

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2012-CP-26-3860

Kendrix Corbitt # 348641,

Petitioner.

v.

The State of South Carolina,

2013-002336

Respondent.

PETITION FOR A WRIT OF CERTIORARI

William Isaac Diggs
ATTORNEY AT LAW
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-4243

ATTORNEY FOR THE PETITIONER

Other Counsel of Record:
Joshua L. Thomas, Esquire
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

ATTORNEY FOR RESPONDENT

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COUNSEL WAS INEFFECTIVE FOR FAILING TO DISCUSS WITH THE PETITIONER A PLEA OF SELF DEFENSE BASED ON THE FACT THAT THE VICTIM HAD CUT THE PETITIONER WITH A KNIFE THUS EVOKING A SELF DEFENSE SHOOTING RESPONSE FROM THE PETITIONER.

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QUESTIONS PRESENTED

Did Petitioner receive ineffective assistance of counsel when his counsel neglected to discuss with him the possibility of a plea of self defense when the victim had lunged at the Petitioner with a knife cutting him, thereby evoking a self defense response from the Petitioner?

STATEMENT OF THE CASE

On November 10, 2011, Petitioner pled guilty before the Honorable Thomas W. Cooper, Jr., Judge, to voluntary manslaughter with a negotiation from the state of a fifteen year active sentence. Judge Cooper accepted Petitioner's plea and sentenced Petitioner to Fifteen years of imprisonment on even date therewith.

Petitioner then brought this action seeking post-conviction relief on May 15, 2012, alleging ineffective assistance of counsel. He alleged that he had been cut with a knife at the scene of the incident which formed the factual basis for the guilty plea entered in this matter immediately prior to his firing his weapon. Investigating police officers(s) observed the knife cut on applicant's arm, however, trial counsel never

discussed this evidence with the applicant even though the evidence forms the basis for a plea of self defense to the charge of murder brought against the applicant. Additionally, Petitioner alleged that he had fired two shots into the ground with his weapon after he was cut by the decedent prior to applicant's firing of the gun shots which allegedly killed the decedent. Trial counsel never discussed with the applicant the possibility that he was criminally negligent in the firing of his weapon and was therefore guilty only of involuntary manslaughter.

A hearing on the application was held on August 26, 2013, before the Honorable J. Cordell Maddox, Jr., Judge. The circuit court denied the application by order dated September 23, 2013, which order was filed of record on October 13, 2012. A notice of appeal was timely served and Petitioner now seeks a writ of certiorari to review this denial.

ARGUMENT I

Trial counsel was ineffective for failing to discuss the possibility of a plea of self defense

Applicant was attending the annual Beach Ball Classic in Myrtle Beach, South Carolina on December 31, 2010. While at the game, a fight broke out between two individuals known to the Applicant, R. 35, line 2, as "JJ" (who is Petitioner's cousin) and "Damian." Id., line 22. Eventually between fifteen and sixteen people left the basketball games and went to the Freestyle Park in Myrtle Beach located off of Mr. Joe White Boulevard. Id. 8, lines 3 – 15. JJ and Damian resumed fighting but Petitioner tried to step in and break up the fight. R. 36, lines 1-2. At that point, Damian pulled out a knife. He lunged at the Petitioner with the knife, and Petitioner responded by firing two shots at the

ground and ran away. R. 36, lines 18 – 24. The Petitioner was cut on the arm a little bit. R. 37 lines 3 – 4. Petitioner testified that the police had seen the cut afterwards. Id, lines 6 – 12. Petitioner did not know if he had shot anyone at that time when he ran away. However, as he ran, he heard additional shots being fired. R. 38, lines 6 -10. Had anyone indicated to him the possibility of self defense or involuntary manslaughter he could see reasonably going to trial in the case to have a jury determine the verdict. R. 42, lines 20 – 25. He testified he would not have pled guilty. R. 43, lines 1 – 4.

“In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On appeal, the PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).” *Hutto v. State*, 387 S.C. 244, 248, 692 S.E.2d 196 (2009)

In the order denying the application for post conviction relief, the Court states,

Applicant and plea counsel discussed the cut on Applicant's arm. However, Applicant admitted to not providing plea counsel with any leads to investigate in regards to the allegation that the victim attacked Applicant. Furthermore, plea counsel testified that Applicant admitted in a police interview that he was not threatened by the knife.

R. 87(Order at p. 8). However, it is not the lack of investigation of which Applicant complains, it is counsel's failure to discuss in any meaningful way the possible plea of self defense in this murder prosecution. Contrary to what the court order states above, trial counsel testified that, “[He did] not remember looking at the cut on him.” Tr. 59, line 10. Counsel further testified,

I'm not gonna tell you we had any extended talk about self defense cause that wouldn't be true. That could have

happened. I know I mentioned it but I'm not gonna say we talked extensively about it. .

R. 58, lines 5 – 9. Moreover, this issue does not turn on whether the Petitioner told the police that he was not “threatened” by the knife. Petitioner was eighteen years old at the time of this incident and it is easy to understand that a young man might be too proud and would not initially admit to being afraid of a knife. We respectfully submit the trial court placed too much reliance on this alleged statement about not feeling threatened as relayed in third or fourth party fashion by trial counsel at the PCR hearing itself, and does not prohibit the plea of self defense in this case.

The court’s order denying relief also states that

Plea counsel also testified the discovery indicated Applicant was suspected of having robbed a high school student of a nine-millimeter handgun at some time just prior to the shooting. Plea counsel believed he would have been unsuccessful in having the evidence of Applicant’s possession of a nine-millimeter handgun excluded at trial.

R 83 – 84;(Order at pages 4-5). However, Petitioner respectfully submits this is stretching the actual words of the applicant’s trial counsel. Counsel testified, “I don’t recall if that evidence showed *which of the three took possession from the kid* of the 9 millimeter so it might not have been him.” R. 70 lines 24 -25. Emphasis added. Moreover, counsel could not recall this Petitioner ever saying he had possession of a 9 millimeter weapon on the night of the shooting. R. 71, lines 1 – 4. Thus there is no apparent admissible evidence to establish this Petitioner stole a 9 millimeter weapon or that he had one that evening. Thus, the order denying post conviction relief is not supported by any probative evidence in the record.

“A criminal defendant is guaranteed the right to effective assistance of counsel

under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *see also Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("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.'" (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. 52 at 59, 106 S.Ct. 366. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also *Hill*, 474 U.S. at 59, 106 S.Ct. 366 (footnote omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citations omitted)."¹

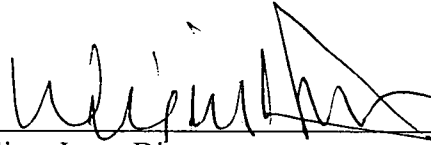
Counsel's performance in this case fell below the applicable standard and warrants reversal of the trial court's order in this instance.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

¹ Quoting *Taylor v. State*, 404 S.C. 350, 745 S.E.2d 97 (2013)



William Isaac Diggs

ATTORNEY AT LAW

1700 Oak Street, Suite D

Myrtle Beach, SC 29577

843-626-4243

ATTORNEY FOR THE PETITIONER

This 12th day of March, 2014
Myrtle Beach, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

MAR 14 2014

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J. Cordell Maddox, Jr., Circuit Court Judge

S.C. SUPREME COURT

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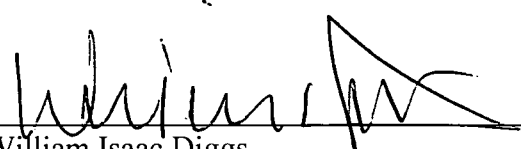
The State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have this 12 day of March, 2014, deposited one copy of the Appendix and Petition for Writ of Certiorari in the U.S. Postal Service with proper postage prepaid and addressed to opposing counsel at the following address:

JOSHUA L. THOMAS, ESQUIRE
ATTORNEY GENERAL'S OFFICE
Post Office Box 789
Columbia, SC 29000



William Isaac Diggs

Myrtle Beach, South Carolina



Law Offices of

WILLIAM ISAAC DIGGS

Licensed in NC & SC

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MAR 1 2014

S.C. SUPREME COURT

1700 Oak Street, Suite D
Myrtle Beach, SC 29577

843.626.4243

843.626.1129 Fax

www.MyrtleBeachLaw.com

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MAR 7 2014

S.C. SUPREME COURT

March 12, 2014

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Kendrix Corbitt vs. The State of South Carolina
Case No.: 2012-CP-26-3860

Dear Mr. Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari and two copies of the Appendix along with our certificate of service showing service on opposing counsel.

If you have any questions or need further information, please advise. With kind regards, I am

Sincerely yours,

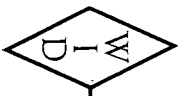
William Isaac Diggs

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TO:
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211



Law Offices of
WILLIAM ISAAC DIGGS
1700 Oak Street, Suite D
Myrtle Beach, SC 29577

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