STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable Daniel McLeod Coble, Circuit Court Judge

DAVID RAY BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NUMBER 2024-000058

PETITIONER'S REPLY TO JOHNSON PETITION FOR WRIT OF CERTIORARI

Gary H. Johnson
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QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED THAT PETITIONER HAD ADMITTED TO CSC 2nd WITH A MINOR AND THAT PETITIONER'S ABILITY TO HAVE POST CONVICTION RELIEF SHOULD BE FORECLOSED, WHEN THE RECORD IS DEVOID OF ANY CONFESSION TO SEXUAL BATTERY?

II. WHETHER THE LOWER COURT ERRED BY FINDING TRIAL COUNSEL EFFECTIVE WHEN:

(a) COUNSEL FAILED TO MOVE FOR SUPPRESSION OF AN IN-COURT IDENTIFICATION BASED UPON AN OUT-OF-COURT IDENTIFICATION WHICH WAS UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTITY?

(b) COUNSEL DECLARED DURING TRIAL THAT STATE'S #9 (CELLPHONE EXTRACTION REPORT) WAS A FABRICATION BUT DURING PCR EVIDENTIARY HEARING STATED HE DID NOT SEE A DEFENSE TO THE USE OF THE CELLPHONE DATA CONNECTED WITH THE PHONES?

(c) COUNSEL EQUATED HIS ABILITY TO THAT OF A TELE-COMMUNICATIONS EXPERT WITNESS BUT FAILED TO DISCOVER AND CHALLENGE 102 TEXT MESSAGES CONTAINED IN THE STATE'S EXPERT'S REPORT, WHICH THE COMPLETE VERIZON RECORDS PROVE WERE NEVER SENT (STATE'S #9 AND #24)?

(d) COUNSEL NEVER SAW THE EXTRACTION REPORT OR COMPLETE VERIZON RECORDS (STATE'S #9 AND #24) UNTIL TRIAL AND HE FAILED TO MOVE FOR EXCLUSION UNDER RULE 5(d)(2), SCRCP?

(e) COUNSEL ALLEGED THAT STATE'S #9 WAS A FABRICATED REPORT BUT DIDN'T REQUEST A RECESS, CONTINUANCE OR OTHERWISE UTILIZE NORMAL RECESS TIME TO COMPLETELY EXAMINE STATE'S #9 VIS-A-VIS STATE'S #24 TO DISCOVER THE 102 TEXT MESSAGES VERIZON RECORDS PROVE WERE NEVER SENT?

(f) COUNSEL FAILED TO MOVE THAT STATE'S #9 BE EXCLUDED PURSUANT TO RULE 404, SCREvi, AS SUCH EVIDENCE ADDRESSES QUESTIONS OF DEFENDANT'S CHARACTER, NOT WHETHER A CRIME OCCURED?

STATEMENT OF THE CASE

On November 18, 2013, the accuser in this case reported to a School District mental health worker, Elizabeth Parker-Floyd, that she had been forcibly raped. This was reported to the School Resource Officer, Michael Griggs. Mr. Griggs spoke to the accuser that same day.

The accuser showed Officer Griggs the picture of her rapist, positively identifying a 16-18 year old male as her assailant. (App., pg. 112, lns. 3-5). The accuser and her rapist hung out together for hours afterward, talking. (App., pg. 112, 8-9). The accuser stated the moon was full and she could "see clearly". (App., pg. 193, lns. 5-8). Her 16-18 year old rapist looked only "slightly older" than hif Facebook picture. (App., pg. 222, lns. 17-25; pg. 223, lns. 1-3).

The following day, the accuser met with a SANE nurse, Temple Hart, and even though she now changed her story to say the Facebook picture was a fake, she still identified her assailant as a 16-18 year old. (App., pg. 279, lns. 20-25; pg. 280, lns. 8-17).

Contemporary to the events between the accuser and her rapist, Petitioner had attempted to "friend" the accuser on Facebook. The accuser refused to friend him because he "was obviously too old". (App., pg. 124, lns. 10-12; lns. 16-24).

Strangely, after 2 months of insisting her rapist was 16-18 year old, she arrived at Detective Strickland's office with her mother and a Facebook picture of the 41 year old, "obviously too old", Petitioner, insisting he was now the rapist. Contradictorily, she stated she just realized this was the man who raped her, but earlier that same day she wrote a report at school which says:

> "When I told him [her assailant] that I saw a Facebook that looked like him & his name was David something (the Guitarist), [sic] he said he didn't know what I was talking about." (Petitioner's Exhibit #1, pg. 6).

The sum of her allegations are that she first identified her assailant as the 41 year olf Petitioner, then she identifies her rapist as the 16-18 year old Facebook male who is not Petitioner, then she states the Facebook of the one she accused is a fake, and then, after insisting her rapist was 16-18 years old she, again, identifies Pettioner as her rapist.

The police procedure for identification was rediculously suggestive. On January 18, 2014, Detective Strickland holds before the accuser one (1) single photograph of Petitioner and asks if she can identify him. (Petitioner's Exhibit #2, page 4 of 4 pages).

The DNA evidence is inconclusive -- a 1 in 240 probability; or, as trial counsel stated, "If you were to look at Lexington alone, that puts 20, 30,000 eligible men that could potentially be the contributor." (App., pg. 79, lns. 17-19).

The extraction report created concerning the accuser's phone presented 302 text messages. (State's #9). Of those 392 text messages, 102 were never sent, according to the complete Verizon records. (Petitioner's Exhibits #3 and #4). Of these 102 messages which were never sent, 3 were discussed by the Judge during pretrial, 7 were read into the record during direct excamination of the accuser, and 1 was discussed by the creator of the report, Mr. Phipps. Even more damning is that th ejury was so interested in these particular text messages that they requested individual copies for use during deliberations. (Petitioner's Exhibit #5).

ARGUMENT AND AUTHORITY

I. THE LOWER COURT ERRED THAT PETITIONER HAD ADMITTED TO CSC 2nd WITH A MINOR AND THAT PETITIONER'S ABILITY TO HAVE POST CONVICTION RELIEF SHOULD BE FORECLOSED, WHEN THE RECORD IS DEVOID OF ANY CONFESSION TO SEXUAL BATTERY.

"The legal definition of 'confession' is 'restricted to acknowledgment of guilt and does not apply to mere statements of fact from which guilt may be inferred'." State v. Cunningham, 275 S.C. 189, 192 268 S.E.2d 291 (1981) (quoting State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947)). See also 29A Am. Jur.2nd Evidence §709 (1994):

> "although every confession is an admission, not every admission is a confession".

State v. Osborne, 335 S.C. 172, 516 S.E.2d 201 (1999).

S.C. Code Ann. §16-3-655(b)(1) requires that "the actor angage in sexual battery with a victim ...". Sectoin 16-3-651(b) states "'Sexual Battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of

a person's body or of any object into the genital or anal openings of another person's body ...".

The Petitioner gave a lengthy statement in mitigation from which guilt may be inferred. (App., pgs. 508, ln. 13 through 513, ln. 13). However, Petitoner never confessed to sexual battery, a required element of the crime of CSC 2nd With a Minor.

The bias of the PCR judge Petitioner elleges stems"from an extrajudicial source and result[ed] in decisions based on information other than what the judge learned from his participation in the case". "The party must show some evidence of bias or prejudice". Mallet v. Mallet, 323 S.C. 141, 145, 473 S.E.2d 804, 807 (Ct.App. 1996).

The PCR court stated in his Order of Dismissal, "Brown's trial counsel was aware of Brown's assertion to him that he was in love with the minor and acknowledged his involvement with her." (App., pg. 701, pgh. 2). Yet, it was trial counsel's testimony that:

> "I just remember his defense was that he was in love and they had really connected. That's all he would say. I don't think he ever made any admissions to me about any specific conduct." (App., pg. 669, lns. 23-25; pg. 670, ln. 1).

Further in the Order, the lower court held:

> "His admission of guilt within the plea in mitigation should foreclose his ability to have post conviction relief." (App., pg. 701, pgh. 4, lns. 1-2). (Emphasis supplied).

The Order of Dismissal is permeated throughout with extrajudicial bias. The judge's prejudice hampers his ability to adjudicate fairly. A new hearing should be granted.

II(a). THE LOWER COURT ERRED BY FINDING TRIAL COUNSEL EFFECTIVE WHEN COUNSEL FAILED TO MOVE FOR SUPPRESSION OF AN IN-COURT IDENTIFICATION BASED UPON AN OUT-OF-COURT IDENTIFICATION WHICH WAS UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTITY.

"A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification". State v. Liverman, 398 S.C. 130, 723 S.E.2d 422 (2012), citing State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004).

The "identification procedure arranged by police" was to present one (1) photograph to the accuser and write on the accuser's statement:

> Q. I just showed you a photograph of a man. Do you recognize him? (Petitioner's Exhibit #2, page 4 of 4).

Under the totality of circumstances, the factors to be considered in assessing the reliability of the otherwise unduly suggestive identification procedure are:

> (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at confrontation, and (5) the length of time between the crime and the confrontation".

Liverman, supra., citing Manson v. Braithwaite, 432 U.S. 98, 114 97 S.Ct. 2243, 53 L.Ed. 140 (1977)) (citing Biggers, 409 S.E. at 199-200, 93 S.Ct. 375).

Petitioner refers to the Statement of the Case, page 3, above, for identification purposes to show the police procedure was

impermissibly suggestive, and that trial counsel was ineffective for not challenging the in-court identification on these grounds.

(1) PCR COUNSEL WAS INEFFECTIVE FOR NOT ADDRESSING THIS ISSUE AND PRESERVING IT FOR APPELLATE REVIEW.

The South Carolina Supreme Court has stated:

> "As a method of effecing the purpose of Rule 71.1(g), SCRCP, and enforcing Austin's entitlement to a PCR procedure, the Court has held Austin could attack his PCR counsel as ineffective by a petition for a writ of certiorari." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 756 (1999).

Petitioner asserts the claim immedicately above is of merit and that he was entitled to have this issue raised by PCR counsel. Failur opf counsel to not so raise is ineffective assistance of counsel and entitled Petitioner to remand for a new hearing.

II(b)(c)(d)(e)(f). THE LOWER COURT ERRED BY FINDING TRIAL COUNSEL EFFECTIVE WHEN

(b) COUNSEL DECLARED DURING TRIAL THAT STATE'S #9 (CELLPHONE EXTRACTION REPORT) WAS A FABRICATION BUT DURING PCR EVIDENTIARY HEARING STATED HE DID NOT SEE A DEFENSE TO THE USE OF THE CELLPHONE DATA CONNECTED WITH THE PHONES;

(c) COUNSEL EQUATED HIS ABILITY TO THAT OF A TELECOMMUNICATIONS EXPERT WITNESS BUT FAILED TO DISCOVER AND CHALLENGE 102 TEXT MESSAGES CONTAINED IN THE STATE'S EXPERT'S REPORT WHICH THE COMPLETE VERIZON RECORDS PROVE WERE NEVER SENT (STATE'S #9 AND #24);

(d) COUNSEL NEVER SAW THE EXTRACTION REPORT OR COMPLETE VERIZON RECORDS (STATE'S #9 AND #24) UNTIL TRIAL AND HE FAILED TO MOVE FOR EXCLUSION UNDER RULE 5(d)(2), SCRCP;

(e) COUNSEL ALLEGED THAT STATE'S #9 WAS A FABRICATIED REPORT BUT DIDN'T REQUEST A RECESS, CONTINUANCE OR OTHERWISE UTILIZE NORMAL RECESS TIME TO COMPLETELY EXAMINE STATE'S #9 VIS-A-VIS STATE'S #24 TO DISCOVER THE 102 TEXT MESSAGES VERIZON RECORDS PROVE WERE NEVER SENT.

(f) COUNSEL FAILED TO MOVE THAT STATE'S #9 BE EXCLUDED PURSUANT TO RULE 404, SCREvi, AS SUCH EVIDENCE ADDRESSES QUESTIONS OF DEFENDANT'S CHARACTER NOT WHETHER A CRIME OCCURRED.

Lexington County Forensic Technology Examiner Michael Phipps' testimony inferred that, beyond any doubt, the text messages in State's #9 Cellphone Extraction Report were sent between the accuser and accused. (App., pgs. 308-341).

The State's #9 shows 392 purported messages. State's #24 is the complete Verizon records related to these phones. The Verizon report shows 102 messages were never sent. Of the 102 which were never sent, 3 were discussed by the judge during pretrial, 7 were read into the record by the accuser, and 1 was dsicussed by Mr. Phipps. The jury requested copies for each of them during deliberations. (See, Petitioner's Exhibit #5). Text messages never sent have no probative value.

The 102 text messages were never authenticated. "All evidence must be authenticated." State v. Brown, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2010). "Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force." State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct.App. 2018).

Trial counsel noted that the cellphone extraction report, State's #9, was a fabrication. He did not motion for recess, continuance or otherwise utilize the time he did have during normal recess to go over the records, and he did not employ a telecommunications expert witness, to find proof in the Verizon records, State's #24, that the messages were never sent. He had thought too much of his alleged expertise:

> Q Were you, also, familiar at the time of this trial with cell phone extractions?
> A. I'd say I'm probably more proficient than most in cell phone data.
> Q. And why is that?
> A. Because of my age. No offense, but I grew up in the cell phone era, so I'm, I guess, hip to the times. I do a lot of cell phone cases, too. Particularly, murder cases, they like to use them. So we do a lot of cell phone extraction cases.
> (App., pg. 652, lns. 20-25; pg. 653, lns. 1-4).

So, Trial counsel's overconfidence ... his "hip"ness ... has cost Petitioner, so far, fourteen years of his life. This was not "trial strategy". this was incompetence and ineffectiveness.

Finally, the accuser alleged she sent nude photographs of herself and Petitioner used his possession as leverage to coerce her into meeting and spending time with him. This is an allegation of bad character.

The prosecution used this evidence of bad character to allege Petitioner used the threat of exposing the photos to accuser's friends to forcibly rape her.

Texts to meet and hang out together do not equate with texts to rape. Coercing a female to spend time with you is not an element of CSC 2nd With a Minor. There is no probative value in any of the

texts. There was no dsicussion of rape. There was no regret nor recrimination, nor even suggestion, in any of the messages, that the two had sex, much less that forcible rape had occurred. If a 41 year old man sweet talks, argues with, even coerced a minor female to spend time with him, that only reflects that he is of bad character. It does not amount to rape. Yet, State's #9 was used to inflame the passions of the jury so that they may assume rape, just as the PCR judge assumed Petitioner had admitted to Sexual Battery. S.C. Rules of Evidence, Rule 404(a), prohibits this:

> "Evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion".

Trial counsel was ineffective for not moving the court to exclude State's #9 due to it being character evidence used to prove a crime.

(1) PCR COUNSEL WAS INEFFECTIVE FOR NOT ADDRESSING THE ISSUES LISTED IN PARAGRAPHS II(b)(c)(d)(e)(f), ABOVE, AND PRESERVING SAME FOR APPELLATE REVIEW.

Petitioner is entitled to effective assistance of counsel in PCR proceedings. Odom v. State, supra. He claims these subjects are with merit and failure of PCR counsel to raise them is ineffective assistance of counsel and entitles Petitioner to remand for a new hearing.

CONCLUSION

WHEREFORE, PREMISSES CONSIDERED, Petitioner prays that this Court grant certiorari, that the case be remanded to the circuit

court for rehearing of the issues listed herein, that he be assigned a new circuit judge, that he be appointed new counsel, that such counsel be instructed to motion the circuit court for approval of fees to employ both DNA and telecommunications expert witnesses; or in the alternative, that this Court assume jurisdiction over each of the questions presented herein and rule to overturn or set aside Petitioner's convictions and sentences, and that he be granted any such and further relief as may be deemed appropriate and just.

RESPECTFULLY SUBMITTED:

David Ray Brown

David Ray Brown, Pro Se
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Pelzer, SC 29669

Dated: 12-9-24

VERIFICATION

I, David Ray Brown, hereby verify that I have read and understand the foregoing 11 pages and swear under penalty of perjury that the contents thereof are true and correct to the best of my knowledge and understanding, excepting as to matters stated upon information and belief, and as to those I believe them to be true also.

David Ray Brown

David Ray Brown