

**IN THE SUPERIOR COURT OF HOUSTON COUNTY
STATE OF GEORGIA**

David Michael Clayboss,)	CASE # 2012-C-46262-L
Petitioner)	
)	Habeas Corpus
vs.)	
)	
Ralph Kemp,)	
Warden)	
Jenkins Correctional Facility)	
Respondent)	

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO O.C.G.A § 9-14-1, et seq., FOR DAVID MICHAEL CLAYBOSS, A PERSON IN STATE CUSTODY

COMES NOW the Petitioner, David Michael Clayboss, by and through undersigned counsel, and hereby submits his petition for writ of habeas corpus pursuant to O.C.G.A § 9-14-1, et seq., because he is confined under a prison sentence in violation of his rights to effective assistance of counsel under the Georgia Constitution and the Sixth Amendment to the United States Constitution.

JURISDICTION AND VENUE

1. This Application, made pursuant to O.C.G.A § 9-14-1, et seq.; respectfully prays that this Court grant Petitioner the relief requested below.

2. Petitioner is currently incarcerated within the Georgia Department of Corrections, serving a term of imprisonment of fifteen (15) years and an additional ten (10) years to be served on probation, pursuant to a judgment of conviction and an order of commitment entered in the Superior Court of Houston County, State of Georgia, under Indictment # 2012-C-46262-L. He is currently in custody at the Jenkins Correctional Facility, located within the State of Georgia.

3. There are no other petitions or appeals pending in any state or federal court relating to the judgment under attack herein.

4. Petitioner was represented by Guy L. Womack, Esq., of 402 Main Street, Sixth Floor, Houston, Texas 77002, at all pre-trial proceedings, at trial upon the aforementioned Indictment, and at the sentencing proceeding. An appeal was not filed.

5. Petitioner has no additional or other sentence to serve once he completes the sentence pursuant to the judgment under attack.

PROCEDURAL HISTORY

6. Petitioner was arrested on June 9, 2012 and indicted for two counts of Aggravated Assault on Peace Officer pursuant to O.C.G.A. § 16-5-21, two counts of Aggravated Assault pursuant to O.C.G.A. § 16-5-21, two counts of Possession of a Firearm or Knife During a Crime pursuant to O.C.G.A. § 16-11-106, one count of Battery pursuant to O.C.G.A. § 16-5-23.1, and one count of Obstruction of an Officer pursuant to O.C.G.A. § 16-10-24.

7. After entering a plea of “not guilty,” Petitioner was tried before this Court and a jury on August 12, 2013. The jury returned a verdict of guilty on August 13, 2013 for one count of Aggravated Assault on Peace Officer, one count of Aggravated Assault, and two counts of Possession of a Firearm or Knife During a Crime. Petitioner was found not guilty of Battery.

8. On November 15, 2013, one count of Aggravated Assault on Peace Officer, and one count of Aggravated Assault were dismissed due to merger with other counts at trial. The one count of Obstruction of an Officer was also dismissed nolle prosequi.

9. Petitioner was sentenced on November 14, 2013 to a total of twenty-five (25) years, with the first fifteen (15) years to be served in confinement and the remainder to be served on probation.

10. Trial counsel did not file a Notice of Appeal on Petitioner's behalf, although requested to do by Petitioner.

STATEMENT OF FACTS¹

11. On June 9, 2012, Mary Ellen Clayboss, Petitioner's wife, and Melissa Clayboss, Petitioner's daughter, called 911 to report Petitioner had hit Mary Ellen Clayboss in the head with a dog bowl and bruised her hip. During this call, the 911 operator was informed there were weapons in the home.

12. Houston County Sheriff Deputy Andrew Gunn and Deputy Jamario Johnson responded to the call, and upon arrival Mary Ellen Clayboss told them Petitioner was in the bedroom. The deputies announced their presence, and Petitioner told them to wait outside for him. Gunn and Johnson proceeded to open the bedroom door, and saw Petitioner holding a gun. The deputies took cover and when Johnson looked into the bedroom he saw Petitioner walking around the bed with a long gun. Johnson ordered Petitioner to drop the gun, but before Petitioner could do so Johnson fired two shots into the bedroom.

13. Deputy Johnson then forcefully removed Mary Ellen Clayboss from the residence causing bruising to her arm. Johnson then returned to Deputy Gunn. Gunn ordered Petitioner to drop his weapon, but when he looked into the bedroom, Petitioner had been shot, was lying on

¹ Only the facts relevant to this application are included in this motion.

the floor, and the guns were no longer in his hands. Sergeant Beck joined Gunn in securing the area, but none of the officers assisted the Petitioner with his gunshot wounds.

14. Petitioner was taken into custody and transported to a local hospital. Upon arrival, it was determined Petitioner had lost eight pints of blood while lying on his bedroom floor, had one gunshot wound to the abdomen, and one gunshot wound to the wrist.

ARGUMENT

PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO PROPERLY PREPARE A DEFENSE AT TRIAL, FAILED TO PROPERLY ADVISE PETITIONER OF THE CONSEQUENCES OF REJECTING A FAVORABLE PLEA OFFER, AND OPERATED UNDER A CONFLICT OF INTEREST WHERE HE URGED PETITIONER TO PROCEED TO TRIAL BECAUSE HE PROMISED HE WOULD SECURE A CIVIL JUDGMENT AGAINST THE POLICE THAT HE WOULD SHARE IN A CONTINGENCY FEE ARRANGEMENT WITH PETITIONER

15. It is axiomatic that the United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. United States v. Cronin, 466 U.S. 648, 658 (1984).

16. The United States Supreme Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a

just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel’s performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment,” and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687. Georgia has adopted the same standard. Smith v. Francis, 253 Ga. 782 (1985).

17. The first prong of the Strickland test requires the Petitioner to show that “trial counsel's performance was not reasonable under the circumstances confronting them before and during the trial, without resorting to hindsight.” Turpin v. Lipham, 270 Ga. 208, 210 (1998). The second prong is met when the Petitioner shows “there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. (quoting Smith v. Francis, 253 Ga. 782, 783 (1985)).

A. Trial Counsel Failed to Adequately Investigate the Case, Prepare a Defense, Prepare Petitioner to Testify in His Own Defense, and Present Mitigation Materials at Sentencing

18. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, 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.

19. Effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. Baxter v. Thomas, 45 F.3d 1501, 1514 (11th Cir. 1995); Scott v. Wainwright, 698 F.2d 427, 429–30 (11th Cir. 1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims, counsel fails to provide service within the expected range of competency).

20. Although, trial counsel is given deference over trial strategy, the strategy that is ultimately pursued must be supported by an adequate investigation. Turpin v. Christenson, 269 Ga. 226, 239 (1998). An attorney is not required to follow every evidentiary lead, but “[t]he adequacy of the scope of an attorney’s investigation is to be judged by the standard of reasonableness.” Jefferson v. Zant, 263 Ga. 316, 319 (1993) (quoting Bush v. Singletary, 988 F.2d 1082, 1091 (11th Cir. 1993)). Ineffective assistance of counsel results when the attorney fails to conduct a reasonable investigation. See Curry v. Zant, 258 Ga. 527, 530 (1988).

21. Here, the lack of preparation by Trial Counsel was evident. First, Trial Counsel failed to interview or call a single defense witness on the Petitioner’s behalf. “[F]ailure to interview witnesses and not being prepared to call them a trial has been held to constitute ineffective assistance of counsel.” Dickens v. State, 280 Ga. 320, 323 (2006) (citing Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992)). This is provided that the decision not to call any

witnesses is unreasonable and no competent attorney would have made the same choice under similar circumstances. Jackson v. State, 278 Ga. 235 (2004).

21. This defense strategy was fatally flawed. Trial counsel could have and should have called Petitioner's wife, the only eyewitness other than the deputies involved. She could have verified Petitioner's version of events, which would have corroborated Petitioner never raised a gun to the deputies. Although, Trial Counsel is given deference on trial strategy, there is a complete lack of strategy when an attorney chooses not to even interview the only unbiased eyewitness.

22. Second, Trial Counsel failed to provide any discovery to, or review the discovery at all with Petitioner, which violated Petitioner's Sixth Amendment rights. In order to protect this fundamental right and effectively represent one's client, counsel has an affirmative duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland v. Washington, 466 U.S. at 689.

23. Here, Trial Counsel never provided Petitioner with any of the discovery received from the Government. Trial Counsel had the ability to remedy this error by advising or explaining what the evidence against Petitioner was, but when requested and urged by Petitioner to discuss the discovery, he refused to make time for the Petitioner.

24. By refusing to provide or discuss the discovery in this case, Trial Counsel failed to keep Petitioner informed of important developments in the course of the prosecution. This failure prevented Petitioner from being able to participate in making fundamental decisions in his

case. Specifically, Petitioner was unable to assist in the decisions related to testifying in his own behalf and the preparation for sentencing.

25. Criminal defendants have the constitutional right to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44 (1987). Trial Counsel has the duty to advise the defendant of his right to testify in his own defense, what positive or negative consequences may result from the choice to testify, and that the defendant has the ability to make the ultimate decision whether or not to testify. Id. This fundamental constitutional right cannot be waived without counsel properly advising the defendant of his right and privilege to testify or refrain from testifying. Id. The defendant maintains this personal right, which cannot be waived by the court or counsel, nor can the “criminal defendant be compelled to remain silent by defense counsel.” U.S. v. Teague, 953 F.2d 1525, 1529 (1992).

26. The decision to testify in one’s own behalf is just as important as the decision whether to plead guilty or not guilty and proceed to trial. Id. This gives the defendant the opportunity to tell his version of the events and confront the charges against him. Id. at 1533. Trial Counsel cannot withhold this constitutional right from the defendant even if they feel it is not in the client’s best interest. State v. Nejad, 286 Ga. 695, 696 (2010).

27. Here, Petitioner repeatedly told Trial Counsel he wanted to testify, both before trial and during trial, but Trial Counsel compelled him not to take the stand in his own behalf. Trial Counsel refused to prepare Petitioner to testify at the trial, and refrained from telling him it was his decision to ultimately make. Had Trial Counsel or the Court informed Petitioner it was his right to testify, he would have exercised his right. Trial Counsel’s refusal to allow Petitioner to testify after being specifically told he wanted to testify and Trial Counsel’s failure to at least

advise Petitioner the decision was his to make denied Petitioner his constitutional right to effective assistance of counsel and prejudiced his defense.

28. Trial counsel's failure to discuss the discovery in this case also led to Petitioner being unable to participate in the decision making process surrounding the preparation for sentencing. The Pre-Sentence Investigation failed to address Petitioner's medical issues in any meaningful way. If Trial Counsel had appropriately advised Petitioner concerning the discovery in this case and Petitioner would have been consulted regarding the discovery, Trial Counsel would have been able to prepare a mitigation defense that would have incorporated Petitioner's specific knowledge and understanding concerning his medical issues involved, and this could have resulted in a reduced sentence.

29. Trial Counsel has a duty to investigate his client's background for mitigation evidence to be used at sentencing. Jefferson v. Zant, 263 Ga. 316, 319-20 (1993). The test to find counsel has been ineffective in failing to produce mitigating evidence is whether a reasonable lawyer would have performed the way defense counsel did. Head v. Carr, 273 Ga. 613, 616 (2001). During the sentencing phase, mitigation evidence scope is broad and evidentiary rules are lenient. Barnes v. State, 269 Ga. 345, 356 (1998). Trial Counsel can be found to act unreasonable if a mental health expert could testify to mitigating evidence. Turpin v. Lipham, 270 Ga. 208, 216 (1998).

30. Here, defense counsel was in receipt of a Georgia Bureau of Investigation Summary, in which Petitioner's doctor, Thomas Williamson, was interviewed by State Attorney Blair Sasnett. (GBOI, 1). This interview revealed Petitioner sustained a head injury while employed by the United States Air Force, which had caused scar tissue on his brain, resulting in decreased

impulse control. (Id.) Trial Counsel did not interview Dr. Williamson and refused to call Dr. Williamson or an expert to present mitigation evidence. Since, mitigation evidence is so important Trial Counsel did not act reasonably when he failed to call or investigate witnesses who could have provided mitigation evidence. Petitioner was actually prejudiced by Trial Counsel failure to present any mitigating evidence, and but for Trial Counsel's ineffectiveness there is a reasonable probability Petitioner would have received a lesser sentence than fifteen (15) years incarceration and three years of probation.

31. Trial counsel's failure to prepare a sentencing memorandum on behalf of the Petitioner or call any character witnesses was also unreasonable under the circumstances, and therefore deficient. Trial Counsel failed to prepare a sentencing memorandum for the hearing and instead relied on the Pre-Sentence Investigation in which he wrote only three paragraphs. Two of these paragraphs functioned as his personal advertisement, and said nothing about the Petitioner. Instead, Trial Counsel chose to explain where he had went to school, how long he has been a member of the bar, and how long he has had a practice. (Pre Sentence Investigation, 7). Clearly, no reasonable attorney would have used this opportunity to present mitigation evidence as a personal advertisement.

32. Often, mitigation witnesses will present the defendant in a more favorable light. Trial Counsel was given a list of twenty-four (24) character witnesses that were willing to testify to Petitioner's good character. Some of those witnesses included his wife, fellow church members, neighbors, friends, and the chief of police. However, Trial Counsel again failed to call a single witness, and simply relied on letters from the Petitioner, his wife, and children as the only mitigation evidence.

33. Here, trial counsel failed to adequately prepare for any aspect of the representation of Petitioner. This failure began with no independent investigation or preparation being conducted prior to the trial. Trial counsel chose to forego the development, investigation, or preparation of any defense from the very outset of the case. Further, as highlighted *supra*, trial counsel even denied Petitioner all discovery and discussions related to discovery. This failure was exasperated by refusing to allow Petitioner to testify in his own behalf.

34. Trial counsel failed to prepare for sentencing. He refused to perform an investigation into mitigating evidence or contact Petitioner's doctor, any relatives or friends that could have assisted in this mitigation development. Counsel further failed to file a sentencing memorandum on behalf of Petitioner.

35. These failures resulted in Petitioner's inability to receive effective representation. Not only did trial counsel not advocate on behalf of Petitioner, Petitioner was unable to file a timely appeal. If trial counsel would have provided adequate representation through the proper preparation and investigation required of counsel, Trial Counsel would have been able to effectively present a defense in favor of Petitioner, which could have resulted in him being found not guilty, or in the least a significant downward departure by properly presenting mitigation evidence at the sentencing hearing, which would have resulted in a reduced sentence in light of Petitioner's not having a prior criminal record.

B. Trial Counsel's Failure to Accurately Advise Petitioner of the Consequences of Rejecting a Favorable Plea Offer Resulted from a Conflict of Interest

36. "Where a constitutional right to counsel exists, the Sixth Amendment to the United States Constitution requires that counsel's representation be free from conflicts of interest."

Williams v. Moody, 287 Ga. 665, 667 (2010) (citing Wood v. Georgia, 450 U.S. 261, 271 (1981); Holloway v. Arkansas, 435 U.S. 475, 482 (1978) ((holding that the Sixth Amendment guarantees conflict-free counsel); United States v. Ross, 33 F.3d 1507, 1524 (11th Cir. 1994) (holding same).

37. A claim that counsel was conflicted is in essence a claim of ineffective assistance of counsel. Edwards v. Lewis, 283 Ga. 345, 351, 658 S.E.2d 116, 121 (2008); Buenoano v. Singletary, 74 F.3d 1078, 1086 (11th Cir. 1996) (citing Lightbourne v. Dugger, 829 F.2d 1012, 1022 (11th Cir.1987). Generally, a defendant who claims ineffective assistance of counsel must show prejudice to prevail upon this claim. Strickland v. Washington, 466 U.S. 668, 686 (1984).

38. However, this is not so when counsel is burdened with an actual conflict of interest. Once the attorney's conflict of interest is established, prejudice is presumed, courts cannot "indulge in nice calculations as to the amount of prejudice." Stano v. Dugger, 921 F.2d 1125, 1183 (11th Cir. 1991) (citing Glasser v. United States, 315 U.S. 60, 76 (1942).

39. Thus, a defendant claiming he was denied his right to conflict-free counsel based upon an actual conflict need not establish a reasonable probability that, but for the conflict or deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish (1) an actual conflict of interest existed; and (2) that the conflict adversely affected counsel's performance. The State v. Mamedov, 288 Ga. 858, 860 (2011); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

1. The Existence of an Actual Conflict of Interest

40. In the instant case, it was abundantly clear that a significant, actual conflict of interest existed, pitting the Petitioner's interest squarely against Trial Counsel. Trial Counsel's primary motivation in telling Petitioner to reject the State's plea offer and go to trial was to

secure a civil case on a contingent fee basis against the Police Department for Deputy Johnson's negligent shooting of Petitioner.

41. "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests to the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client..." Ga. Rules of Professional Conduct R. 1.7(a). Further, a client cannot give informed consent to such conflicts when prohibited by law or Georgia's Rules of Professional Conduct. Ga. Rules of Professional Conduct R. 1.7(c). Particularly, an attorney is not allowed to adversely affect the client's representation with his or her own personal or economic interests. Ga. Rules of Professional Conduct R. 1.7 cmt. 6. This duty of loyalty is one of the most basic duties of counsel. Strickland v. Washington, 466 U.S. at 692; see Sallie v. State, 269 Ga. 446, 448 (1998).

42. Here, Trial Counsel's defective advice was completely inadequate by the ongoing conflict of interest. The Georgia Supreme Court has held a lawyer's defective advice to accurately advise the client of the consequences of rejecting a guilty plea offer constitutes ineffective assistance of counsel. Lloyd v. State, 258 Ga. 645, 646 (1988). This is because effective assistance of counsel requires trial counsel to inform his client of any offers to plead guilty and "to be advised of the consequences of the choices confronting him." Id. at 648. To show the defendant was prejudiced by trial counsel's failure to accurately advise the client of the plea offer there must be "at least an inference from the evidence that defendant would have accepted the offer as made or something similar." Id.

2. The Conflict Adversely Affected Trial Counsel's Performance

43. To refute the presumption of competent representation, a defendant “must show that trial counsel's performance fell below an objective standard of reasonableness.” Bell v. State, 294 Ga. App. 443, 448 (2009); Strickland v. Washington, 466 U.S. at 688. “Decisions regarding trial tactics and strategy may form the basis for an ineffectiveness claim only if they were so patently unreasonable that no competent attorney would have followed such a course.” Reed v. State, 294 Ga. 877, 882, 757 S.E.2d 84, 89 (2014). Had trial counsel looked beyond his own interest of obtaining a contingent fee of a potential \$20 million civil judgment, and put the Petitioner’s interest first by accurately advising him of the consequences of rejecting a guilty plea offer; the petitioner could have made an informed decision whether to accept the State’s initial plea offer.

44. Here, the Petitioner was unable to accept an eight year incarceration with three years parole offer because of Trial Counsel’s complete lack of preparation of the case and to properly advise the Petitioner that he should accept the guilty plea offer. Instead, Trial Counsel adamantly told the Petitioner “not to take the offer, the State did not have a case against him, and after his acquittal they would sue them in civil court for \$20 million dollars.” Trial Counsel’s cavalier attitude, unwarranted advocacy against the Petitioner accepting the plea offer, and failure to advise the Petitioner he was subject to twenty (20) years of incarceration if he did not accept the plea establishes he did not receive counsel guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. at 687.

45. The only reason the Petitioner did not accept the eight years with three years parole offer was because of Trial Counsel’s guarantees that he would be acquitted and that he would receive an enormous award for compensatory damages in a civil suit after the inevitable

acquittal. Petitioner's decision to reject the plea offer and proceed to trial was based entirely upon these guarantees and the allure of a \$20 million promise.

46. Trial Counsel failed to advise Petitioner of what he needed most, which was to be told that he may be found guilty, and the potential incarceration of twenty (20) years. Once, Trial Counsel realized the Petitioner could be found guilty he attempted to plead the case again, but this time Petitioner was offered twenty (20) years with eight years parole. Trial Counsel was infuriated and reiterated to the Petitioner to reject the plea offer, and they would sue in civil court for \$20 million dollars.

47. Trial Counsel failed to fulfill his duty to the Petitioner by refusing to give meaningful advice of the consequences of rejecting the plea offer, which was exasperated by Trial Counsel's promises of acquittal and a \$20 million dollar payday. Trial Counsel completely failed to advise Petitioner of the chance he could be found guilty at trial, or provide any assistance on crucial decisions that would have properly informed Petitioner the real possibility of being incarcerated for twenty (20) years. Trial Counsel should have advised Petitioner of the consequences of not accepting the eight year incarceration with three years parole plea offer.

48. Instead, Trial Counsel advised Petitioner of a frivolous \$20 million lawsuit at the expense of fulfilling his legal and ethical duties to advise Petitioner of the consequences of not accepting a guilty plea offer. Trial Counsel failed to devote any reasonable time, labor, or commitment to Petitioner's case, which deprived Petitioner of his right to counsel guaranteed by the Sixth Amendment.

49. Trial Counsel's failure was complete when after sentencing, Petitioner requested that Trial Counsel file a Notice of Appeal on his behalf, as Petitioner explained that he fully intended

to appeal his case. However, Trial Counsel utterly failed to preserve Petitioner's appellate rights. As a consequence, Petitioner was forced to file a motion for an out-of-time appeal, which has since been denied. Because of Trial Counsel's foregoing egregious errors this Court should grant Petitioner a new trial.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth herein, Petitioner respectfully prays that this Court:

- A. Vacate the judgment of conviction entered against Petitioner;
- B. Grant Petitioner a new trial in this Indictment; and
- C. Grant Petitioner such other and further relief as this Court deems just, proper and equitable.

Dated:

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2014 I served a copy of the foregoing via United States Mail upon