

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

PHILLIP KEATHE CAREY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212575

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment rights by failing to conduct an adequate investigation before coercing petitioner into pleading guilty?

STATEMENT

On October 20, 2009, a Greenville County grand jury indicted petitioner for three counts of armed robbery, kidnapping, and first degree burglary. App. 98 - 107. Petitioner waived presentment on another first degree burglary charge. App. 48, ll. 5 - 11. On November 9, 2009, petitioner pled guilty to all of the charges, except the first degree burglary charges were reduced to second degree burglary. App. 48, ll. 12 - 19. Barbara Tiffin represented the State and Chris Posey represented petitioner. App. 1. The Honorable Edward Miller accepted the plea and sentenced petitioner to concurrent terms of thirteen years' imprisonment on each charge. App. 29, l. 25 - 30, l. 7. Petitioner did not appeal.

On August 11, 2010, petitioner filed a PCR application. App. 33. On February 29, 2012, a hearing was held before the Honorable D. Garrison Hill. App. 46. Thomas J. Quinn represented petitioner and Karen C. Ratigan represented the State. App. 46. On June 25, 2012, Judge Hill dismissed petitioner's application. App. 121. This petition follows.

ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment rights by failing to conduct an adequate investigation investigation before coercing petitioner into pleading guilty.

The PCR court erred because plea counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Trial counsel has a duty to conduct a full investigation and present a complete and coherent defense. Wiggins v. Smith, 539 U.S. 510, 524 (2003). Part of this duty includes investigating the case and interviewing witnesses. See Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008).

Petitioner testified that he would not have pled guilty but for being pressured into a plea by his attorney. App. 63, l. 24 – 64, l. 2. Petitioner testified that plea counsel met with him less than five times. App. 50, ll. 5 - 7. Of these meetings, only one was for longer than five or ten minutes. App. 50, ll. 8 – 10. At this longer meeting, which occurred at plea counsel's office, petitioner and his mother attempted to discuss issues with the State's discovery which they had carefully reviewed and tabbed. App. 53, l. 5 – 24. Petitioner's mother accompanied him to this meeting and also testified about it at the PCR hearing. App. 68, l. 24 -71, l. 3. Both petitioner and his mother described plea counsel as uninterested in the discussion or the points they raised. App. 53, ll. 5 – 14; App. 71, ll. 1 – 3. Petitioner testified that pleas counsel acted like representing him was "a burden." App. 53, ll. 15 – 24.

Petitioner testified that trial counsel did not do an investigation. App. 53, l. 15 – 55, l. 19. Petitioner's review of the discovery showed there was not any evidence against him except for

the statements of his co-defendants. App. 53, l. 15 – 55, l. 19. Additionally, no DNA testing was performed on a black bandana found at the crime scene. App. 54, ll. 15 – 25.

The PCR court erred in finding defense counsel’s testimony credible and that he adequately investigated the charges against petitioner. App. 94 - 96. The PCR court also erred in holding that petitioner did not suffer prejudice as a result of plea counsel’s actions. App. 94 - 96. “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted).

“The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). Without a complete investigation by counsel, petitioner could not have made a knowing and voluntary plea because trial counsel’s actions gave him an unreasonable fear of the possibility of trial and left him with no realistic alternative.

The record shows that petitioner did not want to plead guilty. He was crying and emotional at the plea hearing. App. 9, l. 12 – 11, 13. Judge Miller asked him if he was “emotionally okay.” App. 9, ll. 14 – 15. Petitioner told him he was not. App. 9, l. 15. Judge Miller told him “You have to face the music one day, but apparently you’re not ready to face it today. Is there any reason why?” App. 9, ll. 16 – 19. Plea counsel then told the court that it was petitioner’s last day to enter a plea before going to trial. App. 9, ll. 20 – 22. Judge Miller then asked petitioner whether he was competent and understood what was going on that day. App. 9,

ll. 23 – 24. Judge Miller ultimately told him, “It’s time to fish or cut bait.” App. 11, l. 5. Petitioner then pled guilty. App. 11, ll. 5 – 13.

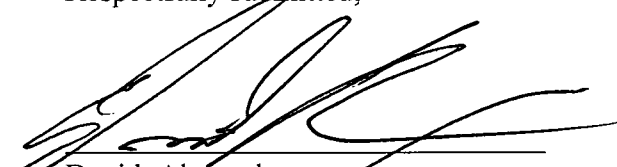
Petitioner said that he was pressured into taking the plea deal by his attorney who told him that if he went to trial, “nine times out of ten that I’ll go to prison and come out with a body bag – or a toe tag.” App. 63, ll. 12 – 17. Plea counsel did not deny using this extreme language. App. 77, l. 25 – 78, l. 8.

Under these circumstances, petitioner’s will was overborne by his attorney’s actions and the coercive nature of the plea colloquy. He was emotional and scared at the hearing. His attorney terrified him concerning the potential sentence if he went to trial. Therefore, his plea was involuntary and should be set aside.

CONCLUSION

For the foregoing reasons, the Court should grant the petition with the ultimate relief of a new trial for petitioner.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
D. GARRISON HILL, CIRCUIT COURT JUDGE

PHILLIP KEATHE CAREY,

PETITIONER,

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STATE OF SOUTH CAROLINA,

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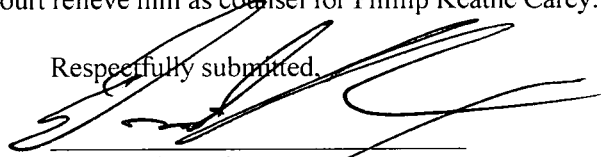
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Phillip Keathe Carey states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 29, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Phillip Keathe Carey.

Respectfully submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of June, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

PHILLIP KEATHE CAREY,

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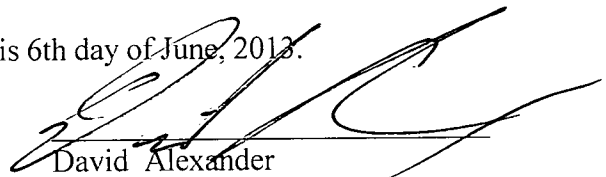
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2012-212575

CERTIFICATE OF SERVICE

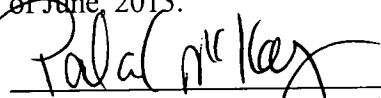
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Phillip Keathe Carey, # 337868, at Tyger River Correctional Institution this 6th day of June, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of June, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.