

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

CRAIG AUSTIN LIVINGSTON,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

ORIGINAL
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S.C. SUPREME COURT
RESPONDENT

APPELLATE CASE NO 2018-000523

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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The PCR judge erred in denying petitioner’s claim that trial
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ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim that trial counsel erred in failing to honor petitioner's request for a jury trial because the state would have been required to prove at trial every element of the offense of DUI (resulting in death) charged against him in the case.

STATEMENT

Petitioner Craig S. Livingston pled guilty to two counts of felony DUI resulting in death during the April 2016 term of the Horry County General Sessions Court before Judge Steven H. John and was sentenced to two concurrent twenty-year prison terms. App. 1-29. Petitioner did not appeal his guilty pleas or sentences. Johnny Gardner represented petitioner at the plea proceeding and Assistant Solicitor George H. DeBusk appeared on behalf of the state.

On July 12, 2016, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 31-38. The respondent filed a return dated March 20, 2017, requesting that a hearing be held in response to petitioner's PCR action. App. 39-42.

A PCR hearing was convened on November 29, 2017, at the Horry County Courthouse before Judge William H. Seals. App. 44-84. Petitioner was present at the PCR hearing and represented by Steven W. Fowler, and Assistant Attorney General Johnny E. James appeared on behalf of the state.

On March 6, 2018, Judge Seals issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 86-94.

Petitioner appealed Judge Seals' Order of Dismissal. This petition follows.

ARGUMENT

The PCR judge erred in denying petitioner's claim that trial counsel erred in failing to honor petitioner's request for a jury trial because the state would have been required to prove at trial every element of the offense of DUI (resulting in death) charged against him in the case.

The indictment charged that petitioner did in Horry County on or about December 22, 2014 drive a motor vehicle while under the influence of alcohol, drugs, or a combination of both, and did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused the death of Miles Tommy Waddell and Christopher Lee Waddell, to wit: while operating a 1998 Ford SUV while under the influence of alcohol did cross the center line on Secondary 31 and strike a 2003 Jeep, occupied by the victims, head on, in violation of Section 56-05-2945(A)(2). App. 96; App. 98.

During the PCR hearing, petitioner testified in effect that he was not the driver of the vehicle when the collision occurred because although he was in the driver's seat, the front seat passenger grabbed the steering wheel and veered the car into the opposing lane and caused the accident. Petitioner complained that counsel failed to develop this defense and that had he done so then he would opted for a jury trial. App. 48, l. 2- p. 50, l. 19; App. 57, l. 22- p. 58, l. 15.

Trial counsel testified at the PCR hearing and explained that maybe petitioner's scenario was true, but that "the witness [would have den[ied] it if it went to trial." App. 68, 1-18. Counsel stated that the jury would not have believed the steering wheel version. App. 72, l. 22- p. 73, l. 7. Counsel added that it was in petitioner's best interest not to go to trial. App. 73, l. 3-17.

The PCR judge found no deficiency on counsel's behalf with respect to the steering wheel investigation and denied PCR relief. App. 90-91.

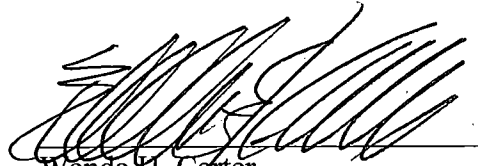
Petitioner was coerced into pleading guilty believing that he had no other choice because he had no defense. However, the defendant has a right to remain silent, plead not guilty, and put the state to its burden of proof. See State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), citing to Doyle v. Ohio, 426 U.S. 610 (1976) and Griffin v. California, 380 U.S. 609 (1981). The prosecution must prove every element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

Under S.C. Code Ann. §56-5-2945, DUI requires that the actor drive a vehicle under the influence of alcohol or drugs, and that the actor does an act forbidden by law or neglects a duty imposed by law, and that act or neglect proximately causes great bodily injury or death. Thus, it was the burden of the prosecution to prove the identity of the driver in the case when the collision occurred.

Counsel's error in failing to advise petitioner that the state had the burden of proof regarding the identity of the driver if he opted for a jury trial and that the defense had no burden of proof at trial constituted deficient legal representation in petitioner's case; and but for counsel's error in this regard, a reasonable probability existed that petitioner would have opted for a jury trial and not pled guilty as charged. Per these circumstances in the instant case, clearly petitioner did not plead guilty voluntarily. See Boykin v. Alabama, 395 U.S. 268 (1964). Counsel's deficient performance in his representation of petitioner in this case as outlined above violated petitioner's right to effective assistance of legal counsel in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Craig Austin Livingston states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge William H. Seals, which was held on November 29, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She 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 her as counsel for Craig Austin Livingston.

Respectfully Submitted,



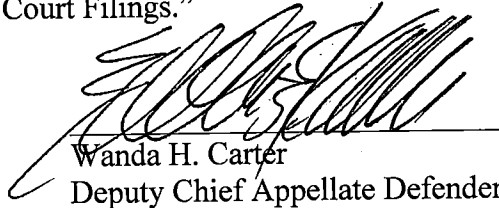
Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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Deputy Chief Appellate Defender

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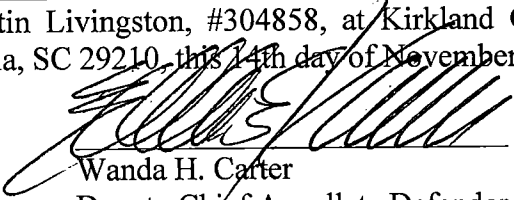
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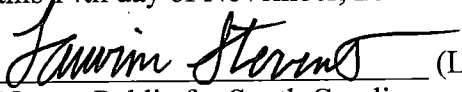
S.C. SUPREME COURT

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 Craig Austin Livingston, #304858, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 14th day of November, 2018.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2018.


(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.