

May 14, 2014

State of South Carolina In The Supreme Court

Certiorari to Darlington County
R. Ferrell Cothran, Jr., Circuit Court Judge

Taveio Boston,

Petitioner,

V.

State of South Carolina,

Respondent

RECEIVED

MAY 29 2014

S.C. SUPREME COURT

Appellant Case No. 2013-001889

Johnson Petition For Writ of Certiorari

Pro se Response: By Appellant Taveio Boston

Benjamin John Tripp: Appellant Defender

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Issues Presented

11. Did PCR court fail to rule that trial counsel was ineffective for not investigating Appellant's medical history, evaluations, and life history?
12. Did PCR court fail to rule that trial counsel was ineffective for not investigating Appellant's confession given during interrogation which was not voluntarily made which deprived Appellant of a fair trial?
13. Did PCR court fail to rule that trial counsel was ineffective for not investigating eyewitness statement when he stated that was what he was worrying about?
14. Did PCR court fail to rule that trial counsel failed to give Appellant Rule 5 and still advise Appellant to plead guilty and not investigate and prepare Appellant's case, which Appellant plead guilty without knowing the nature and crucial elements of offense, which Appellant's plea involuntary?
15. Did PCR court fail to rule that trial counsel was ineffective for allowing the solicitor to solicit about crimes that Appellant was not charged with in indictment?

Statement

On April 7, 2011, the Darlington County Grand Jury indicted Petitioner Tavelo Rawol' Bilal Boston on two counts of murder and assault and battery with intent to kill. App. 84-88. On September 14, 2011, Petitioner attended a plea hearing before The Honorable Paul M. Burch. Richard Jones represented Petitioner and Kernard E. Redmond represented the state. App. 1.

During the hearing, the state alleged that on October 26, 2008, Petitioner had an argument with his mother, who was 8 months pregnant. At their residence that evening, Petitioner confronted and shot her 5 times with a handgun. Petitioner then shot his sister, also in the residence, in the neck before fleeing in his mother's car. Petitioner's mother later died along with unborn child, but his sister survived. App. 12, In. 18- App. 15, In. 12. Petitioner was only fourteen at the time. App. 18, In. 18-23.

The Plea Judge engaged Petitioner in a routine plea colloquy. App. 5, In. 21- App. 12, In. 15. The Judge then sentenced Petitioner to concurrent sentences of twenty years imprisonment for the charge of assault and battery with intent to kill and thirty-six years for each charge of murder. App. 26, In. 16-20.

On June 12, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 29-42. The state filed a return on August 12, 2012. App. 43-46. On July 15, 2013, Petitioner attended a hearing before The Honorable R. Ferrell Colthran, Jr. Charles T. Brooks, III represented Petitioner and Karan C. Ratigan represented the state. App. 47.

On August 13, 2013, the PCR Court issued an order of dismissal. The order stated Petitioner knowingly and voluntarily pled guilty because he told the plea judge that he understood the trial rights he was waiving and that he had not been coerced in any way. Therefore, he could not establish ineffective assistance of plea counsel. App. 75-83.

Petitioner was appointed Attorney Benjamin John Tripp of South Carolina Commission of Indigent Defense. Attorney filed Johnson petition for writ of certiorari. This is Appellant's Pro se Response.

Issue Number One

Did PCR Court fail to rule that trial counsel was ineffective for not investigating Appellant's medical history, evaluations, and life history?

Argument

The PCR Court failed to rule that trial counsel was ineffective for not investigating Appellant's medical history, evaluations, and life history. Appellant was deprived a fair trial by deficient performance because trial counsel failed to investigate these things of his client. Trial counsel was suppose to investigate Appellant's medical history and evaluations to see and be sure that Appellant understood all his rights and court procedures so that Appellant could have made an decision on whether he wanted to go to trial or plea. Trial Counsel should have investigated the two because this revolves around the Appellant's mental condition and also Appellant's frame of mind, in order to know, acknowledge, and understand his rights, so that he could have made a decision. Trial Counsel should have investigated Appellant's medical history, evaluation's, and life history so he could assist Appellant in preparing a defense for the crime that was charged. Trial Counsel should have investigated the three because it is a possibility that these things were and had a affect on the Appellant to commit the crime. It was mandatory that counsel should have investigated Appellant's case because by the 6th Amendment of the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense". Nevertheless, Adams v. United States ex. rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 241-42 (1942), makes it plain that "the right to the assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalities. They rest on considerations that go to the substance of an accused's position before the law. The public-conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense". This is relevant and should have been investigated because a person accused of a crime should know and understand the criminal procedures and his rights that he has. The fifth Amendment of the United States Constitution is like a weapon for the accused which states "nor be deprived of life, liberty, or property without due process of law". Which the the 14th Amendment enforces by commanding "nor shall any person be deprived of life, liberty, or property without due process of law; nor deny to any person within

its jurisdiction the equal protection of laws." Due process is a procedural process that grants adequate notice, opportunity to be heard, right to introduce evidence and a right to confront and cross-examine witnesses. The evaluations that Appellant had should of been taken in by trial counsel. If trial counsel would have investigated, he would discerned that Appellant was 14 years of age at the time of the evaluation. App. 4, In. 18-25, App. 5, In. 1-4. Also a second evaluation was done. App. 65, In. 14-25, App. 66, In. 1-6. Where as Appellant confirms having evaluations. App. 56, In. 15-21. Trial counsel should of investigated evaluations and counsel would have seen that Appellant had a low level of education, intelligence, and understanding. He also would have noticed that at the end of both evaluations the examiners requested that Appellant was 14 years of age at the time of evaluation and that if Appellant was to get waived up to general sessions court, he should have another evaluations, so that Appellant may understand. On Appellant third evaluation also at the same age examiners found a cyst on the Appellant's brain and said that it causes emotional symptoms. The evaluations also saw that during the time of the crime and before the crime that Appellant was on medications for depression, mood swings, ADHD, and anger problems. They found in Appellant's prior and recent medical records that Appellant had a conduct disorder, Xanax Abuse, cannabis abuse, and a depressive disorder. They also found that Appellant was also attending Pee Dee Mental Health center at the time of the crime. Which counsel stated at sentencing. App. 17, In. 17-22. Appellant also had previous evaluations which examiners compared them to the evaluations in 2008. Which the Appellant's IQ went from 100 in 2002 and decreased to 76, which examiners labeled below average at the age 14 years old. Trial Counsel fail to investigate these things. Examiners recommended that Appellant should have another evaluation before sentencing to make sure he may understand everything against him and his rights. Which Appellant states at PCR hearing. App. 56, In. 15-23. He also mentioned at sentencing that Appellant was Abused as a child. App. 16, In. 1-3. In order of dismissal, App. 79, trial counsel states he had no problems communicating with Appellant and Appellant never said he didn't understand their discussions. In *Riverla v. Franzen* 594 F. Supp. 198 it says "trial counsel's impression that client was lucid and controlled during their interviews did not adequately relate to client's mental condition on the night of the crime." Trial counsel was judging Appellant frame of mind at the time of their

meetings. Which Appellant only meet with trial counsel three times. App. 57, ln. 24-25, App. 58, ln. 1. He never had time to observe and anatomize Appellant's mind. Appellant raised medical defenses to the trial counsel, which trial counsel admits. App. 71, ln. 4-19. He states that I was a smart young man, but at sentencing he says that I was still a kid and may not have done well in school, but I was maturing. App. 16, ln. 14, App. 17, ln. 11-12. He also stated that we could of argued that Appellant was young at the time of the crime. Young means first or early stage in life or recently come into being. A young person doesn't fully understand. Appellant was deprived a fair trial and it prejudice Appellant because trial counsel knew Appellant had lack of education and understanding because he admitted that he looked through Appellant's notebook which had his Rules in it. From Appellant's first Attorney. App. 70, ln. 18-22. Trial counsel knew I was on medication before and after the crime. If trial counsel would have investigated like he was suppose to, we could have prepared and looked for a defense within Appellant's request. And this failing to investigate these things, the trial counsel also could have requested that Appellant have another evaluation before he was ready to make a decision. To see if Appellant understood all rights and court proceedings as stated in *Attman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), before a defendant can enter a guilty plea, he must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum sentence he can receive before he pleads guilty. If Appellant would have chosen trial, the jury and court would of had to deliberate on whether Appellant was competent. Criminal Law 1221 and Criminal Law 683(3). In *Rivera v. Frazer*, it says "Livingston did not make any investigation of a potential insanity defense, aside from his conversations with Rivera. Thus, the standard enunciated in Strickland mandates two separate inquires in this case. First, did Livingston's conversations with Rivera amount to a "reasonable investigation" into a potential insanity defense. If not, then was Livingston's decision not to further investigate this potential defense a reasonable decision in light of all circumstances, including Livingston's conversations with Rivera." It was reasonable that he investigate Appellant's because Counsel even stated that Appellant was very young at the time, on medication, and was going to Pee Dee Mental Health. Appellant should of had another evaluation before any type of plea or trial just as in *Harris By And Through Ramseyer v. Wood* 64 F.3d 1432 (9th Cir. 1995), where defendant requested the same thing. Counsel prejudiced Appellant because he

knew of all Appellant's medical history, life history, and evaluations and he still advised Appellant to plea because counsel stated at PCR hearing the case was sitting for 3 years and he wanted the solicitor to get the case before the year was out. App. 69, In. 23-25, App. 70, In. 1. When he advised Appellant to plea he let Appellant self-incriminate himself which is a violation of Appellant's 5th Amendment right, which states that "nor 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; nor shall private property be taken for public use, without just compensation." If it wasn't for counsel's ineffectiveness, the Appellant would have chosen trial and it's a possibility that Appellant's mental condition would have been taken in by the jury. And counsel could of also motion for another evaluation if he would have investigated these things, so that Appellant could have made a decision on what he wanted to do and to make sure he understood rights. At trial the jury would have had to make a decision on whether Appellant was competent during time of the crime or not. But there is also no other evidence that could of convict Appellant if trial was decided after evaluation. Appellant's confession during the time of investigation was coerced and in violation of Appellant's 5th Amendment because Appellant self-incriminated himself and at a Jackson v. Denno hearing it would of gotten suppressed and wouldn't be able to be used against Appellant. The Eye witness statement is not credible to where it may convict the Appellant of murder because Eye witness has two statements which one she states that she had her eyes closed and when she opened them when the shooting stopped, she saw Appellant running from scene in the dark, and her second statement says she saw Appellant commit murder in dark, but never had full vision of Appellant in dark and at trial I have a right to cross-examine her or the motion for a suppression of her statement. And there is nothing in evidence to prove that Appellant committed the crime of murder, so the state will not be able to prove malice aforethought because the state dismissed Appellant's weapon charge and that is the only thing that can prove malice and that Appellant committed the crime. The state would not be able to speak upon a weapon or charge Appellant in an indictment because it would be in violation of Appellant's 5th Amendment right which is "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The jury would not be able to prove the elements of murder and neither the state. If it wasn't for counsel's ineffectiveness Appellant would have had confidence in the outcome of trial, if trial was chosen.

Issue Number Two

Did PCR court fail to rule that trial counsel was ineffective for not investigating Appellant's confession given during interrogation which was not voluntarily made which deprived Appellant of a fair trial?

Argument

~~The~~ PCR court fail to rule that trial counsel was ineffective for not investigating Appellant's confession given during interrogation which deprived Appellant of a fair trial because the confession was not voluntarily made. Appellant was deprived a fair trial by deficient performance because trial counsel failed to do a thorough investigation of Appellant's confession to see if it was voluntarily, intelligently, knowingly and freely given and made. When determining whether a confession is voluntary and not coerced is to be based on the totality of the circumstances. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602. This is to see whether the confession was freely made. And also whether it was voluntary, knowingly, and intelligently given. The totality of the circumstances are the accused's age, maturity, family environment, education, emotional and mental state and also if the accused has a prior record of being arrested. Defendant's constitutional rights have been violated if conviction is based on, in whole or in part, on involuntary confession, regardless of its truth or falsity, even if there is ample evidence aside from confession to support conviction, Criminal Law 110 (410.76). If person in custody is to be subjected to interrogation, he must be first informed in clear and unequivocal terms that he ~~may~~ remain silent. He is also to be informed that he has a right to have an attorney present at this time. If right is waived by accused then anything said by accused can be used against him. But do to the 5th Amendment which clearly states that "nor shall be compelled in any criminal case to be a witness against himself." When you waive this privilege, you are agreeing to cooperate with officers. Trial counsel was to investigate Appellant's confession and if he would have investigated the confession, he would have seen that Appellant violated his 5th Amendment right against self-incrimination. This 5th Amendment is what protects citizens when they are held or in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. Appellant was arrested around 9:30 p.m. on October 26, 2008 and taken into custody by several police officers. Appellant gave 2 confessions, which the first confession was not admitting to the crime, while the second confession Appellant owned up to murder.

Appellant's first confession was at 10:30 p.m. while Appellant's second was at 2:55 a.m. which would have been October 27, 2008. Where the officers did a audio/video statement and had Appellant sign for statement which two signatures by Appellant were given by Appellant. As for the Miranda rights state differently. The first Miranda rights say November 26, 2008 which the Appellant was at the Department of Juvenile Justice. The time on the Miranda rights of it says at 10:30 p.m. On the second Miranda rights it states at 2:55 a.m. on October 26, 2008 Appellant waived his rights. This is really and truly not accurate because at 2:55 a.m. on October 26, 2008 Appellant was at home asleep. This Miranda rights that were signed by Appellant has two different timings. The first Miranda rights were dated a month after Appellant's statement and that crime occurred. Appellant was never asked would he like to have a parent or guardian present at the time of interrogation. On Appellant's Miranda rights it only states that a lawyer may be present. ~~It doesn't mention a lawyer.~~ Appellant was 14 years old at the time of the interrogation, he was there alone with 6 investigators who questioned him about the crime that was supposedly committed by him. Appellant was in interrogation for 6 hours alone with officers. This was Appellant's first time being arrested and he had no knowledge of law. Appellant was on medication for mood swings and anger problems from what Appellant told officers. Appellant's education was below average as medical records state. Appellant was also crying during 2nd confession and Appellant's mental state was low of understanding. These are the totality of the circumstances. Appellant thought that he had to cooperate with the police officers ~~because~~ they are the law. In Appellant's medical record it states that Appellant can be told something, read something, or read something himself and don't understand what is being said or interpreted to him. Appellant did not have a full understanding or no understanding of his constitutional rights because this was Appellant's first time dealing with law Enforcement. In *Gallegos v. Colorado*, 370 U.S. 49, 84 (1962), it says "observing that a 14 year old suspect could not be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." The juvenile defendant, in the court's review, required "the aid of more mature judgement as to the steps he would take in the predicament in which he found himself. A lawyer or an adult friend or friend could have given the petitioner the protection which his own maturity could not." The courts stated in

North Carolina v. Butler 441 U.S., at 373, that the question whether the accused waived his rights is not one of form, but whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. Thus the determination whether statements during Custodial Interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the Interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel, Miranda v. Arizona, 384 U.S., at 475-477. Appellant gave first confession at 10:30 p.m. and gave an story of being kidnapped. While after the first statement still being harassed, threatened, and questioned by officers, the officers exited the interrogation room. Appellant went to sleep and at 2:55 a.m. or a couple minutes before then Appellant was awoken by more officers and questioning, but this time they had an tape recorder which eye witness was saying that Appellant was the one who committed the crime. Appellant denied, then came more officers and questions and telling Appellant he was going to get 30, 40 years to life, then Appellant finally confessed and said he committed the crime. They all thus share salient features - incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminate statements without full warnings of Constitutional rights, Miranda v. Arizona. The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. If Appellant's counsel would have investigated Appellant's confession he would have seen that this was a violation of Appellant's 5th Amendment. Trial counsel prejudice Appellant a fair trial when he advised Appellant to plea because he thought Appellant's confession and eye witness statements were damaging. But Appellant knew that the confession had issues and could of been argued at trial. App. 70, ln. 2-6. But also counsel stated that Appellant told him about the confession, but he didn't remember it. App. 69, ln. 12-16. If he would have investigated he would of never let me incriminate myself into advising me to plea. He states he was worrying about eye witness statement and he was trying to get me in court before the end of the year. App. 69, ln. 19-25, App. 70, ln. 1-6. But also where counsel admits that he just stopped investigating Appellant's case. App. 70, ln. 15-22. He states he flip through it ~~of~~ a time or two which is not effective assistance of counsel, which he

Just stop investigating Appellant's case. This was a violation of Appellant's 6th Amendment right to have assistance of counsel for his defense. It was again a violation of my 5th Amendment because counsel knew we could have argued confession and still advised me to plea which I incriminated myself by advise from counsel because he failed to investigate Appellant's case but instead was focusing on getting Appellant in court before year out. This prejudiced Appellant of a right to a fair trial. If Appellant would of went to trial, Appellant's counsel could have put in a motion for a Jackson v. Denno hearing to get Appellant's confession suppressed due to the fact that it was in violation of Appellant's 5th Amendment right and it was not voluntarily given due to the totality of circumstances of the custodial interrogation. Jackson v. Denno, 309 F.2d 573. At trial the Eyewitness could of been cross-examined due to the fact that the eyewitness gave two statements when she did not get a full description of the accused. In her first statement she stated that she saw defendent commit murder and shot her in the dark. While in her 2nd statement, she states that her eyes were closed and when she opened them when she heard shooting stop and saw Appellant running from the house. The Appellant has a right to cross examine witnesses against him due to the 6th Amendment of the United States also required by the due process claim of the 5th Amendment that the 14th Amendment commands. At trial, the state would of had to prove evidence to show by proof that Appellant committed murder with malice aforethought, willingly, feloniously, with a handgun as Appellant indictment says. The state must prove malice & intent to the jury in order for a guilty verdict to be lawfully returned by the jury of Appellant's guilt by the state by proving that that weapon was the cause of death and is where the malice is inferred from. The Judge can not charge the jury with crimes that Appellant was not indicted of because Appellant has a right to an indictment by a legal grand jury in order to have a fair trial upon. That's by my 5th Amendment which states "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." If there is no indictment charging Appellant of a crime then there can not be an opportunity to be heard nor to put in issue Appellant's presumption of Innocence because Appellant is already innocent if never indicted. Therefore at trial the prosecutor can not mention nothing at all at trial to the jury about shooting a gun ~~because~~ to kill the victim because

the state dismissed Appellant's gun charge. At trial when Appellant's confession would of been suppressed, there would be no evidence to prove malice to the jury at trial in order for the judge to charge the jury with malice aforethought so they could go into jury room and weigh all the evidence to try to see if any malice exist, so they could return a verdict of guilt. There will be no evidence because there is no gun that is required to find malice from because Appellant's indictment says he shot someone with a handgun, which the state dismissed Appellant's gun charge. And at a new trial they would not be able to charge Appellant with a weapons charge because it would be a violation of Appellant's 5th Amendment right which clearly states that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". If trial counsel would of investigated Appellant's confession as he states at PCR hearing that Appellant mentioned it, they could have prepared a defense for trial. And it is a reasonable probability that Appellant would of had confidence in the outcome of trial.

Issue Number Three

Did PCR court fail to rule that counsel was ineffective for not investigating Eyewitness statement when he stated that was what he was worrying about?

Argument

The PCR court failed to rule that trial counsel was ineffective for not investigating the Eyewitness statement when he stated that was what he was worrying about. App. 69, In. 12-18. Appellant was deprived a fair trial by deficient performance because trial counsel failed to investigate eyewitness statement. If counsel would have investigated eyewitness statement, he would have seen that eyewitness first statement was given to officer Sgt. Tim Robertson-53609 on October 26, 2008. at around 2345 hours. Eyewitness stated that she and her mom ~~he~~ were at home watching T.V. when she got up to put some laundry in and as she walked back into the living room to proceed watching T.V., she saw defendant standing in the doorway, in the dark. She stated that she heard some gun shots and then saw Appellant shoot her mom. Then turn and shoot her. Eyewitness second statement was given to officer Ray Patricia on October 26, 2008 also but doesn't have the time. In this statement Eyewitness states that Appellant stood in front of her and her mother and begin shooting her mother, then shot her. She said when she opened her eyes she seen Appellant running from the home. Eyewitness was the age of twelve years old at the time of the crime. Eyewitness did not sign an Affidavit verifying that Appellant was the shooter or verified that she was the one who gave this statement to the police officers. She also did not give a description to the police officers describing how Appellant looked at the time of the crime. She stated to the officers that defendant's name was Taveio Boston and that he was 14 years old and that he did the shooting. Eyewitness had an adult with her during statement and if the eyewitness could not have signed for eyewitness herself then the Adult would have to do so to confirm that eyewitness was not coerced of any sort. Eyewitness was never given photographs on what the defendant looked like. If counsel would have investigated the statements, he would have discerned that there was a defense that we could have bringing up at trial, but he admits he only looked through Appellant's file only once or twice then quit. App. 70, In. 7-22. Eyewitness also stated that she heard Appellant's voice in her statement to Ray Patricia. In determining whether possesses particularized guarantees of trustworthiness under Subsection (B)(2)(B), the court may consider but is not limited to the

following factors: Child's personal knowledge of the event, Age and maturity of child, certainty that the statement was made including the credibility of the person testifying about the statement, any apparent motive the child may have to falsify or distort the event including bias, corruption, or coercion; more than one person heard the statement, whether the child was suffering pain or distress when making statement, nature and duration of any alleged, whether the child's young age makes it unlikely that the child fabricated a statement that represent graphic, detailed account beyond the child's knowledge and experience, whether the statement was a ring of verity, has internal consistency or coherence and uses terminology appropriate for the child's age, and whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement. This is Criminal law 19-1-180. Out of court statements by certain children. Trial counsel should have investigated the eyewitness to see if we could have built a defense and attack the credibility of the eyewitness statement. Rule 609, impeachment by evidence of conviction of crime. Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unjust and unfair prejudice, confusion of issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. And also Rule 608. Evidence of character, conduct, or bias of witness. If counsel would have investigated eyewitness statement he would have seen that it was a possible defense that could of been built upon. The witness claims that she identified the Appellant in her statement. She also says that she heard Appellant's voice before shooting occurred. where as in Neil v. Biggers, 93 S. Ct. 375 (1972) where his victim states she heard his voice. Voice identification is weaker than a visual and physical identification. Meaning you have to have a "full" and "complete" description claiming that you saw a person commit a particular crime. If a person is claiming that they saw someone commit a crime then they should be able to describe the physical appearances of an accused. As in United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568 (1973), it states "As the court of Appeals recognized, the dangers of mistaken identification... set forth in Wade are applicable in large measure to photographic as well as corporeal identifications. 149 U.S. App. D.C., at 9. 461 F.2d, at 100. To the extent that misidentification may be attributable to a witness faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display

as at a line up. But because of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality.... a photographic identification even when properly obtained, is clearly inferior to a properly obtained corporeal identification. P. Wall, Eye-witness Identification in criminal cases 70 (1965). Indeed noting 'the hazards of initial identification by photograph, we have expressly recognized that a "corporeal identification" is normally more accurate than a photographic identification. Corporeal meaning physical or material or both.' Rule 901: Requirement of Authentication or Identification, General provisions and illustrations. As in *Stovall v. Denno*, (1967) 388 U.S. 293, 18 L Ed 2d 1199 87 S.Ct 1967, where the supreme court dealt with the first time with the constitutionality of suggestive show up identification which also in that case dealt with criminal law and procedure: Eyewitness Identification, Fair identification requirement which is: The factors to be considered in the evaluating of the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness degree of attention, the accuracy of the witness prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. In *Stovall v. Denno*, 388 U.S. 293 (1967) states "the court held that the defendant could claim that the confrontation conducted... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This, we held, must be determined on the totality of the circumstances". Eyewitness stated that her brother did the shooting where as she went to put in laundry and came back to the living room and saw her brother in the doorway which was opened and also dark outside. She said she then heard gunshots and saw her brother shoot her mother then her. In her second, she states her eyes were closed and when she opened them, she saw Appellant running from home. In the distance from ~~the~~ where eyewitness was, was at least 10 to 15 yards away from the doorway. It was dark and she stated she had her eyes closed which she could not have identified a shooter 10 to 15 yards away in the dark or with her eyes closed. She said she saw Appellant running from the home, which she also states in both her statements that she ran from the home. But at sentencing it states that Appellant took his mother's car went to biological father's house. When eyewitness stated she went to put in laundry, the door was opened to the house and it was also dark in the house and outside the house. In these conditions she never saw the shooter's face, clothing, physical, skin,

or anything in particular because she had her eyes closed and it was also dark in the home and outside. When eyewitness said that she went to put in laundry, it's a possibility that an intruder or suspect, or anyone else could have come into the home and shot her and her mother. The door was a screen door. In Neil v. Biggers, 93 S.Ct. 375 that Appellant's witness, mentioned she had interacted with defendant before and also claimed to see Appellant in dark house and under the moonlight outside and she also gave an description to the officers and said at photograph line up that it was Appellant because she could never forget his face. Moreover, in the Neil v. Biggers case it states "the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime and also the complaining witness was unable to give a good physical description of her assailant" to the police officers. If trial counsel would have done an investigation of the eyewitness, we could of had a defense at trial. He said that the statements were damaging. Trial counsel prejudice Appellant because Appellant has a right to the due process clause required by the 5th Amendment which is the right of adequate notice, opportunity to be heard, corroborate evidence, and right to confront and cross examine witnesses. Trial counsel also prejudice Appellant because he advised Appellant to plea because he stated that the eyewitness statement was damaging. When he advised Appellant to plea, he allowed Appellant to violate his 5th Amendment right which no person shall be a witness against himself and this is guaranteed and recommending it to citizens by the 14th Amendment due process clause. Appellant's 5th Amendment was also violated which Appellant has a right to assistance of counsel for his defense and that assistance is to help and give loyalty to the Appellant and this 6th Amendment was also violated because Appellant has a right to a fair trial. If it wasn't for counsel's ineffectiveness Appellant would have chosen to go to trial and had confidence in the outcome because there would have been no other evidence to Appellant was guilty of murder. Appellant's Confession would have been suppressed and couldn't be used against him at trial, cause it's a violation of his 5th Amendment and wasn't given voluntarily. And Appellant would of had a chance to cross-examine witness and it would of been up to the jury to decide by the state's evidence beyond a reasonable doubt which the state has no evidence committed the crime of murder in which the state dismissed Appellant's weapon charge which was the only thing could have proved malice and they could not have recharged him cause it would of violated 5th Amendment which no person shall be charged for same offense twice to be put in double jeopardy. Appellant would of had confidence at trial.

Issue Number Four

Did PCR court fail to rule that trial counsel failed to give Appellant Rule 5 and still advise Appellant to plead guilty and not investigate and prepare Appellant's case which Appellant plead guilty without knowing the nature and crucial elements of offense, which made Appellant's plea involuntary?

Argument

The PCR court failed to rule that counsel failed to give Appellant Rule 5 and still advised Appellant to plead guilty and not investigate and prepare Appellant's case which Appellant plead guilty without knowing the nature and crucial elements of the offense, which made Appellant's plea involuntary. Appellant was deprived a fair trial by deficient performance cause trial counsel was ineffective for not providing Appellant with Rule 5. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194. This material of Rule 5 should have been given to Appellant by counsel so that they could have investigated and prepared a defense if a defense was raised or found. The trial counsel should have provided Appellant with Rule 5 due to the Appellant's 5th Amendment right which is "nor be deprived of life, liberty, or property, without due process of law", which the 14th Amendment of the United States Constitution guarantees and commands "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 laws". Which due process is a right to adequate notice, opportunity to be heard, corroborate evidence, and confront and cross-examine witnesses. This due process is rights of every citizen. Appellant has a right to know any and all evidence against him, so he or she may know what they are up against. Appellant was without Rule 5 which is similar to going in to a war without a weapon and equipment for safety or protection. Trial counsel stated that he received Appellant's Rule 5 from Appellant's first counsel Mr. Turnblad. App. 68, ln. 5-12. Trial counsel had Rule 5 and never provided Appellant with Rule 5. Where Appellant states he requested his Rule 5, so that they could go to trial. App. 61, ln. 7-16. Appellant has a right to have Rule 5. Appellant never received Rule 5 until after his sentencing. He received Rule 5 on August 9th of 2012 which is 11 months after Appellant received his sentence. Appellant received his Rule 5 because Appellant filed an allegation to the Supreme Court of South Carolina: office of Disciplinary Counsel on his lawyer in June of 2012. While at the South Carolina Department of Corrections. When Appellant's

trial counsel was notified that an allegation was against him, he sent Appellant's Rule 5 to him and Appellant received it on August 9th, 2012. In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct 340, 79 L.Ed. 791 it says "The principle is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in the courts." Appellant's papers are ineptly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the state authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the federal Constitution, and, if proven, would entitle Appellant to release from his present custody. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct 340, 79 L.Ed. 791. Appellant stated at PCR he didn't have Rule 5 which was in the notebook given to trial counsel by Appellant's first attorney. Which Appellant did not have it or receive it until after his sentencing. Trial counsel says he did not take notebook with him when meeting with Appellant. App. 68, In. 25, App. 69, In. 1-8. When trial counsel and Appellant meet, trial counsel only brought discovery with him once as he states, but don't remember. Which Appellant should have been given a copy of Rule 5. Appellant's trial counsel had rule 5 and still failed to do a good investigation and prepare defense or defenses when Appellant raised defenses to trial counsel and trial counsel knows the law because this is what he went to school for. Trial counsel states that Appellant raised defenses about his confession he gave and also his medication. App. 69, In. 12-25, App. 70, In. 1-6, App. 71, In. 4-16. Counsel must conduct a reasonable substantial investigation into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. The same duty ~~is~~ exists if counsel relies at trial only on one line of defense, although others available. In either case, the investigation need not be exhaustive. It must include an independent examination of the facts, circumstances, pleadings, and laws involved. The scope of the duty, however, depends on such facts as the strength of the government's case and the likelihood that pursuing certain leads that may prove more harmful than helpful. *Strickland v. Washington* 104 S.Ct 2052, 1984. Trial counsel did not even conduct a reasonable investigation to see if the issues that Appellant raised were harmful or helpful. For trial counsel

states he only looked through Appellant's case twice. Then states again that after he flipped through Appellant's case once or twice, when he went to see Appellant he quit taking Rule 5 with him. App. 70, In. 13-22. This is so ineffective, because counsel is to assist Appellant and do an investigation. As he stating "flipping through Appellant's file" is not investigating. Trial counsel stated that he told Appellant was young at the time the crime happen. App. 70, In. 2-6. But if trial counsel wanted to argue that Appellant was very young at the time of the crime, they could have also argued that Appellant was very young at the time when he gave his confession and committed crime and Appellant was also on medication. All this evidence was in Appellant's rule 5 which counsel had but failed to do good investigation. The evidence that was used against the Appellant could of been favorable to the defendant because it could have been argued at trial. In Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194, it says "If in fact the 14th Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt that presents a serious and unsettled question that is fundamental to the further conduct of the case." As in Abdul Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998), it says "withheld evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial." Trial counsel should have investigated Appellant's case and would have seen that the confession was given in violation of Appellant's 5th Amendment and was involuntary. The 5th Amendment says that "nor shall be compelled in any criminal case to be a witness against himself." Trial counsel should have investigated the confession, see if it was given voluntarily, freely, knowingly, and intelligently given to the officers which is based on the totality of the circumstances as in, Micheal C. v. Supreme Court of the United States, 442 U.S. 707; 99 S.Ct. 2560; 61 L.Ed. 2d 197; 1979 U.S. Lexis 133. Also in Jackson v. Denno, 378 U.S. 368. If counsel would have investigated eyewitness statement he would have seen that eyewitness did not fully identify the Appellant at the time of the of crime. Eyewitness gave 2 statements, one saying that her eyes were closed and the other saying that the scene was dark which the eyewitness would have not and could

not get a full description of the Appellant. *Neil v. Biggers*, 93 S.Ct. 375.
Trial Counsel also failed to investigate Appellant's medical history
when he was aware and knew Appellant was at Pee Dee Mental Health Center.
Abdur' Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998). At trial, it's a
possibility that the jury would have took Appellant's mental condition at
the crime into consideration. Trial Counsel advised Appellant to plea
because he wanted to get Appellant's case in court before the year was
out is what counsel stated at PCR hearing. App. 69, In. 23-25, App. 70,
In. 1. At PCR hearing trial counsel contradicts himself. Trial Counsel
used a particular strategy against his client which they were suppose to be
similar to a team at helping each other with the Appellant's freedom. In
order of dismissal PCR court stated that it was a possibility Appellant
was facing two life sentences plus 30 years. App. 81. Trial Counsel used
a strategy against Appellant to get the Appellant to plea before the
end of the year as trial counsel say he wanted and was trying to get the
Appellant in court before the year came to an end. Appellant's trial counsel
stated that he went over questions twice with ~~the~~ Appellant, which this is a
practice basically. App. 71, In. 24-25, App. 72, In. 1-3. He also states that he
told Appellant to answer questions truthfully. At PCR hearing Appellant
stated that trial counsel instructed him to answer questions. Instruct is to
teach and when in the process of teaching, a individual listens and go by
what they are taught. App. 61, In. 24-25, App. 62, In. 1-15. Where as this was
to get the Appellant to plea and Appellant listened to his counsel because
he knew nothing about the law or understood his rights. He listened to his
counsel because his counsel had supposed to know and understand the
law and explain it to his client to make sure Appellant understood. As
Appellant states that counsel wanted him to plea everytime they met even
on first visit. App. 58, In. 12-21. Where as Appellant's attorney did admit on
record he was trying to get Appellant in court before year ended. App. 69, In.
23-25, App. 70, In. 1. Trial counsel contradicts him self at PCR hearing
because where he says that Appellant was exploring a plea where right
after that he said that Appellant did not want to plea while he was in DJJ.
He stated Appellant was exploring a plea in DJJ but then said Appellant did
not want to plea. App. 66, In. 7-25, App. 67, In. 1-25. He stated he also gave
Appellant 2 decisions ~~as~~ as stated in those pages, but Appellant
elucidated the decisions that trial counsel told him about. App. 51, In. 19-
25, App. 52, In. 1-8. Trial counsel lied to Appellant about the 40 year
recommendation and about appeal. App. 52, In. 24-25, App. 53, In. 1-22.
The trial counsel rushed Appellant and instructed him so they could get
the sentence out of the way as trial counsel wanted. App. 61, In. 24-25, App.

62, ln. 1-8, ln. 9-15. Appellant stated that trial counsel was not investigating case when trial counsel states that Appellant raised 2 defenses or more. App. 69, ln. 12-25, App. 70, ln. 1-6. But where Appellant's trial counsel says he stop investigating after flipping through file twice. App. 70, 15-22. He stop investigating Appellant's case and came up with a strategy, so that he could get Appellant to plea before the year as he states he wanted to get Appellant in court before year ended. He states that him and Appellant went over evidence, but then states Appellant never went into detail on his side of the story of the crime. App. 69, ln. 6-8, App. 70, ln. 23-25, App. 71, ln. 1-3. Trial counsel advised Appellant to plea because he thought and said that Eyewitness statement was damaging and also that Appellant had already admit to the crime but he told Appellant they could argue the confession cause it had issues in it but he still advised Appellant to plea when Appellant brought defense forth. App. 69, ln. 14-25 - App. 71, ln. 1-16. IF it wasn't for counsel's erroneous advice Appellant would have insisted on going to trial. Counsel prejudice Appellant ~~and~~ by advising Appellant to plea without Rule 5 and also for not investigating and preparing Appellant's case. He also prejudice Appellant when he advised Appellant to plea because Appellant raised issues to counsel. And he prejudice Appellant when he advised Appellant to plea without knowing and understanding the nature and crucial elements of the offense. Appellant was suppose to know the mandatory minimum and maximum of offense which the sentencing judge did not state at sentencing hearing. See Pittman v. State 324 S.E. 2d 623 (S.C. 1999), also State v. Hazel, S.C., 271 S.E. 2d 602 (1980). The minimum for murder is 30 years and can go up to the life sentence or death penalty. The judge was suppose to tell and state the minimum and maximum mandatory sentence for accused charges. At sentencing the judge just stated "~~you know I can give you life for these charges~~" you know that those could carry up to a life sentence. App. 8, ln. 11-13. Trial counsel prejudice Appellant because when he ~~to~~ advised Appellant to plea, it violated Appellant's 5th Amendment right against self-incrimination and also due process of law. Appellant was deprived a fair trial and assistance of counsel, which the 6th Amendment commands. Which that assistance of counsel is effective assistance which trial counsel didn't give Appellant. Appellant 14th Amendment was also violated of Appellant's due process rights. If it wasn't for counsel's ineffectiveness, Appellant would of chosen trial and ~~the~~ Appellant would of had confidence in the outcome come of trial. Trial Counsel ^{advised} Appellant to plea because of Appellant's confession and Eyewitness. Appellant's trial counsel let Appellant's statement

motivate Appellant's plea, when told Appellant "if you did it, you are guilty and you did admit to it." Appellant listened to his attorney because he thought attorney knew law. To see whether a plea was involuntary and that a confession motivated the Appellant to plea is not something to be taken in to get a new trial. For the Appellant must show that the confession that motivated the plea was involuntarily given. *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441 (1970). As Appellant described his confession to be involuntary in issue number two. At trial, the state would of had to prove by evidence that Appellant committed murder beyond a reasonable doubt. When at trial the defendant is innocent until proving guilty. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930. Which the state can not prove that Appellant commit murder with a malice aforethought at trial because the state dismissed Appellant's weapon charge which was the only thing that could prove malice. And the state would not be able to bring the weapon up again or speak upon it because if the state was to charge Appellant again would be violating Appellant's 5th Amendment right that no person shall be subject for the same offense twice to be put in double jeopardy. So the state could not speak of a weapon because they dismissed it and the Appellant is not charged with a weapon in an indictment. Appellant's confession was not voluntary and also in violation of his 5th Amendment right against self-incrimination, which at trial a Jackson v. Derrno hearing could be held and the confession could be suppressed and could not be used against Appellant. Appellant's confession could not be used. The eye witness credibility could of been attacked due to the fact that she made 2 statements and said in one of her statements that it was dark and in the other statement she said she had her eyes ~~closed~~ closed. Appellant has a 6th Amendment to cross-examine witnesses. Or her confession could of be suppressed also, due to the fact that she did not get a full view of the Appellant at the time of the crime. And it's also a possibility that at trial the jury would of took in the Appellant's mental condition and medications he was on and in at the time of the crime. If Appellant would have ~~prots~~ been provided with Rule 5 and trial counsel had investigated and prepared Appellant's case then Appellant of would of chosen trial and had confidence in the outcome. It's a reasonable probability but for counsel's ineffectiveness Appellant would have chosen trial and have confidence in the outcome.

Issue Number Five

Did PCR court fail to rule that trial counsel was ineffective for allowing the solicitor to solicit about crimes that Appellant was not charged with in indictment?

Argument

The PCR court failed to rule that trial counsel was ineffective for allowing the solicitor to solicit about crimes that Appellant was not charged with in indictment. Trial counsel gave Appellant deficient performance when he mentioned things at sentencing that could be a possibility why Appellant received 36 years when it's a possibility that if solicitor did not mention these things, he could of received the minimum of murder which is 30 years. The solicitor did not state that the things mentioned were actual crimes, but under the law the things are crimes. The things that solicitor mentioned were a hit list and gang literature. App. 23, In. 5-10. He (solicitor) also stated that this was the reason while the recommendation came from him. App. 22, In. 13-15. The crimes that these things are conspiracy to commit murder - which is the charge for a hit list. And while the gang literature and gang involvement is a charge under the Rob Act which starts from 5 years to life imprisonment. The solicitor stated that the victim's husband did not want Appellant to receive nothing close to 30 or 40 years and also the victim that lived and survived through shooting and the family wanted Appellant home. App. 22, In. 2-13, App. 55, In. 22-25, App. 56, In. 1-14. Appellant lawyer was suppose to stop the solicitor at this time because where solicitor mentioned that the crime that was committed did not have nothing to do with a gang or the hit list. It was not suppose to be brought up. App. 22, In. 2-25, App. 23, In. 1-25, App. 24, In. 1-10. Solicitor stated he brought these things up because Appellant said he was involved in a gang while in evaluation and that the police officers searched Appellant's home and found gang literature. If trial counsel would have done a thorough investigation, he would have seen that the Family Court Judge, Deputy solicitor, and examiners stated that "the stipulation under the Hitopoulos ruling (State v. Hitopoulos, 309 SE. 2d 747 (1983)) that information Tavelo (Appellant) provided for the purpose of this evaluation could not be used against him in order to establish guilt on these charges." The Family Court Judge recommended this. And also solicitor said that these things had nothing to do with Appellant's charges that he was being sentenced for. For Appellant wasn't aware of this because he did not have Rule 5 at the time. In the criminal law Handbook: 12th edition states and also gives an example similar to the

Appellant's situation. On page 383 in that book it states clearly:

pg. 383 "What is the basic evidence rule." Relevance is the basic building block of evidence rules. Only relevant evidence is admissible. For evidence to be relevant, some logical connection must exist between the evidence and the factual ~~is~~ it is offered to prove or disprove. The connection needn't be so strong that any single item of evidence alone proves or disproves a fact. It's good enough if the piece of evidence constitutes a link in a chain of proof along with other pieces of evidence. (As the famous legal authority McCormick put it long ago, "A brick is not a wall!"). The main limitation of the relevance rule is that the connection must be based on reason and logic rather than on bias and emotion. Example: Lance Seltot is charged with drunk driving. The prosecution wants to offer evidence that Lance is a member of a violent street gang. The evidence is ~~irrelevant~~ irrelevant because the crime charged has nothing to do with gang activities. No logical connection exists between gang membership and whether Lance was drunk at the time he was arrested. The evidence would appeal only to a judge's or juror's emotions and prejudices." Solicitor stated himself at sentencing that the crime was not gang related and the hit list had nothing to do with the crime. There is not evidence to prove that Appellant committed murder with malice. These things had nothing to do with the charges and solicitor stated ~~this~~ evidence because of how he felt. And he mentioned it to the judge and it's a possibility that the judge was against gangs and sentenced Appellant to how he felt, his emotions and prejudices. The criminal law handbook: know your rights, survive the system is what the name of the book is and it's 12th edition. It also states:

pg. 387 "Bad character brought up by prosecution, can they do it." In most situations, no. Evidence rules generally forbids prosecutors from presenting "bad" character evidence unless the defendant first opens the door by presenting evidence of good character. Character evidence is barred in this situation because it is prejudicial. A judge or juror might convict a defendant for being a "bad person", even if the evidence that the defendant committed the charged crime is weak." Now also on the same subject and book it says:

pg. 387 "Non-character, Bad-character Evidence." Despite the rule barring prosecutors from offering evidence of a defendant's bad character, prosecutors routinely try to get around the rule by arguing that the

bad person character evidence is relevant for another reason (Federal Rule of Evidence 404-B). For example, a judge would probably permit a prosecutor or trying to convict a defendant previously assaulted the same victim. A judge would probably rule that the defendant had a grudge against the victim. A limiting instruction warning the jurors not to use the evidence to make a judgement about the defendant's character would be appropriate. Another non-character theory that prosecutor often use to present evidence of defendant's bad character is to present defendant's past misdeeds is modus operandi (m.o.). Under this theory, the prosecutor can offer evidence that the method a defendant allegedly used to commit past misdeeds is unique and nearly identical to the method that the defendant used to commit charged crime. Evidence of the past misdeeds is then admissible, not to paint the defendant as a bad person, but to show that the common m.o. points to the defendant as the perpetrator of the charged crime. Again, for whatever it's worth, a judge might give a limiting instruction: "Now the Appellant has no past history of being incarcerated or anything. Trial counsel, solicitor, and judge was in the wrong. For trial counsel would of known it couldn't be used against me if he searched my file and saw what the family court judge, Deputy solicitor, and examiners mentioned. This prejudice Appellant because it could of been put to sentence the Appellant off of emotions and prejudices. This prejudice the defendant because these things were not charged in an indictment which this is what a judge or jury are suppose to off of due to Appellant's 5th Amendment right "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury". And where Counsel allowed solicitor to mention these things when stated they had nothing to do with the crimes charged to Appellant was a violation of Appellant's 6th Amendment right clearly states "a right to assistance of counsel for his defense". Counsel was suppose to defend Appellant when solicitor said these things. If it wasn't for counsels ineffectiveness it's a reasonable probability that ~~trial counsel~~ Appellant would and could have received the mandatory minimum for murder, which is 30 years.

Conclusion

For the foregoing reasons, this court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issues.

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