THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2016-000823

James Livingston .....Petitioner

v.

State of South Carolina.....Respondent

PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

1. DID THE PCR COURT ERR BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO INVESTIGATE THE FACT THAT THE SOLE IDENTIFYING WITNESS IN TWO OF APPLICANT'S CASES WAS DECEASED AT THE TIME OF THE PLEA?

2. DID THE PCR COURT ERR BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO PROPERLY ADVISE THE APPLICANT CONCERNING THE LAW CONCERNING AN ENTRAPMENT DEFENSE AND DOMINION AND CONTROL ?

3. DID THE PCR COURT ERR BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO PROPERLY ADVISE APPLICANT OF THE POTENTIAL LIFE WITHOUT PAROLE SENTENCE?

4. DID THE PCR COURT ERR BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE PROBATION COURT FAILED TO INQUIRE WITH THE APPLICANT FULLY CONCERNING SELF REPRESENTATION?

STATEMENT OF THE CASE

Petitioner is presently confined in the Wateree River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Petitioner was indicted for Trafficking in Cocaine (2008-GS-32-2647) and two counts of Distribution of Cocaine Base 3d of subsequent offense (2006-GS-32-0170 & 0172). On April 13, 2009, the Petitioner pleaded guilty before the Honorable J.C. Nicholson to both counts of Distribution of Cocaine Base-3d or subsequent offense and to lesser offense of Distribution of Cocaine-3d or subsequent offense and Petitioner was sentenced to three concurrent terms of eighteen years each. App.pp. 2-21. On May 22, 2009, Petitioner appeared without counsel before the Honorable Knox McMahon where his previous probation case was heard pursuant to a probation violation. Judge McMahon revoked a portion the probationary sentences to run concurrent to the aforementioned charges and sentence. App.pp 26-28.

Petitioner subsequently filed an Application for Post-Conviction Relief which was filed on October 28, 2009. App.pp.30-35. A Return was filed by Respondent on March 16, 2010. App.pp. 38-40. An Addendum to the Application for Post-Conviction Relief was filed on May 16, 2011. App.pp.43-45. .An evidentiary hearing was held on August 16, 2013 before the Honorable Edgar W. Dickson at the Lexington County Courthouse. App.pp. 46-117. The Petitioner testified at the hearing that there were two sets of drug charges pending against him at the time of his plea: a West Columbia case and a SLED case. App p. 52 ll 14-19. Petitioner also had a separate probation violation hearing at which Petitioner appeared without counsel and without being warned of the dangers of self representation. App. P. 53 ll. 4-18. Petitioner was represented by Joshua Kendrick for the pending drug charges. Petitioner testified that a confidential informant who was involved in

two of the cases was deceased at the time of his guilty plea. App. p. 56 ll 3-25, p. 57 ll 1-25, p. 58 ll. 1-22. Petitioner further testified that in the SLED case the video that trial attorney played had no working audio. App. p. 65 ll 1-7. Since there was no audio, Petitioner told the trial counsel that basis of the transaction was "that the confidential informant supplied me with the drugs and came back and purchased some of the same drugs and turned them over to SLED". App.p. 65 ll 14-18. Trial attorney then told Petitioner that he was not entitled to an entrapment defense due to his prior record. App.p. 65 ll. 22-25. As to whether he had dominion and control over the alleged drugs, Petitioner testified that he did not. App.p. 66 ll 5-14.

Petitioner further testified that trial counsel informed him that he could be facing a Life Without Parole sentence if he did not accept the plea offer. App p 81 ll 7-25. However, there was never a notice to seek Life Without Parole served on the defendant or his counsel by the State. App p 82 ll 6-9. When asked if he would have pled guilty if he was not facing Life Without Parole, Petitioner stated that he would not. App.p.82, ll16-18.

The Circuit Court issued an Order of Dismissal which was dated May 13th 2015 and received by counsel for Petitioner on June 2, 2015. Petitioner timely filed a Motion to Alter Judgment Pursuant to SCRCP 59 (e), a Motion for a New Trial Pursuant to SCRCP 59(a) and a Motion for Relief from Judgment or Order Pursuant to SCRCP 60(b)(1) and (2) on June 12, 2015. App.pp.134-145. On February 1, 2016, Respondent served and filed Returns to the three motions of the Petitioner. App.pp. 146-159. The Order of the Circuit Court denied the three motions of the Petitioner. App. pp.160-162. A timely Notice of Appeal was filed by the Petitioner. This Petition for Writ of Certiorari followed.

ARGUMENTS

1. THE PCR COURT ERRED BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO INVESTIGATE THE FACT THAT THE SOLE IDENTIFYING WITNESS IN TWO OF APPLICANT'S CASES WAS DECEASED AT THE TIME OF THE PLEA.

The PCR court erred by denying the Petitioner's Application for PCR based on ineffective assistance of counsel since Petitioner proved that trial counsel was deficient in his representation and that this deficiency prejudiced the Petitioner. Probative evidence was presented at the PCR hearing and this evidence supports the allegations that Petitioner received ineffective assistance of counsel. To establish ineffective assistance of counsel, Petitioner must satisfy the two prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989)(internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Applicant testified at the PCR hearing that a confidential informant, the sole identifying witness for the State in the two West Columbia cases (2006-GS-32-0170 and -0172), was deceased at the time of Petitioner's plea and that trial counsel should have discovered this fact through a proper investigation. App. p. 56 ll 3-25, p. 57 ll 1-25, p. 58 ll. 1-22. Petitioner entered the death certificate of the confidential informant into evidence. App. p. 57 ll 8-25, p.58 ll 1-15, Exhibit 1,p. 119. The Petitioner submits that this court ultimately find that trial counsel was deficient for not

investigating the lack of availability of the only eyewitness who was actually deceased before Petitioner's guilty plea. "While the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case". Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008). Furthermore, Petitioner contends that this deficiency created prejudice since the State could not have proceeded with its prosecution without this unavailable witness since the only identifying evidence would have been from the unavailable witness and the introduction of other evidence would have violated the hearsay rule. See Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (S.C., 2001). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonable available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Mr. Livingston further testified that he would not have pleaded guilty if he had known that the witness was dead. App. p.62 ll 1-10. Also, a suppression hearing should have been requested by plea counsel in order to have this issue brought before the court. Therefore, Petitioner submits that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

2. THE PCR COURT ERRED BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO PROPERLY ADVISE THE APPLICANT CONCERNING THE LAW CONCERNING AN ENTRAPMENT DEFENSE AND DOMINION AND CONTROL.

The PCR court erred by denying the Petitioner's Application for PCR based on ineffective assistance of counsel since Petitioner proved that trial counsel was deficient in his representation and that this deficiency prejudiced the Petitioner. Probative evidence was presented at the PCR hearing and this evidence supports the allegations that Petitioner received ineffective assistance of counsel.

The Petitioner further testified that in the SLED case that he explained to trial counsel that the confidential informant had given him drugs to hold for a temporary period of time and over which he had no dominion and control to do anything with the substances except return them to the rightful owner. He testified that he had no right to do anything with the drugs. App.p. 65 ll 12-18. The Petitioner further testified that trial counsel stated that he did not have a valid entrapment defense due to his criminal record. App. p 65 ll 19-25. Conviction for two prior drug offenses alone is insufficient to establish that the defendant was predisposed to sell illegal drugs. See U.S. v. Brooks, 215 F.3d 842 (8th Cir. 2000) and Sherman v. United States, 356 U.S. 369 (1958) "The affirmative defense of entrapment is available where there is the `conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.'" State v. Johnson, 295 S.C. 215, 216, 367 S.E.2d 700, 701 (1988) In this case, the informant was acting as an agent of the government in order to trick and defraud the Petitioner into possessing the drugs. Also, trial counsel did not produce the audio portion of the video in order for the Petitioner to hear its contents. App. p 65 ll 1-7. Clearly, since the Petitioner did not have full dominion and control over the drugs and was only returning the drugs to the person who actually owned the drugs and was tricked and defrauded by the government

agent, trial counsel should have informed the Petitioner of the potential defense of entrapment and the defense of lack of possession. According to the Petitioner, if the Petitioner had heard the audio portion of the videotape he would have had further reasons to raise the defenses of entrapment due to the government agent's trickery and/or lack of possession since he had no dominion and control over the illegal substances. Also, a suppression hearing should have been requested by plea counsel in order to have these issues brought before the court. Petitioner contends that he would have not been in possession of the alleged drugs at all but for the government's informant and agent. The implication from Petitioner's testimony is that it was all orchestrated to entrap him for a crime and was put together by the government through the informant. Therefore, it was an unconstitutional act by the government and it violated the due process rights of the Petitioner. There was not a rebuttal of the evidence of entrapment by the government by any witnesses or other evidence. The Petitioner submits that the government should not be able to rely on the fact that the alleged drugs were in Petitioner's possession after having knowledge that they were given to the Petitioner by the government informant agent. Petitioner submits through his testimony that the case was brought at the instigation of the government which violated the rights of the Petitioner. And the prior record of the Petitioner alone is insufficient to establish that the defendant was predisposed to sell illegal drugs. See U.S. v. Brooks, 215 F.3d 842 (8th Cir. 2000) and Sherman v. United States, 356 U.S. 369 (1958). Petitioner submits that this court ultimately find that trial counsel was deficient for not fully informing the Petitioner of all of the facts of the case and, in addition, failing to adequately inform the Petitioner of the available defenses. Petitioner further requests that this court find that Petitioner was prejudiced by these deficiencies since the Petitioner would have raised these defenses at a jury trial and he would not have pled guilty had he been properly advised of his legal defenses.

Therefore, Petitioner submits that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

3. THE PCR COURT ERRED BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE TRIAL ATTORNEY FAILED TO PROPERLY ADVISE APPLICANT OF THE POTENTIAL LIFE WITHOUT PAROLE SENTENCE.

The PCR court erred by denying the Petitioner's Application for PCR based on ineffective assistance of counsel since Petitioner proved that trial counsel was deficient in his representation and that this deficiency prejudiced the Petitioner. Probative evidence was presented at the PCR hearing and this evidence supports the allegations that Petitioner received ineffective assistance of counsel.

At the PCR hearing, Petitioner testified that trial counsel informed him that he could be facing a Life Without Parole sentence if he did not accept the plea offer. App p 81 ll 7-25. However, a notice to seek Life Without Parole was never served on the defendant or his counsel by the State. App p 82 ll 6-9. The Petitioner testified that he would not have pled guilty if he was not looking at Life Without Parole. App.p.82, ll16-18. Also, the charges to which Petitioner pleaded did not carry the possibility of life without parole. Trial counsel was deficient in advising the Applicant this wrong information and that deficiency prejudiced the Petitioner since he would not have pled guilty but for this erroneous advice. "If a petitioner successfully proves his or her guilty plea was based on inaccurate sentencing advice from counsel, the deficiency prong has been satisfied." Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). Under the second step of the inquiry, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. To meet this burden, the petitioner need only testify that had plea counsel not misinformed him of the potential sentence, he would not have pled guilty. Alexander, 303 S.C. at

543, 402 S.E.2d at 485-86. In the instant case, Petitioner testified that he would not have pled guilty if he had been informed correctly of the potential sentence. App p. 82 ll 16-18. Therefore, the Petitioner was prejudiced by plea counsel's misinformation. Petitioner submits that this court should ultimately find that trial counsel was deficient for misinforming the Petitioner that he was facing life without parole when he was not. Petitioner further submits that this court ultimately find that Applicant was prejudiced by these deficiencies since the Petitioner would not have pled guilty if he had not been misinformed about a life without parole sentence. Therefore, Petitioner submits that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

4. THE PCR COURT ERRED BY DENYING THE PETITIONER'S APPLICATION FOR PCR WHERE THE PROBATION COURT FAILED TO INQUIRE WITH THE APPLICANT FULLY CONCERNING SELF REPRESENTATION.

The trial judge at the probation hearing failed to properly warn the Petitioner of the dangers of proceeding pro se in his probation violation hearing but merely asked if Petitioner wanted to proceed without counsel. App. pp 26-28. Petitioner requests that this court find that since the probation violation court did not inquire into the defendant's background to understand the dangers of self-representation this Petition for Certiorari be granted. In the case cited in the order of the lower court, the appellate court ruled that amongst several factors affecting the probationers understanding of the dangers of self representation, one factor was that she had signed a probation form that had specific warnings about legal representation. State v. Bryant, 383 S.C. 410, 680 S.E.2d 11 (2009). In the present case, there is no evidence of a document advising the Petitioner about legal representation. A defendant may waive his right to counsel and proceed pro se. State v. McLauren, 349 S.C. 488, 493, 563 S.E.2d 346, 348 (Ct. App. 2002); see also Faretta v. California, 422 U.S. 806, 817 (1975) ("[F]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."). The waiver, however, must be made knowingly and intelligently. McLauren,supra 349 S.C. at 493, 563 S.E.2d at 348. The defendant must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Id. at 493, 563 S.E.2d at 348-49. "[T]he record [must] establish [the defendant] knows what he is doing and his choice is made with eyes open." Faretta, supra, 422 U.S. at 835 (internal quotation marks omitted). Thus, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the [circuit court's] advice, but the defendant's understanding." McLauren,supra 349 S.C. at 493, 563 S.E.2d at 348 (citation and internal quotation marks omitted).

Petitioner further requests that this court ultimately find that Petitioner was prejudiced by these failure of the probation court since the Petitioner was denied his Sixth Amendment constitutional right to legal representation. Therefore, Petitioner submits that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari in this case. If this Court grants certiorari, Petitioner requests permission under the rules to brief the issues discussed more fully.

RESPECTFULLY SUBMITTED,

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ATTORNEY FOR THE PETITIONER

This 13th day of April, 2017

THE STATE OF SOUTH CAROLINA
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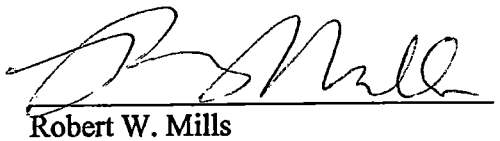
PROOF OF SERVICE

I certify that I have served the PETITION FOR WRIT OF CERTIORARI on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2017 addressed to the attorney of record, Jessica Kinard, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549.

April 13, 2017



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