IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK MAYES #199-718, *
Petitioner,

v. * Civil Action No. MJG-93-2260
(Magistrate Judge Klein)

JON P. GALLEY, et al.,
Respondents *

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SUPPLEMENTAL PETITION UNDER 28 U.S.C. § 2254
FOR SPECIFIC PERFORMANCE OF PLEA AGREEMENT

The Petitioner, Mr. Mark Mayes, through his attorneys, James K. Bredar, Federal Public Defender for the District of Maryland, and Kathryn R. Frey, Assistant Federal Public Defender, moves this Honorable Court pursuant to 28 U.S.C. § 2254 and the Due Process Clause of the Fifth **[AND 14TH??]** Amendment**[S]** to the United States Constitution to grant Petitioner's Motion for Specific Performance of Plea Agreement.

PROCEDURAL HISTORY

On February 22, 1989, the State filed a two count information against Mr. Mayes in the Circuit Court for Baltimore City. Count one charged possession of cocaine with intent to distribute and count two charged importation of drugs in violation of Maryland State law. Respondent's Exhibit (hereinafter "R.E.") 1 at 1. On March 31, 1989, Mr. Mayes appeared entered a plea of not guilty to all counts in the information. Id. at 1. On June 22, 1989, Mr. Mayes appeared before the Honorable Edward J. Angeleti, Associate Judge of the Circuit Court for Baltimore City and entered a plea of guilty to both counts in the information. Id. at 2; R.E. 8. Mr. Mayes's plea of guilty was entered pursuant to a written plea agreement prepared by the

State. Petitioner's Exhibit (hereinafter "P.E.") 1. On July 20, 1989, Mr. Mayes was sentenced to twenty years' imprisonment on count one and twenty-five years' imprisonment and a fine of twenty-five thousand dollars ($25,000) on count two, to run concurrently. P.E. 2 at 31-32.

On August 21, 1989, Mr. Mayes filed an Application for Leave to Appeal asserting that his plea of guilty was involuntary, unknowing, and unintelligent. R.E. 2. On March 22, 1990, in an unreported opinion, the Maryland Court of Special Appeals denied the application. R.E. 3. On December 23, 1991, Mr. Mayes filed a Petition for Post Conviction Relief under the Uniform Post Conviction Procedure Act, Md. Ann. Code art. 27, § 645A. R.E. 4. On July 17, 1992, a hearing was held on the post-conviction petition in the Circuit Court for Baltimore City, the Honorable Marvin B. Steinberg presiding. R.E. 5. On August 5, 1992, the petition was denied. R.E. 5. On September 4, 1992, Mr. Mayes filed an Application for Leave to Appeal to the Maryland Court of Special Appeals. R.E. 6. On February 26, 1993, the Court of Special Appeals denied the Application for Leave to Appeal. R.E. 7.

On August 3, 1993, Mr. Mayes filed a pro se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 asserting that his plea of guilty was involuntary, unknowing, and unintelligent in violation of the Fifth **[and 14th]** Amendment**[s]** to the United States Constitution. On October 18, 1993, Respondent filed an Answer. On December 15, 1993, the Honorable Daniel E. Klein, Jr. appointed the Office of the Federal Public Defender for the District of Maryland to represent Mr. Mayes and to file a supplemental Petition on his behalf.

BRIEF FACTUAL SUMMARY

On June 22, 1989, Mr. Mayes entered a plea of guilty to a two count information in Circuit Court for Baltimore City. R.E. 8. This plea of guilty was entered pursuant to a written

plea agreement drafted by the State. See P.E. 1. The agreement set forth the rights and obligations of each party. Id. These reciprocal obligations were provided in paragraphs three, four, five, six and nine of the plea agreement. Paragraph three provided in relevant part that "Mr. Mayes agrees to enter a plea of guilty to the first counts of the indictments no later than June 22, 1989." P.E. 1, par. 3. Paragraph six set forth Mr. Mayes's specific obligations to cooperate with law enforcement. P.E. 1, par. 6. Paragraph nine provded in relevant part:

> That it is expressly understood by Mr. Mayes that his truth and candor in connection with her [sic] cooperation are express material conditions of this agreement. To that end, Mr. Mayes will agree to take a lie detector test from time to time and any refusal to do so will be considered a breach of this agreement. Should it appear at any time that Mr. Mayes has not been candid and truthful during the course of this agreement, it will be considered a breach of this agreement, and the State will be free to recommend the maximum incarceration as it sees fit.

P.E. 1, par. 9. Paragraph five provided in relevant part that:

> In the event Mr. Mayes does meet all the requirements of this agreement, the State will recommend a ten (10) year suspended sentence on all of the charges and five (5) years supervised probation with drug screening and treatment.

P.E. 1, par. 5. Paragraph Four provided in relevant part:

> In the event that Mr. Mayes fails to meet the requirements of this agreement, the State will recommend incarceration as it sees fit, but in any evens no less than 4 years and no more than 7 years total on all charges.

P.E. 1, par. 4.

On June 22, 1989, the court accepted Mr. Mayes's plea of guilty and ordered a presentence investigation report and set a tentative date for a sentencing hearing. R.E. 8 at 11. After completion of the presentence investigation, a hearing was held in front of the Honorable Edward Angeleti. The court found that Mr. Mayes had been untruthful in violation of paragraph nine. As a result, the court believed that the plea agreement was "null and void." P.E. 2 at 23.

The State agreed. Id. at 3.

Prior to imposition of a sentence, defense counsel made clear his and Mr. Mayes's understanding of the agreement. He advised the court that breach of the truthfullness term in paragraph nine released the State from making a recommendation of probation but still obligated it to make a recommendation of four to seven years. P.E. 2 at 29. In light of defense counsel's statements, the State was silent. Futhermore, the State made no sentencing recommendation. P.E. 2. The court imposed the maximum statutory sentence of twenty years on count one and twenty-five years on count two, to run concurrently.

Mr. Mayes does not contest the state court's finding of untruthfulness. However, he challenges the imposition of the statutory maximum sentence and the State's failure to recommend a sentence of four to seven years. Mr. Mayes contends that the State was obligated to recommend a sentence of four to seven years and its failure to make the recommendation was a breach of the agreement. The State obviously disagrees. P.E. 2 at 3; Respondents' Answer (hereinafter "R.A.").

In the instant Petition, Mr. Mayes asserts that his plea of guilty was involuntary, unknowing, and unintelligent and therefore violates the Due Process Clause of the Fifth **[14th ???]** Amendment to the United States Constitution. Three grounds support a finding that the plea was involuntary, unknowing, and unintelligent: First, the State breached the unambiguous plea agreement; second, in the alternative, the plea agreement was ambiguous and must be construed against the State; and third, the trial court failed to comply with the Maryland Rules which govern plea agreements. Therefore, Mr. Mayes respectfully requests that this Court grant the Writ of Habeas Corpus, order the State to specifically perform its obligations, and order the trial court

to resentence Mr. Mayes accordingly. This Petition first sets forth the applicable standard of review and then addresses each ground for relief.

THE CLAIMS RAISED IN THIS PETITION ARE SUBJECT TO A DE NOVO STANDARD OF REVIEW

The federal constitutional issues raised in this Petition are questions of law and mixed questions of law and fact. This Court reviews such issues de novo.[1] This Petition challenges the voluntary and knowing nature of Petitioner's plea of guilty. An involuntary and unknowing plea of guilty violates the Due Process Clause of the Fifth Amendment to the United States Constitution and requires vacation of the plea or specific performance of the bargain. In Marshall v. Lonberger, 459 U.S. 422, 431, the Supreme Court held that "the governing standard as to whether a plea of guilty is voluntary for purposes of the federal Constitution is a question of law . . ., and not a question of fact subject to the requirements of 28 U.S.C. § 2254(d)." Therefore, the ultimate issue of voluntariness of the plea of guilty is a question of law. Accordingly, this issue is subject to de novo review.

Mr. Mayes asserts three grounds supporting the conclusion that his guilty plea was involuntary. Mr. Mayes's first claim is that the State breached the unambiguous written plea agreement. Whether a written plea agreement is unambiguous is a question of law. United States

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[1] Issues raised under 28 U.S.C. § 2254 are either pure questions of law, pure questions of fact, or mixed questions of law and fact. See Townsend v. Sain, 372 U.S. 293 (1963). Questions of law and mixed questions of law and fact are reviewed by a federal habeas court under a de novo standard of review. See Id.; Miller v. Fenton, 474 U.S. 104, 111 (1985); Cuyler v. Sullivan, 446 U.S. 335 (1980); Knight v. Johnson, 699 F.2d 162, 166 (4th Cir. 1983) cert. denied, 464 U.S. 832 (1933).

v. Garcia, 956 F.2d 41, 44 (4th Cir. 1992). This Court can resolve this matter by simply reviewing the written plea agreement. Accordingly, this issue is reviewed de novo. Whether the State breached the agreement is a mixed question of law and fact. U.S. v. Dixon, 998 F.2d 228 (4th Cir. 1993). This issue can be easily resolved from the record. This Court need not make a credibility or demeanor determination. The record speaks for itself. Accordingly, this issue is also reviewed de novo.

The second claim is that, in the alternative, the plea agreement was ambiguous and therefore must be construed in Petitioner's favor. See United States v. Harvey, 791 F.2d 294. Whether the written agreement in this case was ambiguous is a question of law reviewed de novo. Id. For the same reasons stated in the first claim, de novo review is appropriate.

The third claim is that the trial court failed to comply with the Maryland Rules governing plea agreements. See Md. Rule 4-243; State v. Sanders, 311 Md. 378, 628 A.2d 209 (1993). This issue is resolved from a review of the state guilty plea and sentencing hearing transcripts and a straightforward application of the plain language of Md. Rule 4-243. See State v. Sanders, 331 Md. 378, 628 A.2d 209 (1993). This Court should review this claim de novo.

ARGUMENT

I. PETITIONER'S GUILTY PLEA WAS INVOLUNTARY AND THEREFORE HIS CONVICTION WAS OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A plea of guilty waives several federal constitutional rights including the privilege against compulsory self-incrimination,

trial by jury, and confrontation of one's accusers. Boykin v Alabama, 395 U.S. 238 (1969); Sutton v. State, 289 Md. 359, 424 A.2d 755 (1981). Waiver of these fundamental rights must

be intelligent, voluntary, and knowing. Id. A plea of guilty induced by unfulfilled government promises is involuntary and therefore unconstitutional. Santobello v. New York, 404 U.S. 257 (1971); Miller v. State, 272 Md. 249, 322 A.2d 527 (1974). A knowing guilty plea includes "the actual value of any commitments made to [the defendant] by the court [or the] prosecutor." Brady v. United States, 397 U.S. 742, 745 (1970). A plea is involuntary if prosecutorial commitments are not honored. Id. In Santobello, the Supreme Court held that:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that 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.

404 U.S. at 262; see also Miller v. State, 322 A.2d 527. An involuntary guilty plea violates the Due Process Clause of the Fifth Amendment to the United States Constitution and therefore must be either vacated or remedied. Mabry v. Johnson, 467 U.S. 504 (1984).

A. The Written Plea Agreement In This Case Was Unambiguous And The State's Breach Renders Petitioner's Guitly Plea Involuntary

If the government breaches an unambiguous plea agreement, the plea is rendered involuntary and the Defendant is entitled to have the agreement specifically enforced. United States v. Garcia, 956 F.2d 41, 44 (4th Cir. 1992); Miller v. State, 322 A.2d 527. It is clear from the face of the written agreement in this case that the terms are unambiguous. P.E. 1. Furthermore, it is clear from the guilty plea and sentencing hearing transcript that the State breached the agreement. P.E. 2.

Plea agreements are evaluated under principles derived from commercial contractual law

which require that the parties receive the benefit of the bargain and that unambiguous contracts should be enforced accordingly. United States v. Harvey, 791 F.2d 294. Courts must safeguard against involuntary guilty pleas by ensuring that "the bargain represented by the plea agreement is not frustrated." United States v. Jureidini, 846 F.2d 964, 965-966 (4th Cir. 1988). The party alleging breach has the burden of establishing the government breach by a preponderance of evidence. United States v. Conner, 930 F.2d 1073 (4th Cir.), cert. denied, _ U.S. __, 112 S.Ct. 420 (1991).

Whe the State breaches the terms of an unambiguous plea agreement, the agreement is routinely enforced in the Defendant's favor. In Santobello, a prosecutor promised the Defendant it would not make a sentencing recommendation in exchange for the Defendant's plea of guilty. 404 U.S. at 258. However, at sentencing a different prosecutor made a recommendation for the maximum sentence of one year.[2] Id. at 259. Over Defendant's objections, the sentencing court imposed a sentence of one year. Id. at 259-260. The Supreme Court held that it was constitutional error for the sentencing court to have accepted the guilty plea because it was induced by an unfulfilled promise not to make a sentencing recommendation and was therefore involuntary. Id. at 262; see also Miller v. State, 322 A.2d 527.

Similarly, in United States v. Ringling, 988 F.2d 504 (4th Cir. 1993), the Fourth Circuit required that the Defendant receive the benefit of the bargain where the government breached a term of the unambiguous written plea agreement. The plea agreement required that at sentencing

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[2] On appeal the government conceded that it had made the promise not to make a sentencing recommendation. Santobello, 404 U.S. at 262. Therefore, the terms of the plea agreement were unambiguous.

the government would inform the court of "the full nature and extent of Defendant's cooperation." Id. at 506. The court found that the plea agreement required the government to advise the court as to the extent of Defendant's cooperation. Id. at 505. In order to properly advise the court, the government was required to debrief the Defendant prior to sentencing. The government failed to advise the court about the extent of defendant's cooperation because it failed to debrief the Defendant. The Court found that the government's failure to advise the court of the extent of the defendant's cooperation was a material breach of the agreement. Id. at 506. Recognizing that the Defendant's plea of guilty was induced in part by the government's promise that he may receive a reduced sentence depending upon the extent of his cooperation, the court held that the guilty plea was rendered involuntary due to the government's failure to live up to its end of the deal. Id. The court ordered specific performance of the agreement which required that the defendant be given an opportunity to cooperate with the government. Id.; see also United States v. Jureidini, 846 F.2d 964 (4th Cir. 1988) (unambiguous plea agreement breached by government must be enforced to ensure voluntariness of Defendant's guilty plea); United States v. Dixon, 998 F.2d 228 (4th Cir. 1993) (holding that the terms of an unambiguous plea agreement were breached and that the government's promise must be performed).

A. The Written Plea Agreement Was Unambiguous

Application of these principles to the present case reveals that the language of the plea agreement was clear and that the State failed to adhere to its part of the bargain which induced Mr. Mayes's guilty plea. The plea agreement in this case had two alternte conditions precedent. First, it provided that if Mr. Mayes entered a plea of guilty to both counts of the information, if he cooperated, and if he was truthful, then the State would recommend a ten year suspended

sentence on both charges and a five year term of supervised probation with drug screening and treatment. P.E. 1 at 1, par. 3 (enter plea of guilty to information); par. 6 (cooperation); par. 9 (truthfulness); par. 5 (recommendation of suspended sentence). Alternatively, it provided that, "[i]n the event Mr. Mayes fails to meet the requirements of this agreement, the State will recommend incarceration as it sees fit, but in any event no less than 4 years and no more than 7 years total on all the charges." P.E. 1. at 1, par. 4.

Paragraphs five and four defined these two potential outcomes. Paragraph nine, which sets forth Mr. Mayes's promise to be truthful, is one of the conditions precedent to receive a recommendation of probation pursuant to paragraph five. A violation of this condition of truthfulness released the State from its promise to make a recommendation of probation and instead triggered the State's alternative obligation to recommend "in any event no less than 4 years and no more than 7 years total on all the charges." P.E. 1. at 1, par. 4. Paragraph nine provides that in the event of untruthfulness, "the state will be free to recommend the maximum incarceration as it sees fit." P.E. 1 at 2, par. 9. This language relates back to paragraph four which provides for the maximum sentence the State agreed to recommend in the event Mr. Mayes failed to meet the requirements of the agreement. That paragraph provides for the State to recommend, "incarceration <u>as it sees fit</u>, but in any event no less than 4 years and no more than 7 years total on all the charges." P.E. 1 at 1, par 4.

Thus, the agreement is clear on its face. Completion of "all the requirements" as provided in paragraph five would result in the sentencing recommendation of probation and a suspended sentence as set forth in paragraph five, and "fail[ure] to meet the requirements of this agreement" as set forth in paragraph four would result in a recommendation by the State in accord

with paragraph four.

. . . . . **2. The State Breached the Agreement By Failing to Recommend "No Less Than 4 And No More Than 7 Years Total On All The Charges."**

At the sentencing hearing the State violated the terms of the plea agreement by failing to recommend a sentence of imprisonment of "not less than 4 years and no more than 7 yesras total on all the charges." [3] P.E. 2 at 2-34. The trial court found that Mr. Mayes was not truthful as required by the plea agreement. Petitioner does not contest this finding.[4]

The transcript of the sentencing hearing reveals that the State's Attorney and the trial court misinterpreted the plea agreement. The State misled the court and violated the agreement when it stated: "It is the State's position that the defendant is in violation of the written plea agreement, particularly paragraph 9, where it says that if it appears anytime the defendant has not been candid

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[3] Arguably the State made a tacit recommendation for imposition of the maximum sentence of twenty-five years. P.E. 2 at 23.

> The Court: Mr. Raymond [State's Attorney], I have heard your recommendation; do you have anything else you wish to say?
>
> Mr. Raymond: No.
>
> The Court: What is the maximum penalty for importing in excess of 28 grams of cocaine into the State?
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> Mr. Raymond: 25 years, Your Honor.
>
> The Court: And what is the fine, $25,000?
>
> Mr. Raymond: Yes.

In any event, whether the State failed to make the agreed upon recommendation or whether the State made a recommendation of twenty-five years' imprisonment, the State breached the plain language of the plea agreement.

[4] Respondent's Answer states that the presumption of correctness is afforded to the State court's finding that Mr. Mayes breached the agreement. R.A. at 5. Petitioner does not contest the trial court's finding on this issue.

and truthful during the course of the agreement, it will be considered a breach of the agreement, and the State would be free to recommend the maximum incarceration as it sees fit." P.E. 2 at 3. This was patently untrue because untruthfulness triggered the State's obligation to recommend four to seven years as set forth in paragraph four. The trial court labored under the erroneous belief that as a result of Mr. Mayes's untruthfulness, the plea agreement was "null and void." P.E. 2 at 23. It believed that "under the terms of the agreement, if there was a violation of that agreement, the State had an absolute right to terminate the agreement." Id. at 2. The Maryland post-conviction court's memorandum opinion and order shows that it also misinterpreted the agreement. It found that "Petitioner breached the terms of his plea agreement, the State was not bound by the agreement, and therefore was free to recommend the maximum sentence allowed by law." R.E. 5 at 4.

Respondents' Answer also misconstrued the plain language of the plea agreement. R.A. at 5-6. Contrary to the clear terms of the plea agreement, Respondents' oversimplified analysis addressed only one of the conditional terms of the agreement. It contended that Mr. Mayes's untruthfulness vitiates the entire agreement and releases the State from all of its obligations under the agreement. R.A. at 5-6. Respondents complained that notwithstanding Mr. Mayes's untruthfulness, he sought to "retain all of the advantages for which he bargained." R.A. at 5 (emphasis added).

Contrary to Respondents' argument, Mr. Mayes is not trying to retain all of the advantages for which he bargained. He does not seek to have the State recommend a sentence of ten years' suspended and five years' supervised probation; rather, he only seeks to retain the limited advantages due to him under the agreement -- a State recommendation of no less than four (4)

and no more than seven (7) years' incarceration. P.E. 1 at 1, par. 4. Mr. Mayes seeks to retain no more than what the State promised him in exchange for his plea of guilty.

The record reveals that the State did not recommend a sentence of four to seven years' incarceration as agreed upon by the parties and contemplated by the written agreement. Accordingly, this Court must find the State in breach. Petitioner respectfully requests that this Court grant his Writ of Habeas Corpus and order the requested relief of specific performance.

B. IN THE ALTERNATIVE, THE LANGUAGE OF THE PLEA AGREEMENT IS AMBIGUOUS AND SETTLED FOURTH CIRCUIT LAW REQUIRES THIS COURT TO CONSTRUE THE AMBIGUOUS TERMS IN PETITIONER'S FAVOR

When a criminal defendant pleads guilty he waives fundamental constitutional rights in reliance on and in exchange for government promises. Therefore, it is critical that the written plea agreement be precise and unambiguous. An ambiguous plea agreement renders a guilty plea involuntary. United States v. Harvey, 791 F.2d 294 (4th Cir. 1986). In Harvey, the Fourth Circuit established rules governing interpretation of plea agreements. Whether a plea agreement is ambiguous can be determined from the face of the written contract. Id. Once a plea agreement is deemed ambiguous, its terms must be construed strictly against the government. Id. at 301. The corollary of this rule is that an ambiguous plea agreement is construed in the Defendant's favor because the plea of guilty was predicated on a contract that operated to waive significant constitutional trial rights. Id.

The Fourth Circuit developed these principles mindful of longstanding tenets of private contract law. Id. at 300. However, it recognized that plea agreements must be treated differently from commercial contracts:

[C]onstitutional and supervisory concerns require holding the Government to a

> greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements. . . . This is particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement . . .

Id. 300-301. A Defendant's rights under a plea agreement are different from a party's rights under a commercial contract; the contractual rights of a criminal defendant "differ fundamentally from and run wider than those of commercial contract law." Id. at 300. Courts' supervisory powers implicate the integrity of the government and confidence in the fair and effective administration of justice. Id. Accordingly, a necessary prerequisite to a defendant's voluntary wavier of his constitutional rights is government performance of all bargained for promises. Id. at 301. Courts routinely review the language of plea agreements and find that their terms are ambiguous. In United States v. Garcia, 956 F.2d 41 (4th Cir. 1992), the court found that the terms of the plea agreement included the government's promise not to require the Defendant to cooperate. The government maintained that the agreement only precluded voluntary cooperation, not compelled cooperation. The court found that the terms of the agreement were ambiguous. It reasoned that had the government only meant to allow the defendant to refuse to voluntarily cooperate it could have easily stated that "cooperate" only means "voluntary." Id. at 45. Finding the agreement ambiguous, it construed the ambiguity against the government and ordered imposition of a sentence in accord with the terms of the agreement.

In United States v. Carnine, 974 F.2d 924 (7th Cir. 1992), the parties agreed in the plea agreement that the sentence in the current offense would run concurrently with the sentence defendant was serving on a prior offense. The agreement was ambiguous as to the date on which the sentences would being to run concurrently. The government argued the date was that on which

the defendant pleaded guilty. The Defendant contended that the agreement provided for a retroactive sentence beginning on the date he began to serve his prior sentence. The court held that use of the word "concurrently" was ambiguous and that the government should have clarified the date on which the sentence was to begin to run. Id. at 929. See also United States v. Fields, 766 F.2d 1161, 1169 (7th Cir. 1985) (finding the terms of the agreement ambiguous and cautioning that "[t]he danger that a criminal defendant will be misled into relinquishing important constitutional rights based on an inaccurate understanding of the plea agreement increases in direct proportion to the agreement's vagueness"); United States v. DeMichael, 692 F.2d 1059, 1062-63 (7th Cir. 1982), cert. denied, 461 U.S. 907 (1983) ("It is most distasteful to be confronted with conflicting testimony by lawyers with respect to the terms of an agreement which ought to be clear and indisputable in its terms"). In Harvey, 791 F.2d 294, the government drafted a written plea agreement which was signed by all parties. Id. at 296. The written contract provided that "The Eastern District of Virginia further agrees not to prosecute [the Defendant] for any other possible violations of criminal law arising from the offenses set out in the indictment or the investigation giving rise to those charges." Id. The record of the rearraignment proceeding indicated that the Defendant understood the plea agreement; however, there were no representations by the government, the court, or defense counsel regarding the parties' specific understanding of each term of the agreement. Id.

Subsequent to the court's acceptance of his plea of guilty and imposition of sentence, the Defendant was released and then re-arrested in the District of South Carolina on related charges. Defendant filed a motion for specific performance of the Virginia plea agreement to prohibit the

South Carolina prosecution. The district court found that the plea agreement was unambiguous[5] and denied Defendant's motion. Id. at 299. The Fourth Circuit reversed. Id. at 301.

The Fourth Circuit found that as a matter of law the written plea agreement was ambiguous. Id. After its own evaluation of the plea agreement and the record below, it concluded that the reference to the "Eastern District of Virginia," read literally, was only a reference to the party making the agreement because it read: "the Eastern District of Virginia further agrees . . . ." Id. It remarked that the agreement could have been drafted with more clarity. For example, it could have said, "the Government further agrees that defendant will not be prosecuted in the Eastern District of Virginia (or 'by the Office of the United States Attorney for the Eastern District of Virginia).'" Id. That this clear language that could have been used underscored the ambiguity of the actual language used. Id. The court ordered that agreement be construed to prevent further prosecutions by any agency of Government.[6] Id. at 303.

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[5] The government contended that the plea agreement only prohibited prosecution if two requirements were met: (1) the Eastern District of Virginia sought to prosecute the Defendant and (2) only for "other possible violations of criminal law arising from the offenses set out in the indictment. . .." Harvey, 791 F.2d at 298. It argued that if it had meant to bind any governmental body other than the Eastern District of Virginia, it would have explicitly provided.

The Defendant's interpretation of the agreement was that the offense charged in the South Carolina indictment charged a violation "arising from" the investigation in Virginia and that the plea agreement did not clearly limit the prohibition of future prosecutions to the Eastern District of Virginia. Id.

[6] However, the court remanded the case for determination of whether the South Carolina indictment charged offenses "arising from" the offenses charged in the Virginia indictment. Harvey, 791 F.2d at 303.

The facts of Harvey are similar to the facts of this case. As in Harvey, in the present case the State drafted the written plea agreement. Similarly, the terms of the plea agreement in both cases are ambiguous. In the present case, the plea agreement is ambiguous as to the parties' reciprocal obligations.

The condition precedent which triggers the State's promise to recommend not less than four and not more than seven years' incarceration as provided in paragraph four is not clearly defined. To receive a recommendation of probation under paragraph five Mr. Mayes had to "meet all the requirements of this agreement."[7] P.E. 1 at 1. However, the agreement is unclear as to the State's obligation in the event that Mr. Mayes failed to complete "all" of the requirements. Truthfulness was one of the requirements under the agreement and therefore was a condition precedent to paragraph five (5). Mr. Mayes was untruthful and thereby failed to fulfill "all" of his obligations as required by paragraph five (5). Paragraph five (5) does not apply. However, the agreement is ambiguous as to whether paragraph four (4) or nine (9) applies.

On the one hand, paragraph four could mean that if Mr. Mayes was untruthful the State would recommend four to seven years.[8] Paragraph nine appears to support this conclusion because it states one of the circumstances under which Mr. Mayes would forego the State's recommendation of probation and instead trigger the default provision of a recommendation of

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[7] Though "all" is not clearly defined in paragraph five (5), read in the context of the entire agreement which set out Mr. Mayes's obligations, it must include pleading guilty to counts one and two as provided in paragraph three, cooperating as provided in paragraph six and nine, and being truthful as provided in paragraph nine.

[8]

four to seven years.[9] P.E. 1 at 1, par. 4, 5. Paragraph nine's reference to the "maximum incarceration as it sees fit," when read in conjunction with the rest of the agreement, appears to relate back to paragraph four which refers to "incarceration as it sees fit, but in any event no less than 4 yeras and no more than 7 years total." P.E. 1 at 1, par. 4. Paragraph nine can be read to relate back to paragraph four because it is paragraph four which ultimately defines the State's alternative obligations under this agreement and because of the repeated use of the identical words "as it sees fit," found in both paragraphs four and nine. In other words, paragraph nine can be read as stating one of the ways Mr. Mayes could jeopardize his chance at probation and instead receive a recommendation of four to seven years.

On the other hand, the agreement could also be read to provide that if Mr. Mayes was untruthful, the State was allowed to recommend the maximum statutory sentence of twenty-five years. This was Respondents' position at the sentencing hearing. P.E. 2 at 3. It read paragraph nine in isolation without relation back to paragraph four. However, the words "statutory maximum" fail to appear anywhere within the four corners of the agreement. Instead, the only maximum sentence expressly provided for in the written agreement was seven years as set forth in paragraph four. As required by Harvey, the written agreement was not carefully drafted to make crystal clear the circumstances under which the government must recommend a particular sentence. It also fails to provide clarity on what sentence the State must recommend.

The imprecision of the agreement is further apparent when viewed in light of the completely different interpretations of the agreement given by the different courts that have

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reviewed it including the Maryland trial court, the Maryland Court of Special Appeals, and the Maryland Post-Conviction Court. The State trial court never made an explicit finding as to the parties' obligations under individual terms of the agreement. Instead it only made summary conclusions. At the sentencing hearing on July 20, 1989 the court concluded, without first carefully reviewing the alternative outcomes contemplated under the agreement, that "under the terms of the plea agreement, if there was a violation of that agreement, the State had an absolute right to terminate the agreement." P.E. 2 at 2; see also P.E. 2 at 23.

Defense counsel, Robert Durkin, Esquire, voiced his and his client's understanding of the agreement at the sentencing hearing[10]:

> MR. DURKIN: . . . Judge, the only other thing that I would point out, that in Paragraph 4 of the plea agreement, and I understand that State is asking for seven years and --
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> THE COURT: No one is asking for seven years. And that has no relevance as far as this court is concerned, Mr. Durkin.
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> MR. DURKIN: . . . However, paragraph 4 was put in there by the State in that if he did fail to meet the requirements of the agreement, they would ask for incarceration from 4 to 7 years. That was the terms of the agreement.

P.E. 2 at 29. Notwithstanding defense counsel's efforts, the trial court read "maximum incarceration" provided in paragraph nine in isolation, without any reference to paragraph four

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[10] In Harvey, the Fourth Circuit's ambiguity finding was reinforced by the record of both defense counsel's interpretation of the plea agreement and the government's failure to respond. Harvey, 791 F.2d at 302 ("the [AUSA] stood mute"). Defense counsel in the present case made clear his and his client's understanding of the agreement as indicated in the excerpt above. Furthermore, the State's Attorney remained silent after defense counsel's argument. P.E. 2 at 29. As did the Fourth Circuit, this Court should consider the record of these events as reinforcement of the ambiguous nature of the agreement.

which Petitioner contends set forth the maximum incarceration as "no less than 4 and no more than seve years total." P.E. 1 at 1, par.4. The court was fixated on paragraph nine, which provided that the State could request the "maximum incarceration" in the event that Mr. Mayes was untruthful. Under its understanding of the agreement, it then sentenced Mr. Mayes to twenty years on count one and twenty-five years on count two, to run concurrently. The State's vague terminology and failure to cross-reference the interrelated terms left the agreement open to this erroneous interpretation. The agreement is therefore ambiguous and Petitioner's plea of guilty involuntary.

Subsequent to the sentencing hearing in the present case, Petitioner applied for leave to appeal and the Maryland Court of Special Appeals denied the application in an unpublished written opinion. R.E. 2 & 3. The Court of Special Appeals' interpretation of the plea agreement was:

> State agreed that in return for <u>certain requirements</u> to be met by the appellant, the State would recommend no less than four years nor more than seven years incarceration. The State also agreed that if the appellant met <u>all</u> requirements, it would recommend a ten-year suspended sentence with five years supervised probation.

R.E. 3 at 2 (emphasis added). The Court never defined the "certain requirements." It did recognize that there were two conditions precedent with two alternative outcomes. However, its failure to define "certain requirements," in light of its implicit finding that truthfulness was not one of these requirements, renders its interpretation ambiguous.

Curiously, the Maryland Post-Conviction Court interpreted the agreement in yet another fashion:

> Petitioner had agreed to assist the State by providing information, and other assistance in narcotics investigations. In return, if the Petitioner had met all of the requirements, the

> State, in accordance with the agreement, would have recommended a ten (10) year suspended sentence on all charges and five (5) years supervised probation with drug screening and treatment. The agreement further provided that if the Petitioner failed to meet all the requirements, the State would recommend no less than four (4) years, and no more than seven (7) years. In the event the Petitioner, at any time, failed to be truthful during the performance of the agreement [sic], the state was free to recommend the maximum sentence allowed by law.

R.E. 5 at 2. Under this rendition of the agreement, there are three potential outcomes: (1) Mr. Mayes met all of the requirements and the State would recommend probation; (2) Mr. Mayes "failed to meet all the requirements" and the State would recommend four to seven years' incarceration; or (3) Mr. Mayes was untruthful and the State could recommend the statutory maximum. First, the court failed to define "all." Second, this court's rendition divorces "failure to meet all the requirements" from failure to be truthful. There is no clear support in the written agreement for this interpretation. Third, the court gratuitously read paragraph nine's reference to the "maximum sentence" to mean the statutory maximum. The agreement does not mention the words "statutory maximum" nor does it actually set out the statutory maximum sentences of twenty and twenty-five years.

These different interpretations of the same plea agreement by the different courts support the finding that the plea agreement in this case was ambiguous. Moreover, each court's separate interpretation was ambiguous. The courts' inability to decipher the agreement in an unambiguous manner further bolsters the finding of ambiguity.

The drafter's failure to clearly define a term that could have been clearly defined further suggests ambiguity. See Harvey, 791 F.2d at 301. The Harvey Court illustrated how the plea agreement in that case could have been drafted with clarity and noted that, "[b]ut to state it here as it might so easily and most naturally have been stated reveals the ambiguity, in context, of what

was actually said." Id. In the present case, had the State intended that Mr. Mayes receive the statutory maximum punishment under a particular set of circumstances, it could have expressly included the word "statutory" in the agreement. It also could have set forth the actual statutory maximum sentences provided in each statute. It did not. Paragraph nine provided "maximum sentence as it sees fit," however, paragraph four provided, "as it sees fit, but in any event no less than 4 years and no more than 7 years total on all charges." Did paragraph nine mean statutory maximum or did it mean the maximum sentence as provided in paragraph four? The agreement is not clear. Accordingly, paragraph nine's reference to "maximum incarceration" is ambiguous.

Several other provisions could have been written with more clarity. The State could have drafted the agreement to provide for the specific conditions precedent and the specific resulting obligations of the State. The separate provisions could have cross-referenced each other. The State could have made clear exactly which conditions precedent triggered the recomendation of four to seven under paragraph four. What constituted "fail[ure] to meet the requirements of this agreement" as provided in paragraph four could have easily been defined. Additionally, the word "all" in paragraph five could have been defined so to clearly set forth the conditions precedent to the recommendation of probation and a suspended sentence under paragraph five. Not only could these terms have been precisely defined, they obviously should have been expressly defined.

It is clear from the face of the agreement, and the different interpretations by the different courts and the State, that the agreement was not clear as to how many conditions precedents existed within the agreement or the specific requirements within each condition precedent. The Post-Conviction court believed there were three potential outcomes, but it failed to clearly

describe Mr. Mayes's obligations in relation to each. The Court of Special Appeals believed there were two potential outcomes, but was unclear in the conditions precedent for each. The trial court failed to isolate each condition precedent and failed to provide any analysis to support its conclusion that paragraph nine provided that untruthfulness released the government from its obligations under the agreement.

A review of the agreement will leave this Court in great uncertainty as to the rights and obligations of each party. If this Court finds that the agreement is ambiguous, then the agreement must be construed in Petitioner's favor, the writ of habeas corpus must be granted, and specific performance must be ordered.

C. THE TRIAL COURT ERRED BY FAILING TO APPRISE PETITIONER OF HIS RIGHTS IN ACCORDANCE WITH MARYLAND RULE 4-243(c)(4) WHICH GOVERNS PLEA AGREEMENTS

Generally, the Maryland Rules provide for two types of plea agreements. Rules 4-243(a)(1-5), 4-243(a)(6). Under Rules 4-243(a)(1-5), the court is not bound to any particular sentence, notwithstanding the State's promise to the Defendant to make a particular recommendation. However, under Md. Rule 4-243(a)(6), a court may agree to bind itself to the terms of a plea agreement, specifically a particular sentence.

Plea agreements drafted under Md. Rule 4-243(a)(6) are further governed by Rules 4-243(c)(1-4). Under the rules, the plea agreement is submitted to the court for its consideration. Md. Rule 4-243(c)(1). The court may alternatively accept the terms and agree to bind itself, reject the terms and refuse to bind itself, or defer acceptance or rejection pending pre-sentence investigation. Id. If the plea is approved, the judge must embody the agreed upon sentence in its judgement. Rule 4-243(c)(3). However, if the judge chooses to reject the plea, the rule

provides that it must so advise the defendant and give him the opportunity to withdraw his plea of guilty. Rule 4-243(c)(4); See State v. Sanders, 331 Md. 378, 628 A.2d 209 (1993).

As indicated by the Respondent in its Answer, this plea agreement was governed by Md. Rule 4-243(c)(4): "Having conditionally accepted the plea agreement, and having discovered that Mayes had not complied with the terms of the agreement, the trial court could rightfully reject the plea agreement, Md Rule 4-243(c)(4), and it was not obligated to impose the seven year sentence that it could and indeed would have imposed had Mayes fully complied with the terms of the plea agreement." R.A. at 6. Respondent correctly states that the agreement was only conditionally accepted at the guilty plea hearing. In other words, the court deferred acceptance or rejection pending the presentence investigation. Respondent also correctly states that the trial court ultimately rejected the plea agreement. R.A. at 7; see P.E. 2 at 23. The court found that the agreement was "null and void." P.E. 2 at 23.

However, the Maryland Rules governing plea agreements set forth certain requirements a court must follow upon rejection of a plea agreement. Md. Rule 4-243(c)(4) [ANY MORE RULES?] Most importantly, it must inform the defendant that it is rejecting the agreement and give the defendant the opportunity to withdraw his plea of guilty. RULE ___.

In Sanders, the trial court accepted the defendant's plea of guilty but deferred acceptance of the plea agreement pending presentence investigation. Sanders, 628 A.2d at 211. The court conditioned its acceptance of the agreement on the Defendant's honesty regarding his criminal record. Id. The presentence investigation report revealed that the Defendant had not been truthful regarding his prior record. The court rejected the sentence contemplated by the plea agreement and sentenced the Defendant to a sentence ten times that contemplated by the agreement. Id. at

212. The court refused to allow the Defendant to withdraw his plea of guilty. Id.

Interpreting the plain langauge of Rule 4-243(c)(4), the Maryland Court of Appeals held that rejection of a plea agreement requires the court to "inform the parties and also advise the defendant that the court is not bound by the agreement, and that a different disposition than that contemplated by the plea agreement can be imposed, if the defendant does not withdraw his or her plea, as he or she has a right to." Id. at 214. The trial court failed to afford the defendant the opportunity to withdraw his plea of guilty after he rejected the agreement and before he imposed sentence as required under Md. Rule 4-243(c)(4). Id. Therefore, it held that the trial court violated the plain language of Rule 4-243(c)(4). The court ordered that Defendant be given the opportunity to withdraw the plea of guilty. Id. at 215.

The facts of Sanders are similar to the facts of this case. After Mr. Mayes entered a plea of guilty, the trial court deferred acceptance or rejection of this plea agreement for ninety days pending the presentence investigation and Mr. Mayes's cooperation. R.E. 8 at 11. See State v. Poole , 321 Md. 482, 492-93, 583 A.2d 265, 271 (1991). One of the terms of the agreement was that Mr. Mayes be truthful with regard to his prior criminal history. P.E. 2. at 2. The presentence investigation report revealed that Mr. Mayes had been untruthful. The court found that Mr. Mayes was in breach of the agreement. P.E. 2 at 23. It refused to follow the terms of the plea agreement, finding the agreement "null and void." Id.

The trial court violated Md. Rule 4-243(c)(4) when, after rejecting the plea agreement, it failed to inform Mr. Mayes that he was entitled to withdraw his plea of guilty. Md. Rule 4-243(c)(4); State v. Sanders, 628 A.2d 209 (1993). Though it was free to reject the agreement, Md. Rule 4-243(c)(2,4), rejection of the agreement required the court to follow the rules clearly

set forth in Md. Rule 4-243(c)(4). See State v. Sanders, 628 A.2d 209 (1993).

PETITIONER REQUETS THAT THIS COURT ORDER SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT

Petitioner respectfully requests that this Court order specific performance of the plea agreement. United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) (granting remedy of specific performance and ordering the lower court to resentence the defendant accordingly). Under Petitioner's first claim for relief if this Court finds that the plea agreement was unambiguous and the State breached its promises, then Petitioner requests that this Court order specific performance of the agreement by a different state judge. United States v. Dixon, 998 F.2d 228, 231 (4th Cir. 1993); Santobello v. New York, 404 U.S. at 256-257 (remanding to the lower court for a determination on the proper remedy; specific performance requires resentencing by a different judge).

Under Petitioner's second claim for relief, if this Court finds that the terms of the plea agreement were ambiguous, then those terms must be construed against the government. United States v. Harvey, 791 F.2d 294 (4th Cir. 1986). This necessarily requires specific performance in accord with the new construction of the ambiguous terms of the agreement. Resentencing must be in front of a different judge. Santobello, 404 U.S. 257.

Under Petitioner's third claim for relief, Petitioner requests that this Court order the State trial court to comply with Rule 4-243(c)(4) and explains to Mr. Mayes that he may either withdraw his plea of guilty or persist in his plea of guilty though the court is not honor bound to the terms of the plea agreement. If Mr. Mayes chooses to withdraw his plea of guilty, then he will be free to either proceed to trial or negotiate a new plea agreement. However, if he chooses

not to withdraw his plea of guilty, the outcome depends upon this court's ruling on claims one and two. Though the court is no longer bound to the agreement, the State must specifically peform its part of the bargain if Mr. Mayes persists in his plea of guilty. Therefore, if this court finds the agreement is unambiguous and the State breached a material term as set forth in claim one, then the agreement must be so enforced, i.e., the State must be ordered to make a sentencing recommendation of four to seven years' incarceration. However, if this court finds the agreement is ambiguous as set forth in claim two, then the agreement must be enforced so that the ambiguous terms of the plea agreement are construed in Petitioner's favor. In any event, if Mr. Mayes choses to persist in his plea of guilty, this Court must order that a different court preside over the sentencing hearing.

CONCLUSION

Mr. Mayes respectfully requests that this Court find his plea of guilty involuntary, unknowing, and unintelligent in violation of the Fifth Amendment to the United States Constitution any or all of the reasons set forth in this Petition and order the requested relief accordingly.

REQUEST FOR A HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requeted on Petitioner's motion.

Respectfully submitted,

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