

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Marlboro County

Honorable Roger E. Henderson, Circuit Court Judge S.C. SUPREME COURT

CHARLES EDWARD DUPREE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001482

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether plea counsel was ineffective in failing to investigate petitioner's case?

STATEMENT

On March 6, 2013, petitioner appeared before the Hon. J. Michael Bailey in Marlboro Court and pled guilty to financial transaction card fraud and multiple counts of financial identity fraud. Judge Baxley sentenced petitioner to concurrent terms of ten (10) years imprisonment on each count. Kyle M. Hobbs, Esq. was plea counsel. Mary-Thomas Johnson-Lee, Esq. was the solicitor. (App. p. 1 – p. 55).

Petitioner filed an application for post-conviction relief on August 15, 2013. (App. p. 56 – p. 62). Respondent filed a return dated June 17, 2015. (App. p. 63 – p. 66). An evidentiary hearing was held on January 11, 2016, before the Hon. Roger E. Henderson. Petitioner was present and represented by Tristan M. Shaffer, Esq. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 68 – p. 99). On November 10, 2016, Judge Henderson issued an order denying and dismissing the application for post-conviction relief. He did, however, remand petitioner's case for resentencing on the one charge of financial transaction card fraud because the maximum sentence for that charge could only be one (1) year under S.C. Code Sec. 16-14-60. Petitioner consented to the remand. (App. p. 100 – p. 104).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate petitioner's case.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means 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. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client or failure to investigate. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, *supra*. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. The difference "between a valid guilty plea and a invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a

conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.” 395 U.S. at 242-243, 89 S. Ct. at 1712. The

Court went on to note:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one’s accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 1712.

In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

Petitioner testified at the evidentiary hearing about plea counsel’s failure to investigate as follows:

Well my charges accuse me saying I, financial identity fraud but I been trying to explain it to Mr. Cobb (sic) that some of the charges I didn’t do. But he aint won’t to investigate my case to the fullest and I didn’t – I was trying to explain to him he needed to go through the procedure to help me with the case at any point in time he ain’t never did that.

(App. p. 75, lines 15 – 21).

I want somebody who's going investigate my case and help me with my case because the charge they got me pin for I didn't even commit the charges but my lawyer, Mr. Cobb (sic) if he did the right thing, he would know cuz he ain't try to get no witness, he ain't try do none

of that. The only thing he kept like the best interest to plead guilty, plead guilty, that's the only thing he kept saying. I feel like I ain't had no lawyer that would defend me to the fullest on my case.

(App. p. 79, lines 6 – 14).

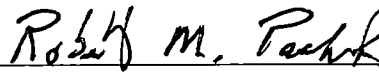
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) the court wrote:

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986); see also *Strickland v. Washington*, 466 U.S. at 691, 104 S. Ct. 2052. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. 2052. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, *332 counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987) (emphasis in original).

372 S.C. at 331 – 332, 642 S.E. 2d at 597.

CONCLUSION

Because plea counsel failed to investigate petitioner's guilty plea should be vacated.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable Roger E. Henderson, Circuit Court Judge

CHARLES EDWARD DUPREE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

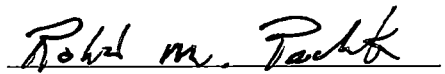
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles Edward Dupree states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Roger E. Henderson, which was held on January 11, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
Therefore, counsel requests that the Court relieve him as counsel for Charles Edward Dupree.

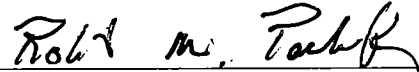
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of December, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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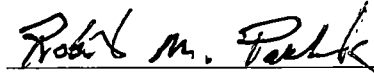
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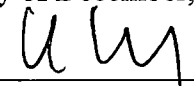
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Charles Edward Dupree, #235404, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 4th day of December, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of December, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025