiated cases involving ineffective assistance allegations due to incorrect advice about trial strategy and incorrect advice about sentencing ramifications. *Lee*, 137 S. Ct. at 1965. It addressed how prejudice can exist even in cases where a defendant has little chance of success at trial. 137 S. Ct. at 1966-67. *Lee* is analogous to the case at hand.

Although Lee's concern was deportation and Brown's was the length of his sentence, both men repeatedly expressed concerns to their attorneys about the ramifications of accepting a plea bargain. 137 S. Ct. at 1963; (C. 171) Both attorneys assured their clients their worries were unfounded. 137 S. Ct. at 1963; (C. 171) Like Lee's attorney, Brown's attorney also showed impatience with his client's inquiries. 137 S. Ct. at 1963; (C. 171) Brown's affidavit states:

> Right before the plea I wanted to confirm with Mr. Laws that I would only have to serve 50% on the armed habitual criminal conviction. He said "yes," and said something like "see – there is nothing in the paperwork about you doing 85%. Don't play with these people." (C. 171)

After pleading guilty, both men discovered their attorneys affirmatively provided them incorrect information on which they relied in accepting a plea bargain. 137 S. Ct. at 1963; (C. 171) Subsequently, Lee and Brown filed petitions alleging ineffective assistance of counsel. 137 S. Ct. at 1963; (C. 167) Unlike in Brown's case, an evidentiary hearing was held in *Lee*, wherein he and his attorney described the otherwise privileged conversations that resulted in acceptance of the plea bargain. 137 S. Ct. at 1963. Brown was denied the opportunity to present evidence at a hearing. (C. 202-203) Because Lee's attorney testified, the Court learned that he thought Lee's case was a "bad case to try" because the defense was weak. 137 S. Ct. at 1963. Both Lee and Brown argued that, had they known the true ramifications of accepting the plea bargain, they would have chosen to go to trial. 137 S. Ct. at 1963; (C. 171-172)

A magistrate judge recommended that Lee's plea be set aside due to ineffective assistance of counsel, but the District Court denied the relief. 137 S. Ct. at 1963-64. It found that "overwhelming evidence of Lee's guilt" made a conviction at trial a near certainty, resulting in a longer sentence as well as subsequent deportation. 137 S. Ct. at 1964. It ruled that Lee could not demonstrate prejudice resulting from his reliance on his attorney's incorrect advice. 137 S. Ct. at 1964. Similarly, the post-conviction judge in Mr. Brown's

case found that Brown could not show prejudice based on his attorney's incorrect advice. The judge found, "Even given the vagaries of the jury system, the defendant's chance of being acquitted was slim to none. However had he been convicted, a sentence in excess of 18 years was a 100% guarantee." (C. 202)

The appellate courts in both cases affirmed the decisions of the lower courts. In *Lee*, the Sixth Circuit Court of Appeals found that, although his attorney performed deficiently, Lee still had to demonstrate that prejudice resulted, and there was "a reasonable probability that but for counsel's errors, he would have not pleaded guilty and would have gone to trial." 137 S. Ct. at 1964. The court further found that Lee had no *bona fide* defense and nothing to gain by going to trial. 137 S. Ct. at 1964. In Mr. Brown's case, the Fourth District Appellate Court did not determine whether Laws performed deficiently. *People v. Brown*, 2016 IL App (4th) 140760. It found that because Brown did not claim innocence or proffer a plausible defense, his claim of ineffective assistance of counsel amounted to nothing more than a bare allegation. *Brown*, 2016 IL App (4th) 140760, ¶ 25. The court specifically stated that Brown *did* make the requisite substantial showing of a constitutional violation under two appellate court cases from 2008 and 2015; however, it rejected those because of an earlier Illinois Supreme Court case, *People v. Rissley*, 206 Ill.2d 403 (2003). *Brown*, 2016 IL App (4th) 140760, ¶ ¶ 11, 12. The Court in Brown's case held that *"Rissley* require[d] a particular showing of prejudice;" whereas the cases Brown cited "do not seem to require"

such a showing. 2016 IL App (4th) 140760, ¶ 11.

The Supreme Court in *Lee* reversed the lower courts' rulings. 137 S. Ct. at 1969. It found that the case did not lend itself to the traditional innocence/plausible defense analysis required in other cases alleging that ineffective assistance of guilty plea counsel induced the defendant to accept a plea bargain. 137 S. Ct. at 1965. The Court disagreed with the government's position that Lee could not show his decision to reject the plea would have been rational. 137 S. Ct. at 1968. "Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." 137 S. Ct. at 1969. Under *Lee,* the lower courts' decisions in Mr. Brown's case must also be reversed.

At the outset, the *Lee* Court sets forth the proper framework in which to review cases where a defendant alleges that ineffective assistance of counsel induced him to plea guilty. The question, according to the Court, is *not* whether the result of a trial would have been different than the result of his plea bargain. 137 S. Ct. at 1965. Rather, the question is whether the defendant was prejudiced by the "'denial of the entire judicial proceedings . . to which he had a right.'" 137 S. Ct. at 1965, quoting *Flores-Ortega*, 528 U.S. 470, 483 (2000). The Court explained, "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.'" 137 S. Ct. at 1965, quoting *Flores-Ortega*, 528 U.S. at 482-83. Mr. Brown's case also presents a situation where that "strong presumption"

does not exist. Brown relinquished his right to trial by accepting a fully-negotiated plea with the understanding that he was eligible to serve just half of his sentence. Counsel's objectively deficient representation prevented him from exercising his right to engage in judicial proceedings.

The *Lee* Court also recognized the difference between plea bargains accepted based on erroneous advice about trial strategy and those accepted as a result of erroneous advice about sentencing ramifications. 137 S. Ct. at 1964-65. Considering whether a defendant would have been better off going to trial is appropriate "when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error." 137 S. Ct. at 1965. For example, the Court explained, that analysis applies where a defendant alleges his lawyer should have sought to suppress an improperly obtained confession. 137 S. Ct. at 1965. "Not all errors, however, are of that sort." 137 S. Ct. at 1965.

Mr. Brown's case is of that other sort. He accepted a plea and waived his right to a trial based on his attorney's incorrect advice about sentencing ramifications. (C. 167-172) Nevertheless, the trial court, affirmed by the appellate court, denied his post-conviction petition based largely on his "slim" chances of a better outcome at trial. (C. 201-202); *Brown*, 2016 IL App (4th) 140760. *Lee* makes it clear that such an analysis is flawed.

Having established that the existence of prejudice based on a hypothetical trial is not always appropriate, the Supreme Court then addressed the importance of the defendant's decision making process when

contemplating the ramifications of accepting a plea bargain. 137 S. Ct. at 1966-67. It acknowledged that a defendant without a viable defense is likely to lose at trial, and, as a result, will rarely be able to demonstrate prejudice from accepting a guilty plea with a sentence likely more favorable than one obtained after trial. 137 S. Ct. at 1966. But, the prejudice inquiry in these circumstances goes beyond the "probability of a conviction for its own sake." 137 S. Ct. at 1966. When deciding whether to accept a plea, a defendant may consider more than just his chances of success at trial. 137 S. Ct. at 1966-67. "Even a highly improbable result may be pertinent to the extent it would have affected his decision making." 137 S. Ct. at 1967.

The State contends that an irreconcilable conflict exists between the *Lee* case and Brown's case because the former involved the "more onerous consequence" of deportation. (St. Br. at 27) Clearly, the cases have factual differences; however, the length of imprisonment can be as much a concern as deportation. Misinformation about either situation implicates similarly severe ramifications which ultimately affect a defendant's decision making.[1] To illustrate the "more onerous" outcome Lee faced, the State noted that he would be separated from friends and family, be required to leave a place he lived for decades, and be sent to a place where he has no connections. (St. Br.

[1] The State attempts to differentiate the cases by stating that Brown's concern regarding the length of his sentence related to a consequence "contingent" on his ability to "earn good-time credits." (St. Br. at 27) Under 730 ILCS 5/3-6-3(a)(1.5)(B) (2013), "sentence credit," as it is called, can be granted by merely complying with the rules and regulations of the Department of Corrections. Thus, to "earn" credit, Brown did not have to affirmatively act – he only needed to do what he was supposed to do in the first place.

at 27) The same description could apply to the consequences Mr. Brown faced, with one difference: Brown's literal freedom - to go outside, to make his own schedule, to spend time with family and friends, to choose his own meals - was at stake. Those, too, are "automatic" and "'dire'" consequences. (St. Br. at 27) The possibility of serving nine years in prison versus a potential acquittal – even if "highly improbable" – certainly may have been the determinative factor in Mr. Brown's decision to relinquish his constitutional rights and plead guilty. An evidentiary hearing is required so he can more thoroughly establish that fact.

The State said in its brief "it is so easy for a defendant to misrepresent conversations he supposedly had with counsel off the record regarding sentencing." (St. Br. at 26) Therefore, according to the State, it is "especially important" that defendants be required to allege innocence or a plausible defense in a post-conviction petition. (St. Br. at 26) The State's argument actually supports Mr. Brown's assertion that he should be granted a third stage evidentiary hearing. Any alleged "misrepresentation" could be rebutted at an evidentiary hearing, after a more thorough investigation ensues, guilty plea counsel testifies, and evidence is introduced regarding the otherwise privileged off the record conversations. The *Lee* Court stated, "Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." 137 S. Ct. at 1967. Unlike in *Lee,* Brown was denied the chance to present evidence in a hearing substantiating his preference of going to trial versus agreeing to an 18-year sentence served at 85 percent. (C.

202-203)

Although the State addresses the *Lee* decision, it disregards the case's holdings throughout much of its brief. For instance, the State maintains that, in a case like Mr. Brown's, a showing of prejudice still rests on a defendant's chances at trial. It cites *Hill v. Lockhart,* 474 U.S. 52 (1985), *People v. Hall,* and *People v. Hughes,* 2012 IL 112817, for the premise that "'resolution of the 'prejudice' inquiry will depend largely on whether [defendant] likely would have succeeded at trial.'" (St. Br. at 22) *Lee* clearly explained that some cases cannot be fairly adjudicated on predicting the outcome of a hypothetical trial. *Lee,* 137 S. Ct. at 1965.

In another example, the State appears to argue that technical pleading deficiencies should prevent Mr. Brown from receiving an evidentiary hearing. "[D]efendant's claim fails because his petition (which was prepared with the assistance of appointed counsel) fails to allege any basis to believe that he is innocent, has a plausible defense, or rationally would have rejected the deal." (St. Br. at 16) *Lee*, however, explains why not all cases are subject to such rigid requirements. In certain cases, a post-conviction petition that asserts prejudice but fails to allege a plausible defense or innocence is not automatically barred from further consideration. Rather, the defendant's decision making process is examined. In *Lee*, that occurred at an evidentiary hearing. The same should happen in Brown's case.

Stare Decisis

The State relies on the doctrine of *stare decisis* to support its apparent

contention that *Rissley*, *Hall*, and *Hughes* remain untouchable Illinois authorities on prejudice in a post-conviction case involving a petitioner who agreed to a fully-negotiated plea bargain based on incorrect advice from counsel. (St. Br. at 17) Mr. Brown's case, and the Supreme Court's decision in *Lee*, are evidence that the law is not so settled.

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Good cause to depart from governing decisions may exist when: 1) They are badly reasoned or unworkable, and 2) They are "likely to result in the serious detriment to public interests." *People v. Colon*, 225 Ill. 2d 125, 145-46 (2007). The State asserts that Mr. Brown failed to argue the existence of any "good cause." (St. Br. at 17) In fact, the very basis for Mr. Brown's appeal is that the prejudice standard set forth in those cases is unworkable *under specific circumstances*. The public interest suffers when a defendant pleads guilty based on incorrect advice from his lawyer. *Stare decisis* should not excuse the denial of a defendant's constitutional right to effective assistance of counsel.

The State also claims that Mr. Brown "implicitly argues" that this Court should overturn its decisions in *Hall, Rissley,* and *Hughes*. (St. Br. at 16) The State then contends that said implicit argument is forfeited because it was not raised in his petition for leave to appeal. (St. Br. at 16-17) The State's assertion misconstrues the basic tenants of appellate argument. Distinguishing case law in his brief does not equate to Mr. Brown advancing

a previously unraised argument. Arguing against the applicability of case law does not mean he advocates overturning it. In fact, he specifically recognized the cases' relevance in his opening brief. (Def. Br. at 28) Moreover, his petition for leave to appeal does state his position that certain post-conviction petitioners are precluded from reaching an evidentiary hearing under the current prejudice standards required. (PLA, p. 15) Thus, it is logical for Brown to discuss those currents standards in his brief. Finally, even if, *arguendo,* Mr. Brown did make an "implicit" argument, and that argument was not properly raised, this Court is not prevented from considering the argument. "The rule of forfeiture is an 'admonition to the parties and not a limitation on the jurisdiction of this court.'" *People v. McCarty,* 223 Ill.2d 109, 142 (2006). It is the province of this Court to determine the applicability of previous cases to Mr. Brown's case. That analysis is particularly crucial in light of *Lee v. United States.*

Anthony Brown agreed to a plea bargain which he did not accurately understand due to incorrect information from his attorney. His petition and affidavit clearly demonstrate that the potential for sentence credit, and thus the total length of his sentence, were the determinative factors in his decision to plead guilty. The ineffective assistance of his attorney caused him to relinquish his right to trial and serve a sentence at least six years more than what Mr. Laws told him. Brown's case should be remanded and a third stage hearing held to give him the opportunity to present evidence of the constitutional violation.

CONCLUSION

For the foregoing reasons and those set forth in his opening brief, Anthony S. Brown, petitioner-appellant, respectfully requests that this Court reverse the judgments of the lower courts and remand the case for a third-stage evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Ann Fick, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 14 pages.

/s/Ann Fick
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Petitioner-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 19, 2017, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system. Also, one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Elgin, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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