

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

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KEYLAN DEJUAN MCCLINTOCK,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002255

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

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT
 Plea counsel was ineffective in failing to investigate by neglecting
 to interview witness. 3

CONCLUSION 5

PETITION TO BE RELIEVED AS COUNSEL 6

ISSUE PRESENTED

Whether plea counsel was ineffective in failing to investigate?

STATEMENT

On November 30, 2015, petitioner appeared before the Honorable J. Derham Cole in Spartanburg County and pled guilty to murder. He was sentenced to thirty (30) years imprisonment. Richard H. Warder, Esq. was plea counsel. Derrick Balsa, Esq. was the assistant solicitor. (App. p. 1- p. 17). Petitioner filed an application for post- conviction relief on August 8, 2016. (App. p. 18- p. 32). Respondent filed a return dated May 16, 2017. (App. p. 33- p. 38). An evidentiary hearing was held September 18, 2017, before the Honorable Grace Gilchrist Knie. Petitioner was present and was represented by Rodney W. Richey, Esq. Respondent was represented by Valerie Giovanoli, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing as did Nakesha Pearson and Sandino Jackson. (App. p. 39-p. 78). On October 16, 2017, Judge Knie issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 79- p. 92).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate by neglecting to interview witness.

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. In 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. 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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. 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. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 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.

In this case petitioner testified at the evidentiary hearing that plea counsel failed to interview witnesses. There was Sandino Jackson and his sister. Petitioner was indicted in the shooting death of the victim. Petitioner said there was an altercation. Mr. Jackson was hit with a car. The victim jumped on Mr. Jackson from behind while he was on the ground. Petitioner shot the victim to protect Mr. Jackson. (App. p. 44, line 11-p. 45, line 22). This could have made a difference in petitioner deciding whether to plead guilty or not. In Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (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 the 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).

CONCLUSION

Plea counsel's failure to investigate constituted ineffective assistance of counsel.
Petitioner's guilty plea should be vacated.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

KEYLAN DEJUAN MCCLINTOCK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

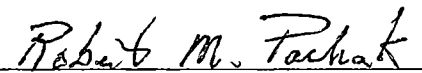
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keylan Dejuan McClintock 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 Grace Gilchrist Knie, which was held on September 18, 2017, 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 Keylan Dejuan McClintock.

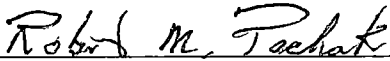
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of March, 2018.

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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This 7th day of March, 2018.

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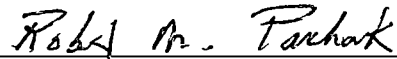
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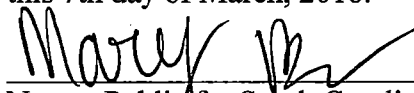
CERTIFICATE OF SERVICE

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 Valerie Garcia Giovanoli, 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 Keylan Dejuan McClintock, #366251, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of March, 2018.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of March, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.