Little Johnny Lee Mackey #294652
Perry Corr. Inst. (Q1B-123)
4301 Oaklawn Rd.
Pelzer, S.C. 29669

July 3, 2013

Honorable Daniel E. Shearouse
Clerk of Court's Office
S.C. Supreme Court of Appeals
P.O. Box ~~[illegible]~~ 11330
Columbia, S.C. 29211

RECEIVED

JUL 11 2013

S.C. SUPREME COURT

Re: Mackey v. State
Appellate Case No. #2012-212877
Johnson Pro Se Writ of
Certiorari Response !!!

Dear Honorable Sir:

Enclosed, please find the Original and a copy of the Johnson Pro Se Writ of Certiorari Response.

Please return a Clock-Stamped Copy to me. Thank you for your time!!!

Respectfully Submitted,

Little Johnny Lee Mackey

Little Johnny L. Mackey

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Alexander S. Macaulay, Circuit Court Judge

LITTLE JOHNNY LEE MACKEY,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent

Appellate Case No. 2012-212877

JOHNSON Pro-Se RESPONSE FOR WRIT OF CERTIORARI

LITTLE JOHNNY LEE MACKEY
Pro-Se
PERRY CORRECTIONAL INST.
430 OAKLAWN ROAD
PELZER, S.C. 29669

INDEX

ISSUE PRESENTED

I. Appellant objects to Ganjehsani's petition to be relieved as counsel of record, and that the granting of Ganjehsani's petition would deny Appellant his right to the effective assistance of appellate counsel on his collateral appeal of right.

II. PCR Court erred when it found that plea counsel failure to advise Applicant of the elements of the crime charge did not make his guilty plea Involuntary.

III. Did Appellant plea lack the advocacy when the factual bases of Appellant case required plea counsel to pursue a negotiated plea deal with solicitor or take it to trial.

STATEMENT

On July 28, 2009, Appellant Little Johnny Lee Mackey was indicted by the Anderson County Grand Jury for: (1) one count of murder in violation of S.C. Code Ann. § 16-3-10; and (2) one count of possession of a weapon while committing the crime of murder in violation of § 16-23-490. App. 93-94

I.

Guilty Plea and Sentence:

On February 8, 2011, Appellant appeared before the Honorable J. Cordell Maddox, Jr. where he pled guilty to murder. Appellant was represented by Jennifer Johnson, and the State was represented by Assistant Solicitor Jennings Byford.

The State presented its version of the facts, followed by Appellant's counsel's (differences) of that presentation. App. 7-13. The incident occurred on May 16, 2009. App. 7, ll. 17. Three (3) days before the incident, Appellant's brother, Anthony and the decedent, Wally Eugene Dawson (Dawson) had gotton into a verbal altercation witnessed by Appellant [Anthony is a little mentally challenged]. App 10, ll. 10-11. Next day, May 15, 2009, Appellant's brother, Anthony's common-law wife was violently shot eight (8) times, in which Anthony said Dawson commented the offense. App. 10, ll. 23-25.

The day of incident, Appellant and Anthony visited his brother's common-law wife at the hospital and then returned to Anthony's house to clean up the blood from the shooting. App. 10, LL. 18-22. [The record does reflect that Dawson had served seven-years for trafficking drugs and that there was bad blood between Dawson and Anthony. App. 12, LL. 12-15].

While Appellant and Anthony were at the house, the decedent (Dawson) approached the home in a vehicle, pulling past the house a little bit and then backed up in the street. He got out his truck and started walking up the drive way. Appellant mind set at the time this happen, certainly preceived Dawson action as a threat and made the assumption that Dawson armed and assumed that he was there to cause trouble. App. 8, L 4; 11, LL. 5-11; 12, LL. 1-.

Following the shooting, it was subsequently discovered that decedent was unarmed and that there were two children in the truck. App. 17, LL. 10-16. Appellant immediately call 911 and gave a statement that he had shot the decedent. App. 8, LL. 14-16.

At the plea hearing, plea counsel requested that Trial Court to consider a sentence of thirty years. App. 12, LL. 19-20. However, did not discussed an appeal or consider a motion to reconsider sentence. App. 64.

As hindsight, plea counsel did not do an analysis of the Castle Doctrine or accident as a defense and its

applicability to Appellant case. App. 22, LL 4-10. This hindsight would have assisted with a plea negotiation. App. 66-67. The state made no recommendation as to the sentence. App. 4, LL 7-8.

The Trial court accepted the plea, accepted the state version of fact and sentenced Appellant to forty-five years. App. 17, LL. 7-8.

I. Appellant objects to Ganjehsani's petition to be relieved as counsel of record, and that the granting of Ganjehsani's petition would deny Appellant his right to the effective assistance of appellate Counsel on his collateral appeal of right.

Facts

Carmen V. Ganjehsani's, Esquire was appointed to represent Appellant on collateral appeal. On April 12, 2013, Ganjehsani filed a no merit appeal pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) claiming the appeal is without legal merit sufficient to warrant a new trial while subsequently motioning this Court to be relieved of counsel.

Appellant objects to Ganjehsani's petition to be relieved as appellate counsel on the ground that there is meritorious and substantive issues available and unbriefed that was properly preserved for Appellate review during Post-conviction relief (PCR) hearing.

Appellant asserts he has a right to the effective assistance of appellate counsel on his collateral appeal as a matter of right. Martinez v. Ryan, 566 U.S. 1 (2012). Ganjehsani' should not be relieved as counsel and this Court should order Ganjehsani to brief the substantive issues Appellant has raised in his pro-se Johnson

brief.

Appellant believes Ganjehsani's petition to be relieve of counsel should be denied and Ganjehsani should be ordered to redraft Appellant's brief to contain the underlying substantive issues.

Argument

Accordingly, the Sixth Amendment as applied to the States through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel on his first appeal as of right. See Douglas v. California, 372 U.S. 353, 356, 83 S.Ct. 814 (1963). It also, guarantees his the effective assistance of counsel on appeal. Lucy v. Evitts, 464 U.S. 396, 105 S.Ct. 830 (1985).

In Jones v. Barnes, 463 U.S. 745, 103 S.Ct 3308, 3311, the Court held that since Anders v California, 386 U.S. 738, 87 S.Ct 1396 (1967), the court has held that since Johnson's bar counsel from abandoning a non-fririolous appeal, it also bars counsel from abandoning a non-frivilous issue on collateral appeal.

Under ANDERS, supra, the Court held that on appointed attorney must advocate his clients cause vigorously and may not withdrew from a non-frivilous appeal -- appointed counsel must present on appeal [all] non-friviolous arguments requested by his client.

In the instant matter, Ganjehsani has abandoned substantive meritorious issues, that in granting Ganjehsani's petition to be relieved as counsel will result in a denial of effective assistance of counsel on collateral appeal an a denial of due process.

The underlying substantive claims that Ganjehsani has abandoned is raised pro-se, herein, the instant pro-se Johnson's brief.

II. PCR Court erred when it found that plea counsel failure to advise Appellant of the elements of the crime charge did not make his guilty plea Involuntary.

Where a defendant challenges a guilty plea, the defendant must show that there is a reasonably probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

The United States Supreme Court has held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). This includes a duty to investigate possible defenses even in a case where the defendant ultimately plead guilty. Cobbs v. State, 305 S.C. 299, 302, 408 S.E.2d 223, 225 (1991)(provides that failure to investigate possible defenses constitutes ineffective assistance of counsel). "Because a guilty plea is valid only if it represents a knowing and voluntary choice among alternatives, ... a client's expressed intention to plead guilt does not relieve counsel of their duty to investigate possible defenses and to advise the defendant so that he can make an informed decision." Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996).

In this case, homicide is excusable on the ground

of accident when it appears that the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (S.C. 1994); State v. M'Caskill, 300 S.C. 256, 387 S.E.2d 260 (1990); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999).

The situation here, Appellant recognize Dawson vehicle. There was bad blood between Anthony's family and Dawson. App. 65, LL. 24-25; App. 66, L. 1. Appellant and his brother hands were in blood that they believe was spilled by Dawson. App. 10, LL. 20-25. Dawson had gotten out of the truck and was walking toward the house. Appellant immediately obtained a weapon because he feared that something else would go wrong. App. 11, LL. 19-21. Although lawfully armed and the discharge of the weapon. The record reflect that Appellant stated: "if I ever see you around again, I'll kill you." App. 8, LL. 24-25. This statement does not satisfy "a specific intent to kill."

The combination of events of the past two days, the decedent had provoked the killing. Objectively, it could be placed in the context of ie, self-defense, accident or base on the presumption that to South Carolina Code Ann. § 16-11-440(A)(E) of the Castle Doctrine. Plea counsel admitted she never analyzed this doctrine as a possible defense. App. 66, LL. 4-10. cf. State v. Damon, 328 S.E.2d 628 (1985).

The State could not present something more, therefore, Appellant was acting within reasonable fear of imminent peril of death or great bodily injury to himself or another.

The fact of the case and the alledge charge, there was evidence that clearly appears to reduce the crime from murder to manslaughter. Appellant should have been inform of all the possible defenses, so, that, he could have made and informed decision. to go to trial.

III. Did Appellant plea lack the advocacy when the factual bases of Appellant case required plea counsel to purse a negotiated plea deal with solicitor or take it to trial.

To establish ineffective assistance of counsel, the Appellant bears the burden of proving the allegations in their application. Where ineffective assistance of counsel is alleged as a ground for relief, the Appellant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The Appellant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Pursuant to Wiggins v. Smith, 539 U.S. 510 (2003), counsel is afforded deference over matters of trial strategy; however, the strategy that is selected must be supported by adequate investigation and

once a strategy is embarked upon, counsel must perform in an effective manner. The reviewing court has an obligation to ensure that any supposed strategy by trial counsel had first conducted the necessary investigation of the facts and the law in order to reach an independent strategy decision. A valid strategy cannot be found when the professed strategy is invalid under an objective standard of reasonableness. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995).

The Appellant first alleges that plea counsel's lack the advocacy when the factual base of Appellant Case and the witnesses to the crime charge would be based--in part--on hearsay testimony: "That [their] father went over there to... apologize." App. 7, LL. 21-25. Such testimony would constitute ineffective assistance of counsel in reliance upon such "dispute fact" deprived Appellant of his constitutional right to confront his accusers. The Appellant wor his brother (Anthony) knew such allegation.

"... this is not a situation where he (Appellant) or his brother went seeking this person. He (Dawson) came by the house. And I know that the children said he had come by to apologize for what happen ... but it was ... certainly perceived as a threat by Mr. Mackey."

App. 11, LL. 22-25; 12, LL. 1. "The Confrontation Clause

of the Sixth Amendment guarantees an accused the right "to be confronted with the witnesses against him in a criminal prosecution." State v. Staten, 369 S.C. 7, 16 (Ct. App. 2005)(citing U.S. Const. amend. IV). This fundamental right is applicable to the states under the Fourteenth Amendment and is also guaranteed under the South Carolina Constitution, Staten, 364 S.C. at 16 (citing Pointer v. Texas, 380 U.S. 400(1965); S.C. Const art. I. § 14).

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held a defendant's Sixth Amendment rights are violated by the admission of hearsay testimony where (1) the declarant is unavailable to testify and (2) the defendant had no prior opportunity to cross-examine the declarant. Id. at 54. The Crawford rule has no application the scope of testimonial hearsay. State v. Ladner, 373 S.C. 103, 113 (2007).

In State v. Schmidt, 342 S.E.2d 401 (S.C 1986) Schmidt specifically sought to introduce threats which the child's father made against Schmidt prior to the time the child made her allegation. However, the trial court's pretrial ruling denied him the right to raise the "vendetta" issue.

In case at bar, there had been some (drug) trade between Mr. Dawson and Anthony, and that's what this prior argument had been about. Yet, plea Counsel did not further investigate the source of the altercation. App. 12, ll. 12-18. Furthermore,

unless counsel can articulate a valid reason for employing a certain strategy i.e., to get Appellant to except a plea of guilty to a "specific intent to kill, malice aforethought murder. Such conduct falls below an objective standard of reasonableness. See State v. Dawkins, 346 S.C. 151, 157 (2001); Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006); Citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

The State key witness testimony connecting the Appellant to "malice Murder" was a hearsay-within-hearsay statements to which plea counsel never properly investigate other defenses. App. 65-66.

Finally, if went to trial, the introduction of testimony that: decedent came to apologize would be a violation of Crawford. Plea counsel's failure to advocate on Appellant's behalf and negotiated a plea, clearly made void Appellant guilty plea.

CONCLUSION

For the reasons set forth herein, the PCR court erred in denying Appellant's Application for Post-Conviction Relief. This Court should grant Appellant's writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,
Little Johnny Lee Mackey
Little Johnny Lee Mackey
pro-se

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2012-212877

LITTLE JOHNNY LEE MACKEY,

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PROOF OF SERVICE

I certify that I have served the JOHNSON. Pro-se response on John W. Whitmire, Attorney General Office, P.O. Box 11549, Columbia, S.C. 29211 by depositing depositing a copy of it in the United States Mail, postage prepaid on July 3, 2013, addressed to the Supreme Court, Post Office Box 11330, Columbia, S.C. 29211.

July 3, 2013

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