

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SEP 25 2017

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

S.C. SUPREME COURT

Appellate Case No.: 2016-000823

James LivingstonPetitioner

v.

State of South Carolina.....Respondent

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

1. RESPONDENT HAS FAILED TO REFUTE THAT 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.

Respondent has failed to refute that 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. The probative evidence that was presented at the PCR hearing included the testimony of the trial counsel and this evidence supports the allegations that Petitioner received ineffective assistance of counsel.

As stated in the Petition, 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.

Trial counsel testified at the PCR hearing that he did not do any investigation to determine whether or not the person who was actively involved as a witness in the case was still available. App. P. 103 ll 23-25, p. 104 ll 1-5. Trial counsel further testified that it may have been a mistake to plead them. App.p. 104 ll 20-24. Trial counsel also agreed that there can be a cumulative effect of pleading to more than one offense at the same time. App. P. 105 ll 2-19. Respondent failed to address these matters.

The Petitioner again submits 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. Trial counsel admitted that it may have been a mistake to plead to those charges and trial counsel admitted that there can be a cumulative effect to pleading to multiple offenses at the same time. "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). . "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). As stated in the Petition, 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.

Therefore, Petitioner submits that the Respondent has failed to refute the ineffectiveness of trial counsel on the issue of the investigation of an essential witness and, therefore, the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

2. RESPONDENT HAS FAILED TO REFUTE THAT 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.

Respondent has failed to refute that 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.

Trial counsel testified at the PCR hearing that he did not know whether he explained all of the elements of entrapment to the Petitioner. App.p.114 ll. 7-10. Trial counsel also testified that he did not fully explore the defense of entrapment with Petitioner. App.p.110 ll 10-12.

According to the testimony of the Petitioner, an entrapment defense may have been available in that case. As stated in the Petition, the Petitioner 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.

Respondent argues that trial counsel testified that he was concerned with Petitioner's prior history of drug business but Respondent failed to refute that 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)

Respondent also did not refute the argument that, 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. 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.

There was not a rebuttal of the evidence of entrapment by the government by any witnesses or other evidence. Respondent did not rebut that 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). Therefore, Petitioner submits Respondent has failed to rebut the argument of Petitioner and that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

3. RESPONDENT HAS FAILED TO REFUTE THAT 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.

Respondent has failed to refute that 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.

As stated in the Petition, 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 testified at the PCR hearing that the Petitioner had other charges pending that would have triggered life without parole however he testified with uncertainty as to which specific past charges were relevant and he did not state their dates of conviction. App. Pp.110-115. Respondent notes that Petitioner testified that he was facing 90 years on the plea charges but that does not refute the trial counsel's failure to specifically express with certainty the relevant past charges and the conviction dates that would have invoked the life without parole sentence.

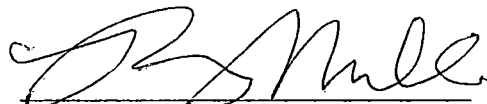
As stated in the Petition, trial counsel was deficient in advising the Applicant this wrong information and that deficiency prejudiced the Petitioner since he would not have pled guilty but for

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). 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 Respondent has not refuted that the denial of relief in the case at hand should be reversed and the Application for Post Conviction Relief should be granted.

CONCLUSION

Petitioner relies upon the arguments previously made in the Petition for Writ of Certiorari for the remaining arguments. For the reasons stated above and in the Petition for Writ of Certiorari, 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,

A handwritten signature in black ink, appearing to read "R. W. Mills", written over a horizontal line.

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ATTORNEY FOR THE PETITIONER

This 25th day of September, 2017

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PROOF OF SERVICE

I certify that I have served the REPLY TO RETURN TO 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 September 25, 2017 addressed to the attorney of record, Melody Brown, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549.

September 25, 2017



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