No 20-8073

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAMARI JENNINGS — PETITIONER

vs.

DARREL VANNOY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAMARI JENNINGS
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LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTIONS PRESENTED

This case involves a juvenile defendant who was coaxed into pleading guilty, allegedly, under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970). In exchange for his plea, Damari Jennings ("Jennings") was sentenced to life with parole at hard labor. The trial court was about to reject the plea because the State did not present a sufficient factual basis even under *North Carolina v. Alford*; and because Jennings maintained his innocence. Jennings's trial counsel and the State convinced the trial court to accept the plea anyway. Jennings appealed and the state appellate court remanded with instructions for the State to present a sufficient factual basis and for the trial court to explain to Jennings what a life sentence in Louisiana means which leads to the following questions:

1. Under the requirements of *Boykin v. Alabama*, was Jennings denied due process and equal protection when the trial court refused to allow him to withdraw his guilty plea after the appellate court's remand?

2. Did Jennings's trial counsel render ineffective assistance with his misplaced advice to plead guilty because Jennings would be parole eligible?

3. Did Jennings's trial counsel's performance fall below the Sixth Amendment's standard when he abdicated his duties and responsibilities to Jennings, especially where counsel failed to investigate the State's case against Jennings?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Jennings respectfully prays that a writ of certiorari be issued to review the order of the Louisiana Court of Appeal, Third Circuit.

OPINIONS BELOW

The order of the Louisiana Supreme Court, No. 2020-KO-01251, denying discretionary review appears at Exhibit A to the petition and has been designated for publication and is reported at *State v. Jennings*, 2020-1251 (La. 3/9/21); - - So.3d - -, 2021 WL 870457.

JURISDICTION

The Louisiana Supreme Court entered final judgment against Jennings March 9, 2021. As such, this Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United Sates Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The Eighth Amendment to the United Sates Constitution provides in pertinent part:

> [N]or cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United Sates Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. R.S. 14:30.1 provides in pertinent part:

> B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

STATEMENT OF THE CASE

On September 19, 2013, Jennings was indicted by a Lafayette Parish grand jury for 1 count of first degree murder and 1 count of attempted second degree murder. Exhibit D, pp. 55,147. On September 2, 2014, Jennings, on the advice of counsel, withdrew his formal pleas of not guilty to the charged offenses and entered pleas of guilty under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) to 1 count of second degree murder and 1 count of aggravated battery. The State and Jennings's counsel stipulated that if a *Miller* hearing was held, Jennings would be considered eligible for parole under *La. R.S.* 15:574.4(E). Jennings was sentenced to concurrent hard labor sentences of life with parole for second degree murder and 10 years at hard labor for aggravated battery—1 year to be served without benefits. Exhibit D, pp.81-85.

On February 18, 2016, Jennings filed an Application for Post-Conviction Relief ("APCR") requesting an out-of-time appeal and raised a claim of ineffective assistance of counsel. The trial court granted the APCR for an out-of-time appeal and deemed the other portions of the APCR premature. The trial court appointed the Louisiana Appellate Project ("LAP") to represent Jennings. Exhibit D, pp. 108-120.

In a letter dated December 29, 2016, Mr. Bauman wrote Jennings and sent him a copy of a letter from the former executive director of LAP. Both letters asked Jennings what did he expect to gain by filing an out-of-time appeal. Mr. Bauman told Jennings there was nothing he could do that would affect his convictions or sentences because he pleaded guilty. Exhibit M, pp. 313-15. The Third Circuit disagreed with Mr. Bauman and remanded Jennings's case to the district court for an evidentiary hearing to:

> ... [1] allow the State the opportunity to present a sufficient factual basis for the offenses. [2] The trial court is also instructed to explain to Defendant the life sentence for second degree murder, including that it must be served at hard labor. [and 3] Thereafter, the trial court is instructed to determine whether Defendant's pleas were entered knowingly, intelligently, and voluntarily based on the circumstances.

Exhibit C, p. 49.

Having been thus advised at the evidentiary hearing, Jennings sought to withdraw the second degree murder guilty plea; however, he was not allowed to withdraw the spurious *Alford* plea—which should have been an integral part of the trial court's determination of whether his pleas were entered knowingly, intelligently and voluntarily. Jennings's aggravated battery plea can be considered a true *Alford* plea because it offered a choice among the alternative of attempted second-degree murder. The second-degree

murder plea does not represent an alternative, among other choices, at all. In its initial review of this case, the appellate court noted:

> Moreover, Defendant did not receive a significant benefit from his plea to second degree murder. Defendant was originally charged with first degree murder but could not receive the death penalty since he was under eighteen at the time the offense was committed. *Roper v. Simmons*, 543 U.S 551, 125 S.Ct. 1183 (2005). Additionally, Defendant's age prohibited a mandatory life sentence without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012). Thus, Defendant's sentence would have been the same under either first degree murder or second degree murder....In addition to Defendant's young age, protestations of innocence, and the minimal benefit he received from pleading guilty, Defendant asserts that his guilty pleas were unconstitutional.

Exhibit C, pp. 39,40.

The illegal 1-year without benefits prohibition on Jennings's 10-year-sentence for aggravated battery was removed. On November 26, 2019, and December 2, 2019, the district court conducted an evidentiary hearing: the hearings did nothing to correct the mistake of allowing a sixteen-year-old, arrested at fifteen, to plead guilty to second degree murder, allegedly, under *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164 and sentenced to life with parole (which is not a valid sentence under *La. R.S* 14:30.1). The State, however, was granted an opportunity to present an alleged sufficient factual basis for both offenses.

Jennings's trial counsel rendered ineffective assistance when he influenced a sixteen-year-old boy to plead guilty because it was, allegedly, in his best interests. Under the facts before the Court, it is clear, Jennings's trial and appellate counsels have rendered ineffective assistance.

On December 2, 2019, the trial court determined that Jennings's guilty pleas were knowingly, voluntarily, and intelligently made. Exhibit L, p. 310. On July 15, 2020, the appellate court ultimately agreed with the trial court and denied Jennings's direct appeal of this matter. Exhibit B, p. 20. The Louisiana Supreme Court denied Jennings's writ application on March 9, 2021. Exhibit A, p. 1. This instant petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

Under Rule 10, the Louisiana courts have denied relief contrary to decided important questions of federal law that has been settled by this Court and further decided important federal questions in ways that conflicts with relevant decisions of this Court as set forth below:

1. Jennings's guilty plea was not voluntarily, intelligently, or knowingly entered contrary to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 13 and 16 of the Louisiana Constitution Of 1974.

On remand, the district court was instructed to allow the State to present a sufficient factual basis for the offenses Jennings pleaded guilty to.

The court was also instructed to explain what a life sentence in Louisiana means because Jennings said his court-appointed counsel told him he would be released after he turned twenty-one. The court was further instructed to determine if Jennings's pleas were knowing, intelligent and voluntary. See Exhibit C. The trial court did not follow the appellate court's instruction.

This Court has said a guilty plea "is more than a confession which admits that the accused did various acts" because the plea itself is "a conviction[.]" Accordingly, the "[a]dmissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies [a defendant's constitutional rights'[.]" *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969) citing *Jackson v. Denno*, 378 U.S. 368, 387, 84 S.Ct. 1774, 1786, 12 L.Ed.2d 908.

This honorable Court has also said that there are several federal constitutional rights involved in a waiver when a defendant pleads guilty in a state criminal trial: (1) the privilege against compulsory self-incrimination; (2) the right to a jury trial; and (3) the right of confrontation. The Court concluded that "a waiver of these three important federal rights" cannot be presumed from a silent record." *Boykin v. Alabama*, 395 U.S., at 242-3, 89 S.Ct., at 1712.

The record in this case unequivocally establishes that Jennings maintained his innocence and said he only pleaded guilty because his attorney told him it was the best option. Exhibit D, pp. 80-82. In fact, Jennings informed the trial court in a letter that he was informed by his counsel that he would be released when he turned twenty-one-years-old. Exhibit D, p. 127. Moreover, during the *Boykinization*, the trial court asked Jennings if he was asking the court to accept his "guilty plea to second degree murder as a juvenile." Exhibit D, p. 81. The record further establishes that the State did not present a sufficient factual basis for the trial court to even accept the guilty pleas in the first place; and, after the matter was remanded, the trial court allowed the State to present what is being called a sufficient factual basis without conducting an examination, with Jennings, under *Boykin v. Alabama*, supra. In *State ex rel Jackson v. Henderson*, the Louisiana Supreme Court, adopting the Court's *Boykin* holding, said:

> The high court further noted that the trial judge must make sure that the accused 'has a full understanding of what the plea connotes and of its consequence'. 395 U.S. 244, 89 S.Ct. 1712. It further quoted with approval the observation that, if guilty pleas "are to be insulated from attack, the trial court is best advised to conduct an *** examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a

> jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences."

State ex rel Jackson v. Henderson, 260 La. 90, 255 So.2d 85 (11/3/1971).

The trial court failed to follow clearly established precedence. This honorable Court has further noted that it has long been recognized that:

> ... a guilty plea is a grave and solemn act to be accepted only with care and discernment ... Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69, 25 L.Ed.2d 747 (1970) (internal citations omitted).

Jennings never admitted guilt to either of the charged offenses and unlike the defendant in *Brady*, his "plea of guilty [was] invalid" on all scores. *Id.*, 397 U.S., at 748, 90 S.Ct., at 1439. After the appellate court's remand, although that court did not vacate Jennings's convictions or sentences, the remand effectively reset the stage for the trial court to determine whether Jennings's guilty pleas were constitutional. In other words, the district court

was re-tasked with satisfying itself that Jennings understood the nature of the charges against him, "his right to a jury trial, [and] the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences." *State ex rel Jackson v. Henderson*, supra citing *Boykin v. Alabama*, supra.

A. THE ALLEGED FACTUAL BASIS IS INSUFFICIENT BECAUSE JENNINGS DID NOT ACCEPT OR STIPULATE TO ANY OF THE ALLEGED FACTS.

As an initial matter, Jennings maintains his innocence on both counts; however, he cannot dispute his gain from pleading guilty under *North Carolina v. Alford* to aggravated battery. As the Louisiana Third Circuit Court of Appeal noted:

> ... Defendant did not receive a significant benefit from his plea to second degree murder. Defendant was originally charged with first degree murder but could not receive the death penalty since he was under eighteen at the time the offense was committed. *Roper v. Simmons*, 543 U.S 551, 125 S.Ct. 1183 (2005). Additionally, Defendant's age prohibited a mandatory life sentence without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012). Thus, Defendant's sentence would have been the same under either first degree murder or second degree murder....In addition to Defendant's young age, protestations of innocence, and the minimal benefit he received from pleading guilty, Defendant asserts that his guilty pleas were unconstitutional.

Exhibit C, pp. 39,40.

On November 26, 2019, the trial court conducted the first of 2 hearings to determine if Jennings's pleas were knowingly, intelligently and voluntarily entered. The court asked the State "to provide a factual basis." Exhibit K, p. 286. The State then informed the trial court of what "the State would prove" and entered a copy of the plea agreement into the record. Jennings's counsel did not object. Exhibit K, pp. 286-88. The State then informed the trial court of what it would prove against Jennings in a trial:

ADA Hamilton: Your honor, the State would prove that on or about August 8, 2013, the defendant in this matter, Damari Jennings, Docket Number 143443, committed aggravated battery. The State would prove that on or about August 8, 2013, the defendant in this matter was here in Lafayette Parish where he passed a group of individuals. For no known reason one of the subjects produced a chrome semi-automatic pistol and fired one round at the victim. The suspect fled the location and the victim called 911 for assistance. The victim left the area and was located at the corner of St. Mary and St. Landry Street. The subject was found to have a gunshot wound to the left side of his face and his shirt was covered in blood. When questioned, the victim, which was Tannel Gentaly, advised that the subject, a black male with a short Afro produced a small semi-automatic handgun and put it up to his face. The male shot him in the jaw and the group fled the location. The victim upon getting medical treatment, the doctor advised that there was a small caliber projectile lodged in the left side of his jaw. The jaw had several minor fractures as a result of the gunshot and they transferred him to repair his jaw. Upon getting a search warrant of where Damari Jennings, the defendant, was residing they found a 25 caliber semi-automatic handgun. The weapon

matched the one described by Mr. Wiltz. It also matched the round that was found in the victim during the medical treatment. Upon doing a lineup for Damari Jennings, the victim came into the lineup and identified Damari Jennings as the shooter. The State will also file and introduce as State's Exhibit number 2, a copy of the Crime Lab report showing the ballistics testing, and also a copy of the Lafayette Police Department's report which is State's Exhibit number 3. And also a copy of the plea agreement, which is State's Exhibit number 4.

***

ADA Hamilton: Your honor, in Docket Number 143444, the State would prove that on or about the date alleged in the bill of information, Corporal Britney Dugas was dispatched to the 1100 block of Madeline Street here in Lafayette Parish and advised that there was a white female lying near the coulee covered in blood. The officers coming to the scene discovered a white female was lying face up on the sidewalk covered with blood near the coulee. The deputy officer observed what appeared to be a gunshot wound to her facial area near the left eye. The victim was obviously deceased. Upon doing an investigation officers received the tip that a juvenile named Damari Jennings had told several of his friends that he murdered the victim in this case, Miss Connie Birch. Upon doing further investigation officers located on social media, namely Facebook, they researched Damari Jennings's location and it was determined to be a non-private and open to the public. Investigations located multiple images of Damari Jennings, the defendant, holding a Beretta, a handgun, as well as what appears to be a 25 caliber handgun. And the shooting occurred on August 18, 2013. Upon officers interviewing Joseph Broussard with his mother present on August 21, 2013, Mr. Broussard indicated that he was present and witnessed Damari Jennings shoot Ms. Birch in the back of the head. The statement was very detailed and specific and included unreleased details such as the color

> of her cell phone and her clothing as well as the fact that she was wearing glasses when she was shot. Joseph Broussard also described the handgun as being black; however, he was unable to state the caliber. He said that he observed Damari Jennings, the defendant, remove Ms. Birch's telephone, cell phone, cellular phone and a bottle of Xanax pill from her body before they fled northward toward West Willow Street. Joseph stated that while fleeing the scene he witnessed the defendant toss the cell phone in field off of Mission Drive, which was eventually found by the detectives. And the State would also offer, file, and introduce State's Exhibit Number 5 into the record at this time, as the Lafayette Police Department report. As State's Exhibit Number 6 we would offer, file, and introduce the plea agreement between the State and the defendant. We would also offer, file, and introduce the Crime Lab report and the Juvenile Arrest report as State's Exhibit Numbers 6,7, and 8, I believe.

Exhibit K, pp. 286-88,289,290.

The court asked the State several questions in response to the allegations:

> Can you tell me you have a photo lineup of the victim identifying him as the shooter? You have the gun found in his room or in his possession? And you have sufficient evidence on file, including evidence such as the sunglasses or the cell phone, the lineup, all showing that Damari Jennings was the shooter in both instances. So, for each crime you have a direct eye-witness to the crime identifying Damari Jennings as the shooter?

Exhibit K, p. 290.

Afterward, the court turned to Jennings's collateral counsel ("Mr. Benezech") who informed the court that Jennings "would like to dispute the charge of second degree murder." Exhibit K, p. 290. The court responded:

> The Court: Well, that's not what we're here for today, though. As of right now I'm filing a review of the transcript, as well as what the State has found this morning, [sic] the factual basis for both charges under the Docket Numbers with the aggravated battery and the second degree murder. We have also, according to the instructions, explained that defendant has a life sentence for second degree murder and that life sentence must be served at hard labor.

Exhibit K, p. 290.

B. JENNINGS DID NOT ADMIT GUILT OR CONSENT TO THE TRIAL COURT'S JUDGMENT OF CONVICTION.

As stated above, Mr. Benezech informed the trial court that Jennings wanted to dispute the second degree murder allegation. After rejecting Jennings's protestation of innocence, the trial court said it would explain to Jennings that "second degree murder must be served at hard labor." The court further claimed it should have been "abundantly clear [to Jennings] from the previous sentencing." Exhibit K, p. 291. Jennings, however, was sixteen-years-old at that previous sentencing; and, if adult criminals have a problem understanding the legal system, then no one can truly expect a boy (who had just turned sixteen) to understand it either. And as mentioned

earlier, during the initial *Boykinization*, the understanding (at least from Jennings's perspective) was that he was pleading guilty as a juvenile under a particular law that would grant him parole because he was a juvenile. See Exhibit D, p. 81. The trial court had the duty of determining if Jennings actually knew what he was pleading guilty to—especially when he maintained his innocence. Still, the State asked the trial court to "take judicial notice on his plea agreement that was signed on the second degree murder case" and claimed a sixteen-year-old boy understood that he was being sentenced under *La. R.S.* 15:574.4. Exhibit K, p. 291. The State then argued that:

> [Jennings's] parole as an adult was contemplated in the plea and explained to him by Mr. McCann ... he understood the statute that was in place at the time [he] took the plea and as a result of that, he shouldn't be able to come here and complain now that he doesn't understand what's going on.

Exhibit K, p. 291.

The trial court responded that:

> Well, Judge Everett did a - - what I think is a very good job of explaining and going through it. Looking at the colloquy, he told to him - - I mean, the fact that it was written on the plea form there was contemplated a Miller hearing, although the Miller hearing would be dispensed with, and that the defendant indicated in the transcript that he understood and went through with it. And, likewise, I don't note any objections unless I'm missing something somewhere, to the sentence that was imposed.

Exhibit K, pp. 291-92.

First of all, the State was not privy to the discussion between Jennings and his trial counsel. Secondly, the trial court, after a brief discussion with the State and Mr. Benezech, said it was constrained to follow the appellate court's instruction to "determine whether there was a knowing and intelligent and voluntary plea." Exhibit K, pp. 291-92. The trial court did not perform this task. The court did not even ask Jennings if he agreed to the **new** alleged facts presented by the State even after the appellate court noted, the initial factual basis presented to Judge Everett was not sufficient. Cf. Exhibit C, p. 49. When Judge Everett asked Jennings what he did, Jennings said he did not do anything. See Exhibit D, pp. 81-82. In fact, the only reason he pleaded guilty was because his trial counsel said it was his best option and he thought would be released under a juvenile law that allowed him to serve juvenile life. In determining if Jennings's guilty plea was knowing and voluntary, the trial court said:

> I have to determine despite the policy, and the good policy by Judge Everett, I may add. I think what we have to do is have Mr. McCann, who will testify as to his knowledge of what transpired ... or [what he] told to the defendant in order to see if it was knowing, intelligent, and voluntarily made. I mean, at this point I don't have any evidence that the defendant was threatened. **It didn't appear by the transcript that he was threatened or coerced into this plea**. The colloquy by Judge Everett seems to be an intelligent colloquy by the defendant. And it seems to run the depth. I **believe at this point from the transcript,**

> **that it was a knowing and intelligent plea.** But I will out of an abundance of caution allow Mr. McCann to testify[.]

Exhibit K, pp. 292-93 (emphasis added).

The trial court's appreciation of Jennings's Boykinization is erroneous. If the initial guilty plea was flawless, the appellate court would not have remanded the matter.

A guilty plea operates as a waiver of important rights and is valid only if done voluntarily, knowingly and intelligently "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. U.S.*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). "Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is

not met and the plea is invalid." *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005).

The incarceration of a fifteen-year-old child to an adult institution for the remainder of his natural life, even with the possibility of parole, is nothing more than death by incarceration and is violative of the Eighth and Thirteenth Amendments to the United States Constitution—especially where the conviction was contrived contrary to the Sixth and Fourteenth Amendments to that same constitution. Jennings's guilty plea to second-degree murder was not voluntary, knowing or intelligent in light of his attorney's inaccurate and unreasonable advice. "A defendant cannot make an intelligent choice about whether to accept a plea offer unless he fully understands the risks of proceeding to trial." *U.S. v. Herrera*, 412 F.3d 577, 580 (5th Cir.2005).

2. Jennings was denied the effective assistance of counsel before, during, and after due proceedings were held.

A claim of ineffective assistance is assessed under the familiar two-pronged standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984). 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Representation of a criminal defendant entails general duties of loyalty and advocacy of the client's cause and more particularized duties to consult and inform the defendant of important developments **throughout** the prosecution and to conduct a thorough investigation of law and facts relevant to plausible options. ***Strickland***, 104 S.Ct., at 2064-2065.

Because the temptation to rely on hindsight is strong in failure to investigate cases, this honorable Court has said that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*, 460 U. S., at 690. However, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 460 U. S., at 690-91. ***Strickland*** does not require deference to decisions that are uninformed by an adequate investigation into the controlling facts and law. *U.S. v. Drones*, 218 F.3d 496, 500 (5th Cir. 2000).

Concerning this claim, the appellate court relegated the matter "to post-conviction relief, where an evidentiary hearing may be held to determine the validity of [Jennings's] claims." Exhibit B, p. 20. However, this could have

been determined at the evidentiary hearing the appellate court ordered because Jennings's counsel was there. In the interest of justice and judicial economy, all parts of Jennings's ineffective assistance claim could have been addressed at the 2 part evidentiary hearing. In fact, either directly or indirectly, the claim was addressed.

A. MR. MCCANN'S UNREASONABLE ADVICE.

Mr. McCann testified that he "negotiated a plea from the standpoint of the benefit to [Jennings] as a juvenile." Exhibit L, p. 297. Mr. McCann acknowledged the significant benefit Jennings received when he pleaded guilty to aggravated battery versus an attempted murder conviction. He said: "[t]he first degree murder case got reduced to a second degree murder case which really didn't change that much, but that the State stipulated that he didn't have to go through the risk of a *Miller* hearing." Exhibit L, p. 298. Mr. McCann said he was worried Jennings would not farewell in a trial or a *Miller* hearing because he was accused of being involved in 2 crimes of violence in a short period of time. See Exhibit L, pp. 298-99. According to Mr. McCann, just the mere possibility (**not** guarantee) that Jennings would be released from prison removed the risk of him being denied parole eligibility by a judge sometime in the future. He said:

> Now, in retrospect, is it the best circumstance? I don't know. But it's, I mean, having the ability to know you're going to have a parole hearing, in my humble opinion is a good thing because you don't have to particularly worry about what a trial judge would do twenty years down the road. And that's the type of conversation I had with Mr. Jennings. All right. Now, I do recognize that at the time he was sixteen years old, you know. And I thought it was explained fairly well. And he didn't seem to have any difficulty getting through the proof. And **he knew** that **it was a best interest plea**. And he also said in the colloquy that he did it because **he thought it was his best option** because the evidence might be sufficient enough to convict him. And I certainly thought that he understood quite well.

Exhibit L, p. 300.

First of all, Jennings did not say it was "his best option." He told the court it was "the" best option because of what Mr. McCann had told him. Secondly, if Mr. McCann was talking to Jennings about what a judge may or may not do twenty years into the future, there is no guarantee that Jennings was **not** confused about what his counsel was telling him. During cross-examination, Mr McCann said he did not even remember speaking to Jennings's parents or anyone else in his family. He also admitted that if Jennings had gone to trial, and convicted, a *Miller* hearing would have been conducted to determine if he was incorrigible. According to Mr. McCann, Jennings benefited enough when he was made parole eligible without the necessity of a *Miller* hearing. In reality, Mr. McCann was the beneficiary because he did not have to effectively advocate for his client. When Judge

Everett was on the verge of rejecting the so-called *Alford* plea, Mr. McCann joined in with the prosecutor to convince the court to accept the plea:

THE COURT: You are asking me to accept your guilty plea to second degree murder as a juvenile; is that right, sir?

JENNINGS: Yes, sir.

THE COURT: Do you understand that to convict you at trial the State of Louisiana would have to prove that in Lafayette Parish you did commit a homicide with the specific intent to kill or cause great bodily harm? Do you understand that?

JENNINGS: Yes, sir.

THE COURT: And do you further understand that if I accept you plea, you will stand convicted of this crime and as a result you would be sentenced to a term of imprisonment for life with parole considerations, according to a particular law in Louisiana which is 15:574.4; is that right, sir?

JENNINGS: Yes, sir.

THE COURT: Tell me what you did.

JENNINGS: Nothing.

THE COURT: Well, sir, I know Mr. Hamilton is not here **but somebody has to give me a factual basis** if he's going to say nothing. Sir, you are pleading guilty to this charge. Is there a reason why you won't say anything about it?

JENNINGS: No, sir.

THE COURT: Then why don't you tell me what you did?

JENNINGS: **I was accused of shooting two people.**

THE COURT: All right, sir. And did you kill someone?

JENNINGS: **No, sir.**

THE COURT: No, sir? All right, sir. **Why are you pleading guilty, young man?**

JENNINGS: **It's the best option.**

THE COURT: Explain that to me, please.

JENNINGS: (No response)

THE COURT: What do you mean? What do you mean?

JENNINGS: **They found evidence but I still didn't do it**, but they found evidence.

THE COURT: Does the State of Louisiana have any evidence to—can you provide me with a factual basis for the plea?

THE STATE: Yes, sir, your honor. At trial the State of Louisiana would prove that on or about August 18, 2018, Damari Jennings did commit an act of first degree murder of one Connie Burch in violation of the provisions of Louisiana Revised Statutes 14:30. Do you want to know the evidence, your honor.

THE COURT: Well, sir, I know what the bill of information or the indictment says but **I need more than just the charge.** I need a factual basis before I can accept a plea or even a best interest plea.

DEFENSE: **There was an eye witness and there was a murder weapon found in his bedroom.**

THE STATE: And forensics came back from the Acadiana Crime Lab on the murder weapon which was found in his room. At the crime there was a 40 caliber cartridge that was found right next to the victim and that when they found the gun in his room, it came back as positive, having been fired from the gun which he was found in possession of.

THE COURT: **Any additional forensics on the weapon?**

THE STATE: **No, sir.**

THE COURT: None was done or—

DEFENSE: **None was found.** There were no forensics done that would have excluded him but the eye witness puts him

there. And under those circumstances and under the circumstances of the parole offer, the parole eligibility, it is considered to be a best interest plea.

***

DEFENSE: Judge, let me put some additional information in the record to make the court feel better and/or other purposes. The circumstances were similar. There was a second eye witness that saw the other shooting. That weapon was a 25 caliber and it was also found with the same search warrant in Mr. Jennings' bedroom. So, the 404B inclusive of the eye witness of the homicide would have made defending this case very difficult.

THE COURT: Right. Under those circumstances, Mr. Jennings, I will accept your plea and adjudicate you guilty. I find you made a knowing and intelligent waiver of the rights previously explained to you and that your plea is freely and voluntarily given without threats or inducements to you whatsoever.

Exhibit D, pp. 81-83,84,85.

Considering the above colloquy, Mr. McCann's claim that he was taken off guard by the appellate court's decision, is amazing. He said Jennings was never treated like a child: and sadly he is right. Cf. Exhibit L, pp. 304-06. When asked by the trial court if he explained the difference between being charged as an adult versus a juvenile to Jennings, Mr. McCann said he did not know if he "necessarily explained it that way because **it was not an issue that was ever brought up**." Exhibit L, p. 304. He then told the court that Jennings knew life meant life. Mr. McCann justified his deficient

performance by explaining he thought Jennings "was a relatively intelligent person." Exhibit L, p. 305. He further claim that:

> ... the Criminal Justice System is complicated. When you throw in the *Miller v. Alabama* mix, [sic] it's complicated. When you have two different cases all pending at the same time, it's complicated. But I think that, based upon the conversations that I had with him and the language that he used with Judge Everett when the plea was done, he certainly seemed to understand what was happening. Or we wouldn't have done it.

Exhibit L, p. 305.

Mr. McCann's assertion is false. As argued above, Judge Everett was on the verge of rejecting Jennings's alleged *Alford* plea and Mr. McCann helped him to reconsider. See Exhibit D, pp. 15-17.

B. FAILURE TO ADEQUATELY INVESTIGATE.

Adequate investigation is a requisite of effective assistance. *State v. Francis*, 01-1667 (La. App. 4 Cir. 2/6/02); 809 So.2d 1132. Mr. McCann failed to do a pre-trial investigation and abridged Jennings's fundamental right to effective representation. Mr. McCann's failure to advocate on Jennings's behalf resulted in Jennings being deprived of his right to present a defense. In other words, Jennings was abandoned by the very one who was tasked with advocating on his behalf. Jennings would not have pled guilty, over his protestations of innocence, had Mr. McCann investigated the State's

allegations against him. It does not look good that physical evidence was found in Jennings's bedroom; however, there are rational, if not reasonable, explanations for the presence of weapons used in these crimes to be found in Jennings's bedroom. For instance, he had the guns because he did not know they were used in crimes prior to his taking possession of them. Also, Mr. McCann's claim that the State had two different eye-witnesses who claims to have saw Jennings shoot the victims in this matter does not qualify as justification for not investigating. It is well known that, for whatever reasons, witnesses can and will lie. Some people have ulterior motives for placing and shifting responsibility on people other than themselves or the people they are trying to protect. At any rate, whether either of the witnesses would be believed was a matter that should have been decided by a twelve-member jury and not by Mr. McCann.

Under prevailing professional norms, Mr. McCann's advice for Jennings to plead guilty, over his protestations of innocence, was violative of the Sixth Amendment's guarantee of the right to the effective assistance of counsel because counsel further failed to subject the State's case to any adversarial testing.

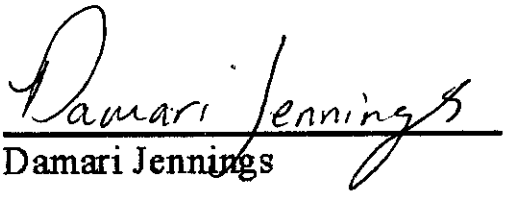
C. Failed To Interview Witnesses.

Jennings told Mr. McCann there were witnesses who would have testified he was somewhere else when each of the shootings were said to have occurred. These witnesses were willing to come forward. Jennings still does not know if the witnesses are still able or willing to come forward or if they even remember what happened. Kayla Prejean, however, is still willing to cooperate.

CONCLUSION

For the foregoing reasons Jennings's petition for a writ of certiorari should be granted.

Respectfully submitted,



Damari Jennings

Date: May 12, 2021