No. _____

19-5536

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Gabriel V. Seay — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel V. Seay
(Your Name)

Federal Number 52332007
(Address) SPC Hazelton
P.O. Box 2000
Bruceton Mills, WV 26525
(City, State, Zip Code)

304.379.5203 (prison camp)
(Phone Number)

I. Question Presented

Where Strickland v. Washington, serves as the current case law protecting an accused's right to fair and competent assistance of legal counsel, there are several different measuring sticks in awarding a Petitioner relief from ineffective counsel and does counsel's inferior work product, lacking case law, and doing no credible investigation into pertinent case law research and investigation (which existed and would have greatly assisted Petitioner's choice to take a plea agreement or go trial, which would have most likely created a different result for Petitioner) represents a Strickland violation?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of the United States Attorney
6406 Ivy Lane
Suite 800
Greenbelt, MD 20770

Clerk's Office
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Table of Authorities

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II. Table of Contents

VII. Constitutional Provisions Involved

Constitution of the United States: Article VI

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

III. Petition for Writ of Certiorari

Gabriel V. Seay, an inmate currently incarcerated at SPC Hazelton in Bruceton Mills, West Virginia, Pro Se, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

V. Opinions Below

The following case information has been published:

United States Court of Appeals for the Fourth Circuit
2019 U.S. Ap. LEXIS 12018
No. 18-6385
April 23, 2019

United States Court of Appeals for the Fourth Circuit
739 Fed. App. 193; U.S. App. LEXIS 28546
No. 18-6385
September 24, 2018

United States District Court for the Fourth Circuit
2018 U.S. Dist. LEXIS 55894
Civil Action No. DKC 15-3367; Criminal Case No. DKC 14-0614
April 2, 2018

For the convenience of the Court, he provides pertinent case information as follows:

United States District Court
District of Maryland (Greenbelt)
Case #: 8:14-cr-00614

The decision by the United States Court of Appeals for the Fourth Circuit was decided on April 23, 2019.

VI. Jurisdiction

Mr. Seay's motion to the United States Fourth Circuit Court of Appeals was denied on April 23, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

VIII. Statement of the Case

On February 12, 2014, law enforcement officers stopped Petitioner for failing to use his left turn signal when he pulled out of a gas station (ECF No. 69, at 6). During the stop, Petitioner informed the officers that he did not have a valid license, and the officers found an outstanding warrant for Petitioner from Dougherty County, Georgia (ECF No. 28-1, at 1). Officers arrested Petitioner for the traffic violation and transported Petitioner to the police station to determine whether extradition was pending on the outstanding warrant (ECF No. 55-2, at 5). After bringing Petitioner to the police station and before transporting him to the Department of Corrections, officers searched Petitioner and found 26.95 grams of cocaine base on his person (ECF No. 28-1, at 1). This "discovery" occurred after law enforcement had taken a drug-sniff dog to Petitioner's residence with no probable cause or suspicion to perform an illegal search.

Before law enforcement found the cocaine base on Petitioner, law enforcement officers then went to Petitioner's apartment building. The officers had taken Petitioner's keys and key fob, which permitted them to enter Petitioner's apartment building (ECF Nos. 21; 55, at 4; 55-2, at 5). It is not entirely clear from the record that the officers used the fob to enter at the time of the dog sniff. The sequence of events recited in the search warrant affidavit and application might reveal that an employee who verified that Petitioner had been seen at the apartment in the prior 30 days let them in. Law enforcement did not provide the name of the employee to Petitioner or his counsel, denying Petitioner's right to confront the employee to determine how law enforcement gained entry into the locked apartment building.

It is important to point out that nothing had happened during the traffic stop or in the process of detaining Petitioner that was any reasonable suspicion or probable cause that he was dealing drugs nothing that would lead law enforcement to his apartment with a drug-sniff dog other than a mere "fishing expedition."

A K-9 unit was brought onto the floor where Petitioner's apartment was

located, it sniffed the door, and alerted to the presence of drugs (ECF No. 55-2 at 5-6). Officers subsequently obtained a warrant and searched Petitioner's residence. In addition to a pistol, cash, a scale and other items suggestive of drug trafficking, they found: "87.35 grams of cocaine base; 452.36 grams of cocaine HCl; 331.9 grams of 3,4-Methylenedioxymethcathione (Methylene), a Schedule I controlled substance; 32.96 grams heroin; 31.74 grams marijuana" (ECF No. 28-1, at 1).

On April 1, 2014, Petitioner was charged in a criminal complaint with possession with intent to distribute controlled substances (ECF No. 1). On October 29, 2014, Petitioner's counsel moved to suppress the evidence found from the initial stop and subsequent search (ECF No. 21), On January 20, 2015, Petitioner pled guilty to an Information charging possession with intent to distribute 28 grams or more of cocaine base in violation of 21 U.S.C. § 841 and one count of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924 (ECF No. 26). On March 30, 2015, Petitioner was sentenced to 144 months of imprisonment (ECF No. 38).

Between being charged and pleading guilty, Petitioner discussed his case and the motion to suppress with his counsel on multiple occasions. Counsel showed Petitioner the discovery and his independent research about the stop. Counsel advised Petitioner to take a plea offer and told Petitioner that the motion to suppress was unlikely to succeed (ECF No. 69, at 14, 33-34; 51-58; 63-65).

Although counsel filed a Motion to Suppress Evidence on behalf of Petitioner on October 29, 2014, the grounds for the suppression merely had to do with the traffic stop in that counsel contended that the traffic stop was unreasonable and not predicated on reasonable articulable suspicions that Petitioner violated a Maryland motor vehicle law and was in violation of the Petitioner's rights under the Fourth Amendment to the United States Constitution. Counsel failed to research appropriate case law with respect to the use of a drug-sniff dog to obtain a search warrant. Counsel's motion was less than three pages and cited no case law to support the motion. At best, counsel's effort, in the opinion of Petitioner, was haphazard

and lacking professional effort and commitment, in addition to the seriousness and diligence to the Petitioner's request. In this motion, Petitioner lists several separate cases that are analogous and supportive to his case.

Counsel's failure to abide by Petitioner's direct insistence and requests adversely and detrimental impacted Petitioner's liberty interest. Had it not been for counsel's failure to follow Petitioner's numerous requests, which are reflected on the record from the September 2, 2016 evidentiary hearing, Petitioner would possibly be a free man today.

Reasons for Granting the Writ

To prevail on a Sixth Amendment ineffective assistance of counsel claim, a defendant must show both that his counsel's performance was deficient and that his counsel's errors caused him prejudice. In assessing deficiency a court asks whether defense "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

From the Evidentiary Hearing on September 2, 2016, there is much on the record testimony regarding former counsel for the Petitioner, John McKenna. At issue is whether McKenna performed at an acceptable manner in terms of his representation of Petitioner. McKenna had negotiated a fee of $15,000 to represent Petitioner and any extra work, such as pursuing a suppression hearing motion, or taking anything other than a plea agreement, would cut into McKenna's "profit."

Under direct questioning, McKenna testified that Petitioner and he discussed pre-trial strategy and specifically about "a motion to suppress the evidence from the traffic stop and how they went along to get the search warrant to go into the house" (ECF 69, 14 at 13-15). The only reason McKenna gave to Petitioner for recommending that Petitioner to take a plea is that going to trial would result in Petitioner losing his three federal sentencing points for not cooperating or taking a plea.

Before advising a client to plead guilty, counsel has two duties: (1) a duty to investigate; and (2) a duty to explain to a defendant the advantages and disadvantages of entering a guilty plea. See Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003); Strickland 466 U.S. at 691 recognizing counsel's duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Additionally, under questioning during the Evidentiary Hearing, McKenna admits to filing the Motion to Suppress (ECF 21) but only as it applied to the traffic stop and the subsequent search of the address where Seay had been residing (ECF 69, 63 and 64). McKenna's efforts were halfhearted at best, he never mentions that he reviewed or was aware of any case law that could be relevant or helpful to Petitioner. McKenna's "investigation" consisted of "going to scene of the traffic stop, taking some photographs" (ECF 69, 64 at 17-24). There was no testimony provided by McKenna that he made any effort to do the necessary legal research - a standard he is obligated to in a lawyer's code of conduct for the benefit of Petitioner.

Indeed, under cross examination, McKenna testifies that he had zero knowledge, performed no research with respect to not only the legality of the traffic stop, which lacked even basic effort and no supporting case law, but he was also "unaware whether the use of a dog to sniff a door without a warrant is legal or not" (ECF 69, 69 at 15-25; 70; and 71).

LEXIS/NEXIS is a wonderful tool which can greatly ease the burden of searching for favorable (or unfavorable) legal cases critical to the lawyer layman in terms of assisting his client. The user-friendly nature of this service is literally "so easy, that a caveman could do it." Indeed, Petitioner has used this service in depth to develop his instant case for this Honorable Court.

Based on McKenna's lack of research and due diligence on an issue critical to Petitioner's defense, an element so simple, McKenna failed in his duty as counsel to Petitioner, most likely robbing him of his liberty interest. His performance fell below a reasonable standard of objectivity and performance. The case law which follows, points towards the second "prong" of ineffective counsel - the Petitioner being prejudiced by McKenna's non-performance and being able to successfully suppress all of the evidence acquired through the highly questionable, most likely unlawful search based on the dog-sniff.

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It was initially the position

of the Fourth Circuit that the use of a drug dog is not a "search," but the fact a drug dog "alerts" constitutes probable cause to search United States v. Jeffus, 22 F. 3d 554, 556-57 (4th Cir. 1994). In 2013, the Supreme Court held in Florida v. Jardines, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) clear the rule that police cannot trespass on the curtilage of a stand-alone home, there also have been confirming rulings from this Honorable Court which detail where an individual may or may not be entitled the protection afforded by the Fourth Amendment relating to use of a "highly sensitive, sophisticated" drug-sniff dog in the private and protective components of an condominium building curtilage, affirming that the Fourth Amendment's rights to privacy that were affirmed by Jardines extend to the apartment curtilage scenario. Hearing this case would allow this Honorable Court to further clarify and coalesce judicial opinion.

Kyllo v. United States 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), which held that using a thermal-imaging device from a public vantage point to monitor the radiation of heat from a home qualified as a search within the meaning of the Fourth Amendment. Just as the police would not be allowed to place a stethoscope on an apartment to ascertain potential illegal activity, police are barred from intruding into a person's privacy with the "super sensitive" nose of a drug dog. Drug detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents as to convey clear and reliable information to their human partners (see Florida v. Harris, 568 U.S. 237, 241, 246-7, 133 S. Ct. 1050, 185 L. Ed. 2d 61 [2013]). Even before Jardines, Kyllo clearly established that law enforcement agents cannot use a sophisticated device to learn facts about the inside of a residence that would otherwise be unknowable without physical intrusion.

In addition to the Jardines and Kyllo precedents, United States v. Hill (776 F. 3d 243; 2015 U.S. App. LEXIS 499, No. 13-4806 (4th Cir. 2015) (this case also involved two other defendants, Eric Barker and Megan Dunigan: United States v. Barker [No. 13-4811] and United States v. Dunigan [No.13-4820]) was decided on January 13, 2015 by the U.S. Court of Appeals for the Fourth Circuit where the court reversed a lower court's denial of a motion to suppress because the law enforcement officials did not have a search warrant

when they conducted a walk-through and dog sniff. Hill and two of his acquaintances, who were all on supervised release at the time, were within the same home. Eric Barker, was one of the friends on supervised release that law officials had suspected him of moving and in violation of his probation had not told law enforcement officials that he had moved. Law officers were able to obtain a warrant for his arrest on this presumed fact. When executed at his new residence, officials found Barker, Hill and Dunigan, all of whom were on probation. After officers had all three in custody and had completed their protective sweep, they conducted a walk-through of the apartment to look for contraband and other evidence of supervised release violations. Upon finding needles in the bathroom, a homemade tourniquet on Barker's arm, pills on the dresser in a locked bedroom and other drug paraphernalia, officers then had a drug-detection dog sniff around the apartment and once the dog alerted, sought a search warrant. In these three cases, all decided before the Petitioner's plea, the government readily conceded that the dog sniff would have been an illegal search after the Supreme Court's decision in Jardines, but argues that officers relied in good faith on pre-Jardines precedent holding that a dog-sniff was not a search and no warrant was required, to which the Appeals Court did not agree. The court, in citing United States v. Whitehead, F.2d 849 (4th Cir. 1988) noted that "when authorities bring in a narcotics detection dog into an area in which the occupant enjoys an expectation of privacy, the [F]ourth [A]mendment extends to protect the owner against 'unreasonable' intrusions." Id. at 857.

At the time of Petitioner's guilty plea in January 2015, the Hill case was well developed, with three substantive entries of litigated matters to including the favorable ruling to Hill (and Petitioner) that the Fourth Circuit Court of Appeals had found that a canine drug-sniff was unlawful and that evidence found during the illegal search were inadmissable. Any diligent and competent lawyer, paralegal, inmate, caveman...basically anyone with access to LEXIS/NEXIS, could have found this case critical to Petitioner's case and consequently, Petitioner's decision to take a plea agreement. If only Petitioner knew then what he knows now. This is also the likely sentiment of Petitioner's former counsel, John McKenna.

Another undeveloped line of material failure of McKenna's legal obligation to Petitioner is why exactly a drug-sniff dog was taken to where Petitioner was residing. At this point, law enforcement had no evidence that Petitioner was in possession of illegal drugs. It was not until well after law enforcement's illegal search that Petitioner was found to have drugs on his person. Law enforcement had no probable cause or reasonable suspicion to take the drug-sniff dog to the condominium where Petitioner was staying. Yet one more strike against lawyer McKenna and his substandard and lackadaisical effort in "assisting" Petitioner.

The Fourth Amendment "protects people from unreasonable Government intrusions into their legitimate expectations of privacy" United States v. Chadwick, 433 U.S. 1, 7, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977). In order to establish a constitutionally legitimate expectation of privacy, a defendant must demonstrate two conditions: (1) the defendant must have exhibited an actual, subjective expectation of privacy; and, (2) the expectation must be one that the society is prepared to recognize as reasonable. Katz v. United States, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). A home, a condominium and an apartment are clearly dwellings that occupants manifest an actual, subjective expectation of privacy. The Supreme Court has held that not only do private homes meet the Fourth Amendment test, but so have hotel rooms (Stoner v. California, 376 U.S. 483, 490, 11 L. Ed. 2d 856, 84 S. Ct. 889 [1964]), overnight guests in another person's home (Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) and also apartments (Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 [1980]) as our societal understanding that areas such as these deserve the most scrupulous protection from government invasion.

While a condominium building may experience more human traffic than a single family home, it still is private property and condominium dwellers expect a certain premise of privacy. A condominium building does not lower the bar for a law enforcement search just because the presence of multiple people in the living area. Further, the property in this instant case benefited from a 24 hour security presence, posted no trespassing signs and several security cameras.

A condominium hallway can have various levels of privacy attached to it - in some cases, the "hallway" could be open air, with no restricted access, or as in this instant matter, an enclosed area accessible only by a renter or owner's key with signage prohibiting trespassing, soliciting or other intrusive actions. Regardless of the level of "access," there is also a reasonable expectation of behavior and privacy, particularly in a restricted area such as Petitioner's dwelling.

This Honorable Court has relied on several cases to define "curtilage," with the most prominent being Oliver v. United States, 466 U.S. 170, 180 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) which states "We therefore regard the area 'immediately surrounding and associated with the home' - what our cases call the curtilage - as 'part of the home itself for Fourth Amendment purposes.'" This Court clarified that "[d]etermining whether a particular area is part-5-of the curtilage of an individual's residence requires consideration of 'factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.'" United States v. Bausby, 720 F. 3d 652, 656 (8th Cir. 2013)(quoting United States v. Boyster, 436 F. 3d 986, 991 (8th Cir. 2006)). To resolve curtilage questions, four relevant factors are considered: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." Id. (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)).

While there is one factor which militates against finding the condominium hallway to be part of the curtilage is that, while technically not surrounded by an enclosure such as a fence, in this instant case, the hallway was clearly enclosed by flooring, walling and roofing, in addition to only being able to be accessed by a key fob, adding a layer of security and privacy. The presence of the condominium door protects the resident from observation by people passing by. The law enforcement officials in this instant case had no implied license to enter the hallway and the hallway was not visible from public areas and had restricted access to tenants only, unless the guest(s) were accompanied by a tenant. Unaccompanied

guests were still required or dependent upon a tenant to admit them to hallways via an intercom buzzer.

To prevail on an ineffective assistance of counsel claim, the Petitioner is required to overcome two hurdles: (1) counsel's "representation fell below an objective standard of reasonableness" (Strickland, 466 U.S. at 688; and (2) Petitioner was prejudiced by counsel's deficiency because there exists "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." McPhearson v. United States, 675 F.3d 553, 563 (6th Cir. 2012)(quoting Strickland, 466 U.S. at 694).

Additionally, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Huff v. United States, 734 F.3d 606 (alterations in original)(quoting Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003)).

The pertinent facts in this instant action are basic and straightforward. Petitioner gets pulled over for an alleged traffic violation. Law enforcement notes that Petitioner has an outstanding warrant. Petitioner is detained. Although law enforcement has no reasonable or justifiable cause, law enforcement takes a drug-sniff dog to Petitioner's residence. Drug dog alerts, police use the alert to obtain a search warrant where incriminating evidence is found and Petitioner is charged.

Further, it is not reasonable to put forth that the drugs eventually found on Petitioner's person would have occurred since, in the absence of the unconstitutional search at Petitioner's residence, Petitioner most likely would have been released from custody.

Lower courts have given Petitioner's counsel for his arraignment, plea agreement and sentencing John McKenna "credit" for recommending that Petitioner accept a plea agreement. This action, however, is devoid of any research or reason to justify his recommendation to Petitioner other than Petitioner's

ability to receive 3 federal sentencing points credit for acceptance of responsibility and getting a "good deal" as a career offender. Indeed, counsel McKenna's suppression motion focused only on the traffic stop with no case law or research to support suppression of the vehicle stop. From the record, McKenna indicates he has nothing to support his motion, nor is there any mention by McKenna questioning or researching law enforcement's action of taking a drug-sniff dog to Petitioner's residence without reasonable cause and undertaking nothing more than a "fishing expedition."

Based on the record, McKenna's "investigation" of the aforementioned facts consisted of "going to the scene of the stop, taking some photographs" (ECF 69, 64 at 21-22). Nothing in the record indicates any case law research as to McKenna's advice to Petitioner to take a plea. In the same hearing, under cross-examination, McKenna says that "off the top of his head, I don't know the name" of the use of a dog to sniff a door without a warrant is legal or not (ECF 69, 69 at 15-19). McKenna disavows any real knowledge or detail regarding Florida v. Jardines, which is the Supreme Court case of March 2013 - a full year before Petitioner's arrest - that is most pertinent to Petitioner's ability to suppress the unconstitutional drug-sniff action by law enforcement. McKenna further shows his ineffectiveness and less than professional handling of key litigation matters in his cross-examination testimony (ECF 69, 70 at 3-25; 71 at 1-6):

> Petitioner's counsel: "And if the case said that it was a violation of the Fourth Amendment to use a dog sniff to sniff a door without a warrant, don't you think that would have been relevant to the motion to suppress?
>
> McKenna: Sure.
>
> Petitioner's counsel: And did you discuss this case with Mr. Seay?
>
> McKenna: I don't believe so, no.
>
> Petitioner's counsel: What did you tell Mr. Seay were the pros and cons of going forward with a motion to suppress?
>
> McKenna: Well, getting the evidence suppressed obviously, and...
>
> Petitioner's counsel: What, in your opinion...what did you tell Mr. Seay was good about the motion, favorable to him?

McKenna: Well, if we won the motion, we'd have the gun and drugs suppressed.

Petitioner's counsel: Right.

McKenna: He'd win his case.

Petitioner's counsel: And did you tell him why you thought the motion would or would not be successful?

McKenna: I am sure I did.

Petitioner's counsel: And do you know what you told him?

McKenna: I don't know what I told him, no.

Petitioner's counsel: But you did not mention the Supreme Court case to him?

McKenna: I don't think I mentioned that particular case, no.

Petitioner's counsel: And, in fact, in your motion to suppress, you don't cite any case law, do you?

McKenna: I did not, did I?

Petitioner's counsel: And did you supplement your motion to suppress at any point in time?

McKenna: I don't believe so, no."

Under questioning if McKenna had done the appropriate case law research, his recommendation to Petitioner would have been different. The case would have had a different result had McKenna carried out his legal duties in a diligent and professional manner.

Conclusion

The petition for a writ of certiorar should be granted.

July 11, 2019

Respectfully submitted,

Gabriel V. Seay, Pro Se