

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL E. KEYSER,)
) **No. 378, 2012**
Appellant,)
) **ON APPEAL FROM THE**
v.) **SUPERIOR COURT OF THE**
) **STATE OF DELAWARE IN**
STATE OF DELAWARE,) **ID No. 0310021647**
)
Appellee.)

MOTION TO WITHDRAW AS COUNSEL

Patrick J. Collins and Albert J. Roop, V, hereby moves pursuant to Supreme Court Rule 26(c) that this Court grant them leave to withdraw as counsel. Counsel states and affirms that they have made a conscientious examination of the record and the law and have concluded that this appeal is without merit.

WHEREFORE, Counsel request that this Court permit them to withdraw as counsel for Appellant Michael Keyser.

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Dated: December 16, 2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL E. KEYSER,)	
)	
Defendant Below -)	No. 378, 2012
Appellant,)	
)	
v.)	Court Below --- Superior Court
)	of the State of Delaware
STATE OF DELAWARE,)	in and for Kent County
)	ID No. 0310021647
Plaintiff Below -)	
Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
 DELAWARE IN AND FOR KENT COUNTY

APPELLANT’S BRIEF PURSUANT TO RULE 26(c)

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NATURE OF THE CHARGES¹

1. Pretrial Proceedings and Capital Murder Trial.

Police arrested Michael E. Keyser on October 27, 2003 in connection with Kimberly Holton's murder, which occurred on September 30, 2003.² On advice of his then-counsel, Kevin Howard, Esquire, Mr. Keyser waived his right to a preliminary hearing in order to obtain certain police reports from the State.³ The Grand Jury indicted Mr. Keyser on January 5, 2004 on three charges: Murder First Degree, Conspiracy First Degree, and Abuse of a Corpse.⁴

Eventually, Mr. Keyser retained Beth Savitz, Esquire, and Joseph Gabay, Esquire, as his trial counsel. The State noticed its intent to proceed with a capital murder prosecution. Mr. Keyser's attorneys waived the Proof Positive Hearing in exchange for "open file" discovery from the State, in order to be better prepared for trial.⁵

On October 6, 2004, after a day-long plea discussion at which Mr. Keyser's parents were present, Mr. Keyser rejected a plea to Murder Second Degree with a recommendation for an 18 ½ year sentence, and exercised his right to a jury trial.⁶

The defense filed various pretrial motions, upon which a hearing was held on October 26,

¹ This case has gone through a trial and sentencing, a direct appeal, a postconviction relief proceeding, and another direct appeal. The undersigned was appointed after the filing of Mr. Keyser's *pro se* Opening Brief. As such, this section contains a procedural history from the beginning of the case to the present date.

² His would-be codefendant, Jacob Jones, committed suicide on October 20, 2003, shortly after Ms. Holton's body was found in the Atlantic Ocean off the coast of New Jersey.

³ A20-25.

⁴ A1. The State entered a *nolle prosequi* as to the charge of Abuse of a Corpse.

⁵ A33-34.

⁶ A112-113.

2004.⁷ An eight-day trial began on October 27, 2004, with Mr. Keyser being found guilty of both remaining charges. The sentencing phase of the trial began on November 17, 2004. Ten of the twelve jurors found that the aggravating circumstances outweighed the mitigating circumstances.⁸

Before sentencing, Mr. Keyser sought to dismiss his lawyers and seek representation by the Office of the Public Defender. This trial judge denied his request, having found no good cause shown.⁹ The trial judge issued his sentencing opinion on June 3, 2005, and despite the 10-2 vote, sentenced Mr. Keyser to life in prison.¹⁰

2. The Direct Appeal.

Mr. Keyser, now represented by the Office of the Public Defender, filed a timely Notice of Appeal. He raised four claims of error on appeal: (1) improper exclusion of a hearsay statement from the deceased Jacob Jones, (2) improper denial of Mr. Keyser's proposed presumption of innocence instruction, (3) the Court's failure to *sua sponte* issue an instruction on attempted murder, and (4) the court's disparaging remarks to trial counsel in the jury's presence. This Court affirmed Mr. Keyser's convictions.¹¹

As to the first claim, this Court reviewed for plain error and found that the excluded statement attributed to Jones was cumulative and only corroborated statements made by Mr.

⁷ A113-134.

⁸ A4.

⁹ A298-230.

¹⁰ *State v. Keyser*, 2005 WL 1331778 (Del. Super. Ct.); A287-297.

¹¹ *Keyser v. State*, 893 A.2d 956 (Del. 2006); A301-A308.

Keyser in his own confession.¹² This Court held as to the second claim that the pattern presumption of innocence instruction favored by the trial judge accurately stated the law and allowed the jury to properly perform its function.¹³ This Court reviewed the lesser-included instruction claim for plain error, citing case law indicating that such an instruction must be given if requested by the parties and supported by the evidence; moreover, this Court noted that the lack of request for the instruction may have been a tactical decision by trial counsel. Finally, this Court did find that certain of the comments made by the trial judge in the jury's presence were improper. However, again reviewing for plain error, this Court found that given the "overwhelming evidence of his guilt," the improper remarks did not deprive Mr. Keyser of his right to a fair trial.¹⁴

3. The Motion for Postconviction Relief.

On January 31, 2007, Mr. Keyser filed a *pro se* Motion for Postconviction Relief.¹⁵ Shortly thereafter, the Court appointed Gregory Johnson, Esquire to represent Mr. Keyser.¹⁶ Mr. Keyser's motion contained three general headings, with specific claims under each heading, summarized as follows:

Ineffective Assistance of Counsel.

Mr. Keyser claimed his lawyers were ineffective for failing to investigate certain elements of the case, including: (a) the medical examiner's inability to determine whether the victim's death was caused by suffocation or the fall from the airplane, (b) the circumstances

¹² A304.

¹³ *Id.*

¹⁴ A305-306.

¹⁵ A8.

¹⁶ A9.

surrounding the Jacob Jones' flight from Dover Air Force Base, (c) whether the body could have reached its final location by being dumped out of the airplane, (d) Mr. Keyser's mental state at the time of his confession, and (5) Mr. Keyser's girlfriend, who, purportedly would have testified as to Mr. Keyser's drinking and drug use at the time of his custodial statement.¹⁷

Another ineffectiveness claim refers to counsel's alleged refusal to give Mr. Keyser information about his case. Mr. Keyser also asserts that his counsel was abusive to him and disregarded his claims that the crime could not have happened how he said it did during his confession. Another part of the abusiveness allegation is that trial counsel tried to get Mr. Keyser to take the plea deal offered by the State.¹⁸ Mr. Keyser also claimed that counsel was ineffective for failing to file a motion to transfer venue and failure to move to disqualify the trial judge. He also claimed that counsel failed to object to certain evidence, notably the video from Wawa purporting to be Mr. Keyser and the victim just prior to going to the Budget Inn. Mr. Keyser insists that is not him in the video or the still photographs admitted into evidence.¹⁹

Next, Mr. Keyser claims that his counsel failed to handle certain jury issues properly. Finally, Mr. Keyser asserts that trial counsel was ineffective for failing to pursue a motion to suppress his custodial statement, the evidence of the chains wrapped around the decedent, the aforementioned Wawa footage, and all evidence related to the airplane.²⁰

Prosecutorial Misconduct.

In Ground Two, Mr. Keyser asserted that he was constitutionally prejudiced by

¹⁷ A320-322.

¹⁸ A321.

¹⁹ A324.

²⁰ A324-325.

prosecutorial misconduct. He relies on two subclaims: improper remarks, and the eliciting of false evidence.²¹

Judicial Abuse

Mr. Keyser's third claim was an allegation that "judicial abuse" prejudiced his right to a fair trial. He first argued that the trial judge made improper comments in the presence of the jury. Next, he claimed that the judge made improper comments to witnesses and the jury. Finally, he claimed that the trial judge abused his discretion in making certain evidentiary rulings.²²

4. *Postconviction Proceedings.*

Trial counsel filed affidavits in response to Mr. Keyser's motion on June 13, 2007.²³ The affidavits generally comport with each other and dispute Mr. Keyser's claims. Several of the responses are of note. First, counsel asserted that they hired a forensic pathologist, Ali Hameli, MD, to review the State's forensic pathologist's findings; he could not render an opinion refuting any of Dr. Blanchard's findings.²⁴ Moreover, the trial lawyers dismissed any notion that Ms. Holton was alive after being taken out of the hotel room and wrapped in a blanket and chains, but before being dropped into the ocean from an airplane as "absurd" given the all the evidence in the case, especially Mr. Keyser's own confession.²⁵

With respect to the defense not filing a motion to suppress Mr. Keyser's confessions,

²¹ A325-326.

²² A327-330.

²³ Mr. Gabay's affidavit is at A334-A341. Ms. Savitz's affidavit is at A342-A356.

²⁴ A345.

²⁵ A333-334.

counsel both averred that there was nothing to be found in the circumstances of the statements to justify the filing of the motion. They found no indication that Mr. Keyser was incompetent to knowingly and voluntarily waive his constitutional protections.²⁶ Moreover, they noted that no grounds presented themselves to justify moving to suppress other evidentiary items, such as the video footage from Wawa showing Mr. Keyser and the decedent purchasing cigarettes and soda just prior to going to the Budget Inn to meet Jones.²⁷

Both trial counsel also note that a day-long plea meeting with the State took place, with the Court taking the unusual step of permitting Mr. Keyser's parents to be present. The plea offer, which defense counsel negotiated and urged Mr. Keyser to accept, contemplated a recommended sentence of 17 ½ additional years in jail. Mr. Keyser rejected the plea offer and exercised his right to a trial.²⁸

The Evidentiary Hearing.

The Court granted a hearing on the sole claim of trial counsel declining to file a motion to suppress. This hearing took place on May 29, 2008.²⁹ Counsel's testimony comports with the affidavits they authored. Ms. Savitz pointed out that Mr. Keyser voluntarily drove himself to the police station to give a statement on October 24, 2003 where he was Mirandized and gave a statement. Then he voluntarily went back to the police station on October 27, 2003, took a polygraph, and gave another Mirandized statement.³⁰ She further testified that she reviewed the

²⁶ A348.

²⁷ A353.

²⁸ A335.

²⁹ The transcript of this hearing begins at A367.

³⁰ A375-376.

statements carefully and there was nothing within them to indicate Mr. Keyser asked for a lawyer or was laboring under any mental illness or any coercion by the police.³¹

With respect to physical items of evidence like the chain purchased at Lowes by Jones for the purpose of shackling and securing Kim Holton's body, Mr. Gabay testified that even if there were any suppression issues, he chose not to pursue them as a matter of strategy.³² Since Mr. Keyser was not involved in Jones' purchases, Mr. Gabay thought the evidence actually helped Mr. Keyser, since it was affirmative proof that Mr. Keyser was not involved in the substantial planning aspect of the capital murder case.³³

Mr. Keyser moves to proceed *pro se*.

On August 18, 2009, Mr. Keyser filed a *pro se* "motion to recuse counsel."³⁴ In that motion, he asserted that Mr. Johnson had, among other things, failed to research evidence, lied to him, and refused to respond to him. After some correspondence back and forth with the trial judge,³⁵ the court ordered a hearing to discuss the issue. In that hearing, Mr. Keyser reiterated that he wanted to dismiss his counsel.³⁶ The court explained the procedural posture of the motion as well as the jurisdictional deadline for filing a Notice of Appeal should the motion be

³¹ *Id.*

³² A399-400.

³³ A399.

³⁴ A463.

³⁵ A465-472.

³⁶ A476.

denied.³⁷

The trial judge permitted Mr. Keyser to address the Court regarding his various claims, generally comporting to the claims he filed. He did note a new claim, asserting that evidence such as a newspaper article would show that Lorraine Machette saw the victim alive six days after she purportedly died.³⁸ However, he admitted that his postconviction lawyer did look into that issue and was unable to verify any such claim.³⁹

The trial judge expressed an opinion that Mr. Johnson had made good efforts to present all cognizable postconviction claims,⁴⁰ but ultimately granted Mr. Keyser's application to proceed *pro se*.

5. The Court Denies Mr. Keyser's Postconviction Motion.

On June 29, 2012, the trial judge issued an Opinion denying all Mr. Keyser's postconviction claims.⁴¹

6. The Appeal from the Denial of the Motion for Postconviction Relief.

On July 12, 2012, Mr. Keyser filed a timely *pro se* Notice of Appeal.⁴² On December 26, 2012, he filed an Opening Brief.⁴³

Mr. Keyser raises two general claims of error. The first is ineffective assistance of

³⁷ A477.

³⁸ A479.

³⁹ *Id.*

⁴⁰ A475.

⁴¹ Exhibit A; A518.

⁴² A18.

⁴³ A492. A verbatim typed version is found at A503-512.

counsel and is presented in subsections. The second claim relates to prosecutorial misconduct. The claims are summarized here as follows:

Mr. Keyser raises several subclaims of ineffective assistance of counsel. The first subclaim is styled “Counsel’s failure to conduct pretrial investigations.” In that section, Mr. Keyser claims:⁴⁴

- Victim’s injuries (apparently referring to proof issues regarding the manner in which Ms. Holton died).
- Dover Air Force Base Records: failure to obtain records of Jacob Jones’ flight.
- Location of the victim’s body: although not specifically addressed, this can be assumed from prior filings to refer to an assertion that the body could not have ended up where it did in the ocean off of Cape May, New Jersey’s coast.
- Defendant’s Mental Health: asserting that counsel should have investigated his mental health in connection with a potential motion to suppress his statement.
- Defendant’s Fiancée: asserting that counsel should have asked Kathy Pippin about his drug and alcohol use prior to his confession.

⁴⁴ A508-510.

- Victim seen alive afterwards: this is a new claim, and asserts that counsel failed to interview witnesses who would attest they had seen Kimberly Holton alive days after she was purportedly killed.

The next ineffective assistance claim asserts that Counsel failed to keep Mr. Keyser informed about the case.⁴⁵ He claims his knowledge of the case was so minimal that he rejected the plea offer. He further claims that Counsel should have objected to the admission of the chain wrapped around Ms. Holton's body. Finally, Mr. Keyser claims counsel was ineffective for failing to file a motion to suppress evidence, in particular his statement and items of physical evidence.

Mr. Keyser next asserts prosecutorial misconduct. First, he claims that the State elicited false testimony from Dr. Blanchard, the medical examiner, in that she could not provide a cause of death. Then, he claims that a Detective Williams threatened him "off the record" in the basement of the police station prior to his confession to Detective Porter.⁴⁶

On January 8, 2013, the State filed a Motion to Affirm.⁴⁷ On June 3, 2013, this Court denied that motion, and *sua sponte* ordered the appointment of counsel in the interest of justice.⁴⁸

NATURE OF THE DEFENSE MADE AT TRIAL

Given Mr. Keyser's confession to his role in the crime, the defense focused on minimizing Mr. Keyser's role as compared to that of Jacob Jones, who planned and carried out

⁴⁵ A510-511.

⁴⁶ A512.

⁴⁷ A514.

⁴⁸ A543.

the murder of Kimberly Holton. The defense applied for and received lesser-included instructions on the Murder First Degree count. The jury was instructed as to Murder Second Degree, Manslaughter, and Criminally Negligent Homicide.⁴⁹

The defense also sought and received a jury instruction on the affirmative defense of duress.⁵⁰ Again, this comports with Mr. Keyser's statement, which indicated that he only participated in the homicide because Jacob Jones had threatened him and his girlfriend if he did not comply with Jones' instructions.

Much of trial counsel's argument focused on a theory that the State failed to prove that anyone but Jacob Jones intentionally killed Kimberly Holton.⁵¹ In essence, the argument asked the jury to see Mr. Keyser's actions as something less than intentional murder.

Trial counsel tried to deal with Mr. Keyser's suicide attempt as "evidence of a broken heart" rather than evidence of consciousness of guilt.⁵²

Finally, the defense urged the jury to consider whether the State had proved when and how Kimberly Holton died. That is to say, they argued that Ms. Holton could have died in the motel room, but also could have died in Jones' car, or in the plane piloted by Jones, or when she was dropped out of Jones' plane into the Atlantic.⁵³

⁴⁹ A216-221.

⁵⁰ A230.

⁵¹ A271, A274, A278.

⁵² A270. The record reflects that Mr. Keyser attempted suicide in his jail cell after his arrest.

⁵³ A280.

SUMMARY OF THE EVIDENCE

This Court's Discussion of the Evidence.

This Court, on direct appeal, summarized the evidence at trial as follows:

On September 29, 2003, at the Dover Budget Inn, Michael Keyser and Jacob Jones killed Kimberly Holton. Ms. Holton was the foster sister of Jones' girlfriend, Heather Nasakaitis. Keyser drove Ms. Holton to the motel, and after both men had sex with her in the room, Keyser held down Ms. Holton's legs while Jones suffocated her. The two men wrapped Ms. Holton's body in a blanket, bound it with duct tape, and put the body into the trunk of Jones' car. That evening, Jones rented an airplane from Dover Air Park, and circled over the Atlantic Ocean near Cape May, New Jersey. On October 8, 2003, a couple found Ms. Holton's body in the ocean while fishing three miles from the Cape May coastline.

Jones committed suicide on October 20, 2003, allegedly leaving behind a suicide note. Keyser gave a taped interview statement to police on October 27, claiming that it was Jones who planned to kill Holton, and that Jones had threatened to kill him (Keyser) and his girlfriend (Kathy Pippin) if Keyser did not assist him. After Keyser was arrested on October 28, he attempted suicide in his jail cell, but was unsuccessful.⁵⁴

This Court also held that the evidence against Mr. Keyser was "overwhelming," noting that Mr. Keyser made highly incriminating statements regarding his involvement in the murder.⁵⁵ He admitted that he held Ms. Holton down while Jones suffocated her, then helped Jones wrap her in a blanket and place her body in the trunk of Jones car.⁵⁶

This Court also remarked upon the evidence of Mr. Keyser's consciousness of guilt,

⁵⁴ *Keyser v. State*, 893 A.2d 956, 958-959 (Del. 2006); A303.

⁵⁵ A303.

⁵⁶ *Id.*

including his suicide attempt after arrest and his appearance with the victim on a Wawa security video on the night she was murdered. He also asked his girlfriend to tell the police that he was working on the night of the murder.⁵⁷

Mr. Keyser's Statement

Fishermen found Ms. Holton's body off the New Jersey coast on October 8, 2003.⁵⁸ A New Jersey State Police detective was able to identify certain markings on the chain used to secure Ms. Holton's body.⁵⁹ He traced that particular chain as one sold by the Lowe's Home Improvement Store.⁶⁰ This enabled another detective to obtain security video footage of Jacob Jones buying the chain used in this crime at the Lowes in Dover.⁶¹ This series of events caused Jones to be identified as a suspect. He committed suicide shortly thereafter.

After a phone call from Jones' father to Michael Keyser on October 24, 2003, which was recorded by the police, Mr. Keyser voluntarily drove to the police station to speak with detectives. After that statement, he was released, but promised to return to take a polygraph test. Police reports indicate that he did in fact return on October 27, 2003, and failed the polygraph test. That led to Mr. Keyser's second statement to the police that evening.

Prior to his statement, the police read Mr. Keyser his *Miranda* warnings.⁶² Mr. Keyser

⁵⁷ *Id.*

⁵⁸ A135.

⁵⁹ A137.

⁶⁰ A138.

⁶¹ A140.

⁶² A35.

went on to state that Jones told him he was planning to kill Kimberly Holton.⁶³ Jones asked Mr. Keyser to bring Ms. Holton to the Budget Inn. He complied, and on the way, stopped at a Wawa to buy cigarettes and soda.⁶⁴

When Mr. Keyser and Jones met up at the Budget Inn, Mr. Keyser said that he saw a loaded shotgun in Jones' trunk. Jones then told him that he wanted his help in killing Ms. Holton, and that he would kill Mr. Keyser and his girlfriend if he did not comply.⁶⁵

Both Jones and Mr. Keyser had sex with Ms. Holton in the motel room.⁶⁶ While Jones was kissing Ms. Holton on the bed, he took a pillow and put it over her face. Mr. Keyser then stated that he began trying to pull Jones off Ms. Holton, with no success.⁶⁷ Mr. Keyser then held Ms. Holton's legs until she stopped moving. Once Jones finished suffocating her, he checked Ms. Holton for a pulse and found none.⁶⁸

Mr. Keyser stated that he helped Jones wrap the body in a blanket, secure the blanket with duct tape, and put the body in the trunk of Jones car.⁶⁹ The next day, Jones visited Mr. Keyser at work and asked for help with purchasing the chains and taking the airplane trip with him to dump the body.⁷⁰ Mr. Keyser initially agreed, but then did not end up helping Jones.

⁶³ A45.

⁶⁴ A54.

⁶⁵ A61.

⁶⁶ A64.

⁶⁷ *Id.*

⁶⁸ A65.

⁶⁹ A67.

⁷⁰ A73.

Jones contacted him the next morning and told him, “it’s done.”⁷¹

The interview began at 7:58 PM.⁷² At 9:25, Mr. Keyser was given a break and allowed to step outside to smoke a cigarette.⁷³ Eight minutes later, the interview resumed.⁷⁴ After confirming a few more details, the interview concluded and the police arrested Mr. Keyser.⁷⁵

Testimony of C. Chase Blanchard, MD

Dr. Blanchard, a medical examiner for the state of New Jersey, was the forensic pathology witness at trial.⁷⁶ Dr. Blanchard went to the scene where the body was found. She observed Ms. Holton’s body to have been bloated, which she testified happens several days after a person dies.⁷⁷ She opined that Ms. Holton had been dead “approximately a week prior to when the body was found...”⁷⁸ She also noted that marine life had eaten away some of Ms. Holton’s skin, and some skin had slipped off the body due to decomposition.⁷⁹

When Dr. Blanchard opined that death could have occurred by “positional asphyxia,” the defense objected.⁸⁰ The objection was sustained, and the Court gave a curative instruction,

⁷¹ A76.

⁷² A35.

⁷³ A93.

⁷⁴ A94.

⁷⁵ A111.

⁷⁶ A174.

⁷⁷ A175.

⁷⁸ A178.

⁷⁹ A178.

⁸⁰ A181.

noting that Dr. Blanchard was not in a position to opine as to the exact cause of death.⁸¹

However, she did note that the fracture of the skull occurred post-mortem and was consistent with a fall from a height.⁸²

Dr. Blanchard's ultimate opinion was that the cause of Kimberly Holton's death was "homicidal violence," and the manner of death was "homicide."⁸³ Specifically, she stated that the death was caused likely by suffocation or strangulation, but she could not be sure because Ms. Holton's face was gone by the time she was retrieved from the ocean.⁸⁴

This characterization caused an immediate application for a mistrial by the defense, which argued it had not been put on notice of these possible causes of death, and that the testimony was not to a reasonable degree of medical certainty.⁸⁵

After hearing argument, the Court denied the application, but instructed the jury to not consider the speculative opinions of Dr. Blanchard in its consideration of the evidence.⁸⁶

The Postconviction Evidentiary Hearing.

The Court granted an evidentiary hearing on the sole issue of whether trial counsel was ineffective for failing to file a motion to suppress Mr. Keyser's custodial statements. Ms. Savitz

⁸¹ A185.

⁸² A187.

⁸³ A195.

⁸⁴ *Id.*

⁸⁵ A195-196.

⁸⁶ A200.

testified that she and Mr. Gabay believed there was no good faith basis to file such a motion.⁸⁷ In support of that decision, she noted that on October 24, 2003, Mr. Keyser voluntarily went to the police station to give his own account.⁸⁸ Then, after being released, he again went voluntarily to the police station to be polygraphed and questioned.⁸⁹ She also noted that Mr. Keyser received *Miranda* warnings multiple times during all his statements.⁹⁰

Mr. Gabay echoed Ms. Savitz's testimony, and added that he reviewed all the tapes, and at no time did he find a basis for the notion that Mr. Keyser was intoxicated.⁹¹ He also noted that he considered the opinion of Dr. Ed Dougherty, a psychologist who examined Mr. Keyser, who indicated there was no basis to suppress the statements on the grounds that Mr. Keyser was suffering from a psychological condition.⁹² Ultimately, Mr. Gabay reached the conclusion that the filing of a motion to suppress would have been a frivolous filing.⁹³

⁸⁷ A374.

⁸⁸ A375.

⁸⁹ *Id.*

⁹⁰ A376.

⁹¹ A389.

⁹² *Id.*

⁹³ A391.

SIGNIFICANT PRETRIAL APPLICATIONS AND RULINGS

On October 26, 2004, the Court held a hearing to address all of Mr. Keyser's pretrial applications.

The first matter was the defense's motion to exclude certain of the graphic photographs that the State planned to admit.⁹⁴ After reviewing all the photographs and hearing argument, the Court excluded several of the photographs.⁹⁵ On defense's application, the Court also excluded a photograph depicting Ms. Holton's hand wearing a ring.⁹⁶

Next, the Court asked for a status report with respect to Mr. Keyser's custodial statement. The judge was not sure what the issue was, since Mr. Keyser voluntarily went to the police and was *Mirandized*.⁹⁷ After taking a moment to confer with Mr. Keyser, Mr. Gabay stated, "thank you, Your Honor, this is not an issue."⁹⁸

Next for discussion was the October 24, 2003 phone call from Jones' father to Mr. Keyser, which the police recorded. The Court held that there was no basis to exclude Mr. Keyser's statements on the call. In any event, Mr. Keyser made no incriminating statements to Mr. Jones during the call.⁹⁹

The Court then noted that the fact of Mr. Keyser's suicide attempt in prison was

⁹⁴ A117.

⁹⁵ A120.

⁹⁶ A121.

⁹⁷ A123.

⁹⁸ *Id.*

⁹⁹ A124.

admissible, without objection.¹⁰⁰ But the fact of Jones' suicide was the topic of some debate.

The State sought to admit it as evidence of an ongoing conspiracy with Mr. Keyser.¹⁰¹ The court ultimately held that the Jones suicide was admissible as a fact, but could not be considered by the jury to assess the issue of an ongoing conspiracy.¹⁰²

THE SENTENCE

The Court issued its Findings After Penalty Hearing on June 3, 2005.¹⁰³ Despite the jury's finding by a vote of 10 to 2 that the aggravating factors outweighed the mitigating factors, the trial judge sentenced Mr. Keyser to life imprisonment.

THE DEFENDANT'S POINTS

Mr. Keyser has furnished to the undersigned the points he wishes this Court to consider. Mr. Keyser's submission is annexed to this brief as Exhibit B.

CONCLUSION

The judgment of this Court is sought upon the basis of the facts and authorities set forth in this brief.

¹⁰⁰ A125.

¹⁰¹ A125-129.

¹⁰² A129.

¹⁰³ *State v. Keyser*, 2005 WL 1331778 (Del. Super.); A287.

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CERTIFICATE OF SERVICE

I hereby certify on this 16th day of December, 2013, that I, Patrick J. Collins, have served a copy of the foregoing Motion to Withdraw, Brief Pursuant to Rule 26(c), and Appendix on the below listed individual by:

Electronic Mail via Lexis Nexis.

Elizabeth McFarlan, Esquire
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ATTORNEY STATEMENT

Patrick J. Collins and Albert J. Roop, V, counsel for Appellant Michael Keyser, state and affirm as follows:

1. On November 14, 2013, they furnished to Mr. Keyser a true and correct copy of the Motion to Withdraw as Counsel and a true and correct copy of the Brief Pursuant to Rule 26(c).
2. On November 14, 2013, they advised Mr. Keyser that he could state in a writing, delivered within 30 days, any point he would like this Court to consider, and that such a writing will be included in the Brief.
3. Mr. Keyser did in fact furnish the undersigned with Points for Consideration, and that document is included in the Brief as Exhibit B.

COLLINS & ROOP

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Attorneys for Appellant

Dated: December 16, 2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL E. KEYSER,)
) **No. 378, 2012**
Appellant,)
) **ON APPEAL FROM THE**
v.) **SUPERIOR COURT OF THE**
) **STATE OF DELAWARE IN**
STATE OF DELAWARE,) **ID No. 0310021647**
)
Appellee.)

CERTIFICATE OF SERVICE

I hereby certify on this 16th day of December, 2013, that I, Patrick J. Collins, have served a copy of the foregoing Attorney Statement on the below listed individual by:

Electronic Mail via Lexis Nexis.

Elizabeth McFarlan, Esquire
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, DE 19801

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