

VOLUME ONE OF TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

RECEIVED

FEB 02 2015

S.C. Supreme Court

TERRANCE TERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000956

APPENDIX

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
)
 -VS-)
)
 TERRENCE D. TERRY,)
)
 DEFENDANT.)
 _____)

2005-GS-23-1157, 1158 & 1274

TRANSCRIPT OF RECORD

MARCH 8, 2005
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

JOHN NEWKIRK, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

ERNEST HAMILTON, ESQUIRE
JOHN ABDALLA, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

INDEXWITNESSPAGE NO.

CERTIFICATE OF REPORTER

16

****COURT REPORTER'S NOTE:** JIMMY C. AUSTIN'S GUILTY PLEA WAS TAKEN
AT THE SAME TIME, INDICTMENT NUMBERS 2004-FS-23-6686 & 8448.

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>

(NO EXHIBITS WERE PRESENTED DURING THIS HEARING)

1 MADAME CLERK: YOUR HONOR, THIS IS INDICTMENT NUMBER
2 2005-GS-23-1157, TERRENCE DIMINGO TERRY, INDICTED FOR A LEWD
3 ACT UPON A CHILD, PLEADING TO THE SAME. INDICTMENT NUMBER
4 2005-GS-23-1158, INDICTED FOR LEWD ACT UPON A CHILD,
5 PLEADING TO THE SAME. INDICTMENT NUMBER 2005-GS-23-1274,
6 INDICTED FOR CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST
7 DEGREE, PLEADING TO THE SAME. THEY ARE ALL TRUE BILLS.

8 INDICTMENT NUMBER 2004-GS-23-6686, JIMMY C. AUSTIN,
9 INDICTED FOR SHOPLIFTING THIRD OR ABOVE, PLEADING TO THE
10 SAME. INDICTMENT NUMBER 2004-GS-23-8448, INDICTED FOR
11 SHOPLIFTING, PLEADING TO THE SAME. AND THEY ARE ALL TRUE
12 BILLS.

13 (WHEREUPON BOTH DEFENDANTS WERE DULY SWORN)

14 THE COURT: MR. TERRY, HOW OLD ARE YOU?

15 MR. TERRY: FORTY-SIX YEARS OLD.

16 THE COURT: HIGHEST GRADE YOU FINISHED?

17 MR. TERRY: TWO SEMESTERS OF COLLEGE.

18 THE COURT: WHAT KIND OF WORK YOU DO?

19 MR. TERRY: I WORK FOR WAL-MART.

20 THE COURT: WHAT'S YOUR MARITAL SITUATION?

21 MR. TERRY: I BELIEVE UNDER THE CIRCUMSTANCES THERE'S
22 GOING TO BE A SEPARATION, BUT I'M CURRENTLY MARRIED.

23 THE COURT: DO YOU HAVE CHILDREN?

24 MR. TERRY: YES, SIR, THREE.

25 THE COURT: HOW OLD ARE THEY?

1 MR. TERRY: NINE, TEN, AND ELEVEN.
2 THE COURT: DAYS IN JAIL?
3 MR. NEWKIRK: TWO HUNDRED AND FORTY-ONE, YOUR HONOR.
4 THE COURT: MR. AUSTIN, HOW OLD ARE YOU?
5 MR. AUSTIN: FORTY-NINE.
6 THE COURT: HIGHEST GRADE YOU FINISHED?
7 MR. AUSTIN: EIGHTH.
8 THE COURT: CAN YOU READ AND WRITE?
9 MR. AUSTIN: A LITTLE.
10 THE COURT: WHAT ARE YOU UP HERE TO DO TODAY?
11 MR. AUSTIN: PLEAD GUILTY.
12 THE COURT: ALL RIGHT. WHAT KIND OF WORK YOU DO?
13 MR. AUSTIN: PLUMBING AND ELECTRICIAN.
14 THE COURT: WHAT'S YOUR MARITAL SITUATION?
15 MR. AUSTIN: SINGLE.
16 THE COURT: CHILDREN?
17 MR. AUSTIN: YES, SIR.
18 THE COURT: HOW OLD ARE THEY?
19 MR. AUSTIN: THEY'RE TEN AND ELEVEN.
20 THE COURT: DAYS IN JAIL?
21 MR. AUSTIN: FIFTY-FOUR.
22 THE COURT: FIFTY-FOUR.
23 MR. NEWKIRK: THAT'S CORRECT, YOUR HONOR.
24 THE COURT: IN THE LAST TWENTY-FOUR HOURS HAVE YOU HAD
25 ANY DRUGS, ALCOHOL, OR MEDICATION, MR. TERRY?

1 MR. TERRY: MEDICATION.
2 THE COURT: WHAT?
3 MR. TERRY: FOR HYPERTENSION.
4 THE COURT: DID YOU TAKE THE PRESCRIBED DOSAGE?
5 MR. TERRY: YES, SIR. YES, YOUR HONOR.
6 THE COURT: DO YOU FEEL FINE?
7 MR. TERRY: YES, SIR.
8 THE COURT: HUH?
9 MR. TERRY: A LITTLE NERVOUS, BUT YES, SIR, I'M FINE.
10 THE COURT: WELL, YOU OUGHT TO BE NERVOUS. HOW ABOUT
11 YOU, MR. AUSTIN?
12 MR. AUSTIN: NO, SIR.
13 THE COURT: NO, YOU'RE NOT NERVOUS?
14 MR. AUSTIN: OH, NERVOUS? YES, SIR. I THOUGHT YOU
15 SAID ON DRUGS.
16 THE COURT: YEAH. ALL RIGHT. BUT YOU HAVEN'T TAKEN
17 ANY MEDICINE, DRUGS, OR ALCOHOL IN THE LAST TWENTY-FOUR
18 HOURS?
19 MR. AUSTIN: NO, SIR.
20 THE COURT: HAVE YOU EVER BEEN TREATED FOR THE ABUSE OF
21 ALCOHOL, DRUGS, OR MENTAL ILLNESS, OR EMOTIONAL PROBLEMS,
22 MR. TERRY?
23 MR. TERRY: YES, YOUR HONOR, I HAVE.
24 THE COURT: WHAT?
25 MR. TERRY: FOR DRUGS AND PSYCHIATRIC.

1 THE COURT: WHAT IS IT?

2 MR. TERRY: I'M SORRY?

3 THE COURT: WHO TREATED YOU AND WHEN?

4 MR. TERRY: OH, FORGIVE ME. I WAS -- THE SALVATION
5 ARMY. THEY HAD A -- THEY HAVE THIRTY, SIXTY -- THEY HAVE A
6 NINETY DAY REHABILITATION PROGRAM WHICH YOU LIVE IN, WHICH I
7 GRADUATED FROM LAST YEAR.

8 THE COURT: ALL RIGHT. HOW ABOUT YOU, MR. AUSTIN?

9 MR. AUSTIN: NO, SIR.

10 THE COURT: ALL RIGHT. MR. TERRY, YOU'RE UP HERE ON
11 INDICTMENT 05-1274. IT ALLEGES YOU DID IN GREENVILLE COUNTY
12 JULY 4, '04 ENGAGE IN SEXUAL BATTERY WITH CLRJ, LESS THAN
13 ELEVEN YEARS OF AGE. THAT CARRIES THIRTY YEARS. IT'S A
14 MOST SERIOUS OFFENSE. IT'S A VIOLENT OFFENSE. THAT MEANS
15 NO PAROLE. AND YOU GET TWO OR MORE CONVICTIONS FOR MOST
16 SERIOUS OFFENSES YOU'RE ELIGIBLE FOR LIFE WITHOUT PAROLE.
17 DO YOU UNDERSTAND THAT?

18 MR. TERRY: I DO NOW, YOUR HONOR.

19 THE COURT: ALL RIGHT. YOU'RE ALSO HERE ON 05-1158.
20 IT ALLEGES YOU DID IN GREENVILLE COUNTY ON OR ABOUT --
21 BETWEEN JUNE 1ST AND JUNE 25TH, '04 BEING OVER THE AGE OF
22 FOURTEEN WILFULLY AND LEWDLY COMMITTED A LEWD AND LASCIVIOUS
23 ACT UPON THE BODY OR ITS PARTS OF MFM, A CHILD UNDER THE AGE
24 OF SIXTEEN WITH THE INTENT OF AROUSING, APPEALING TO,
25 GRATIFYING THE LUSTS, PASSIONS, OR SEXUAL DESIRES OF

1 YOURSELF OR THE CHILD. FIFTEEN YEARS. YOU UNDERSTAND THAT?

2 MR. TERRY: YES, YOUR HONOR.

3 THE COURT: YOU'RE ALSO HERE ON 05-1157. IT ALLEGES
4 YOU DID IN GREENVILLE COUNTY MAY 31ST, '04 BEING OVER THE
5 AGE OF FOURTEEN, YOU WILFULLY AND LEWDLY COMMITTED A -- OR
6 ATTEMPTED A LEWD AND LASCIVIOUS ACT UPON THE BODY OR ITS
7 PARTS OF BNM, A CHILD UNDER THE AGE OF SIXTEEN WITH THE
8 INTENT OF AROUSING, APPEALING TO, OR GRATIFYING THE LUSTS,
9 PASSIONS, OR SEXUAL DESIRES OF YOURSELF OR THE CHILD.
10 THAT'S ANOTHER FIFTEEN YEARS. YOU UNDERSTAND THAT?

11 MR. TERRY: YES, YOUR HONOR.

12 THE COURT: MR. AUSTIN, YOU'RE UP HERE ON 04-8448. IT
13 ALLEGES YOU DID IN GREENVILLE COUNTY AUGUST 28TH, '04 WITH
14 TWO PRIOR PROPERTY OFFENSE CONVICTIONS SHOPLIFTED A PACK OF
15 BACON AT OR LESS THAN A THOUSAND DOLLARS OFFERED FOR SALE BY
16 PUMPERS. TEN YEARS. DO YOU UNDERSTAND THAT?

17 MR. AUSTIN: YES, SIR.

18 THE COURT: YOU'RE ALSO UP HERE ON 04-6686. IT ALLEGES
19 THAT YOU DID IN GREENVILLE COUNTY ON OR ABOUT MAY 3RD, '04
20 WITH TWO PRIOR PROPERTY OFFENSE CONVICTIONS SHOPLIFTED A
21 BOTTLE OF WINE VALUED AT LESS THAN A THOUSAND DOLLARS
22 OFFERED FOR SALE BY BI-LO. TEN MORE YEARS. YOU UNDERSTAND
23 THAT?

24 MR. AUSTIN: YES, SIR.

25 THE COURT: UNDERSTANDING THE NATURE OF THE CHARGES

1 AGAINST YOU AND THE MAXIMUM POSSIBLE PUNISHMENT HOW DO YOU
2 WANT TO PLEAD, MR. TERRY?

3 MR. TERRY: NOT GUILTY, YOUR HONOR. I MEAN, GUILTY BY
4 REASON ---

5 THE COURT: WHAT?

6 MR. TERRY: GUILTY, YOUR HONOR. FORGIVE ME.

7 MR. HAMILTON: HE WANTS TO EXPLAIN ...

8 THE COURT: ARE YOU GUILTY? HOW DO YOU WANT TO PLEAD
9 TO THESE INDICTMENTS? YOU HAVE ABSOLUTELY NO -- NOBODY CAN
10 MAKE YOU DO IT BUT YOU.

11 MR. TERRY: GUILTY, YOUR HONOR.

12 THE COURT: OKAY. THAT'S YOUR DECISION?

13 MR. TERRY: YES, SIR.

14 THE COURT: ALL RIGHT. HOW ABOUT YOU, MR. AUSTIN?

15 MR. AUSTIN: I'M GUILTY, YOUR HONOR.

16 THE COURT: ALL RIGHT. NOW, MR. TERRY, YOU HAVE A
17 RECOMMENDATION. I DO NOT HAVE TO FOLLOW IT. I COULD GIVE
18 YOU THE MAXIMUM I'VE DESCRIBED TO YOU. OTHER THAN THAT HAS
19 ANYBODY FORCED YOU, COERCED YOU, THREATENED YOU, OR PROMISED
20 YOU ANYTHING TO PLEAD GUILTY, MR. TERRY?

21 MR. TERRY: NO, YOUR HONOR.

22 THE COURT: MR. AUSTIN?

23 MR. AUSTIN: NO, SIR, YOUR HONOR.

24 THE COURT: YOU'RE DOING THIS FREELY AND VOLUNTARILY,
25 MR. TERRY?

1 MR. TERRY: YES, YOUR HONOR.

2 THE COURT: MR. AUSTIN?

3 MR. AUSTIN: YES, SIR, YOUR HONOR.

4 THE COURT: DO EACH OF YOU UNDERSTAND THAT YOU HAVE AN
5 ABSOLUTE RIGHT TO A TRIAL BY JURY WHERE YOU WOULD BE
6 PRESUMED INNOCENT UNLESS AND UNTIL THE STATE COULD PROVE YOU
7 GUILTY BEYOND ANY REASONABLE DOUBT OF EACH AND EVERY ELEMENT
8 OF EACH OFFENSE THAT YOU'RE CHARGED WITH? YOU'D HAVE A
9 RIGHT TO CONFRONT AND CROSS EXAMINE THE WITNESSES AND THE
10 EVIDENCE PUT UP AGAINST YOU BY THE STATE. YOU'D HAVE A
11 RIGHT TO USE THE SUBPOENA POWER OF THE STATE TO COMPEL IN
12 COURT ALL RELEVANT AND COMPETENT EVIDENCE IN YOUR DEFENSE OR
13 YOU COULD REMAIN SILENT. YOUR SILENCE COULD NOT BE HELD
14 AGAINST YOU. AND YOU CANNOT BE COMPELLED TO INCRIMINATE
15 YOURSELF. YOU WOULD HAVE ALL THOSE RIGHTS IN SEPARATE
16 TRIALS ON EACH OF THESE OFFENSES. DO YOU UNDERSTAND ALL
17 THOSE RIGHTS, MR. TERRY?

18 MR. TERRY: YES, YOUR HONOR.

19 THE COURT: MR. AUSTIN?

20 MR. AUSTIN: YES, SIR, YOUR HONOR.

21 THE COURT: YOU WANT TO GIVE THOSE RIGHTS UP AND PLEAD
22 GUILTY, MR. TERRY?

23 MR. TERRY: YES, YOUR HONOR, I DO.

24 THE COURT: MR. AUSTIN?

25 MR. AUSTIN: YES, SIR, YOUR HONOR.

1 THE COURT: AND ARE YOU GUILTY, MR. TERRY?

2 MR. TERRY: YES, I AM, YOUR HONOR.

3 THE COURT: MR. AUSTIN?

4 MR. AUSTIN: YES, SIR.

5 THE COURT: ARE YOU TOTALLY AND COMPLETELY SATISFIED
6 WITH THE REPRESENTATION OF YOUR ATTORNEY AND HAVE THEY DONE
7 FOR YOU EVERYTHING THAT YOU THINK IS REASONABLY NECESSARY TO
8 ADEQUATELY PREPARE YOUR DEFENSE, MR. TERRY?

9 MR. TERRY: YES, YOUR HONOR.

10 THE COURT: MR. AUSTIN?

11 MR. AUSTIN: YES, SIR, YOUR HONOR.

12 THE COURT: DO YOU HAVE ANY COMPLAINT OF ANY NATURE
13 YOU'D LIKE TO MAKE AGAINST ANYBODY WITH RESPECT TO THESE
14 CHARGES, MR. TERRY?

15 MR. TERRY: NO, YOUR HONOR.

16 THE COURT: MR. AUSTIN?

17 MR. AUSTIN: NO, SIR, YOUR HONOR.

18 THE COURT: AND HAVE YOU HAD AMPLE OPPORTUNITY TO
19 REVIEW THE EVIDENCE THAT THE STATE HAS AGAINST YOU, MR.
20 TERRY?

21 MR. TERRY: YES, YOUR HONOR.

22 THE COURT: AND, MR. AUSTIN?

23 MR. AUSTIN: YES, SIR, YOUR HONOR.

24 THE COURT: ALL RIGHT. LISTEN CAREFULLY WHILE THE
25 STATE RECITES THE FACTS THEY'D PROVE AT TRIAL.

1 MR. NEWKIRK: YOUR HONOR, MAY IT PLEASE THE COURT? AS
2 TO MR. TERRY, ON JULY 4TH OF 2004 THIS DEFENDANT PUT HAIR
3 GREASE ON HIS PENIS AND ON THE VICTIM'S VAGINA AND ATTEMPTED
4 TO HAVE SEXUAL INTERCOURSE WITH HER. WHEN HE WAS UNABLE TO
5 DO SO HE THEN PENETRATED HER VAGINA WITH HIS FINGER AND HER
6 ANUS WITH HIS PENIS. THIS VICTIM WAS THE DEFENDANT'S NINE
7 YEAR OLD STEP-DAUGHTER.

8 IN MAY AND JUNE, 2004 THIS DEFENDANT ALSO COMMITTED
9 NUMEROUS LEWD ACTS ON HIS OTHER TWO STEP-DAUGHTERS, ELEVEN
10 AND TWELVE YEARS OLD BY KISSING THEM ON THE MOUTH, RUBBING
11 THEIR BREASTS, VAGINAL AREAS, AND BUTTOCKS, AND RUBBING HIS
12 BODY AGAINST THEIRS. ALL THESE INCIDENTS OCCURRED WHILE THE
13 FAMILY RESIDED AT [REDACTED] IN GREENVILLE COUNTY.

14 THE DEFENDANT'S WIFE, THE MOTHER OF ALL THREE VICTIMS,
15 CONFRONTED THE DEFENDANT WHEN THE NINE YEAR OLD VICTIM
16 DISCLOSED HER ABUSE. AND THE DEFENDANT STATED THAT HE DID
17 NOT KNOW WHY HE DID IT. THE DEFENDANT ADMITTED GUILT IN THE
18 DSS FAMILY COURT PROCEEDINGS.

19 YOUR HONOR, THE DEFENDANT APPEARS TO HAVE MINOR
20 CONVICTIONS IN MARYLAND, BUT THE DISPOSITION OF CHARGES ARE
21 DIFFICULT TO DETERMINE. THERE'S A RECOMMENDATION FOR
22 CONCURRENT TIME.

23 THE COURT: ALL RIGHT. IS ALL THAT TRUE?

24 MR. TERRY: YES, YOUR HONOR.

25 THE COURT: ALL RIGHT. MR. HAMILTON.

1 MR. HAMILTON: MAY IT PLEASE THE COURT? YOUR HONOR,
2 I'VE TALKED WITH THIS SUBJECT, MR. TERRY. AND HIS
3 EXPLANATION IS -- HE'S PLEADING GUILTY, BUT WHEN YOU ASK HIM
4 WHY HE DID IT, HE SAYS ONLY A CRAZY PERSON WOULD DO
5 SOMETHING LIKE THAT, IT WAS A MOMENT OF INSANITY, THAT HE
6 ADMITS TO DOING IT. WHY HE DID IT, HE CAN'T EXPLAIN. HE
7 KNOWS HE SHOULDN'T -- IT WAS A TERRIBLE WRONG. AND THAT'S
8 WHAT HE HESITATED BY SAYING, I'M GUILTY, BUT INSANE. BUT
9 HE'S NOT INSANE, JUDGE. HE KNOWS THAT ONLY A CRAZY PERSON
10 WOULD DO SUCH A TERRIBLE ACT.

11 AND -- BUT HE'S STANDING HERE ASKING FOR MERCY. HE
12 KNOWS THAT THE COURT IS GOING TO PUNISH HIM FOR THAT, BUT HE
13 WANTS YOU TO UNDERSTAND THAT HE'S ABLE TO WORK. AND HE
14 WANTS TO BE ABLE TO PROVIDE SOME TYPE OF FINANCIAL RESOURCES
15 FOR THOSE LITTLE GIRLS IN THE FUTURE. AND IF YOU COULD
16 FASHION A SENTENCE WHERE HE COULD GET OUT IN A REASONABLE
17 AMOUNT OF TIME AND GO TO WORK AND HELP THOSE LITTLE GIRLS IN
18 SOME KIND OF WAY.

19 THE COURT: ANYTHING ELSE YOU WANT TO TELL ME?

20 MR. TERRY: NO, YOUR HONOR.

21 THE COURT: ALL RIGHT. ON THE CSC, TWENTY YEARS. ON
22 THE OTHER TWO, FIFTEEN. THEY'RE ALL CONCURRENT, CREDIT FOR
23 THE TIME HE'S DONE. GOOD LUCK TO YOU.

24 MR. HAMILTON: THANK YOU, YOUR HONOR.

25 MR. NEWKIRK: YOUR HONOR, AS TO MR. AUSTIN, ON AUGUST

1 28TH OF 2004 THIS DEFENDANT ENTERED THE PUMPKINS LOCATED IN
2 GREENVILLE COUNTY AND CONCEALED EIGHT PACKS OF BACON UNDER
3 HIS SHIRT AND THEN REMOVED THE BACON WITHOUT PAYING FOR IT.

4 ON MAY 3RD, 2004 THIS DEFENDANT ENTERED THE BI-LO IN
5 GREENVILLE COUNTY AND PLACED FOUR BOTTLES OF WINE UNDER HIS
6 JACKET AND LEFT THE PLACE OF BUSINESS. ALL ITEMS WERE
7 RECOVERED WITHOUT INCIDENT.

8 PRIOR RECORD, '76, SHOPLIFTING, BURGLARY, HOUSE
9 BREAKING, '79, PWID MARIJUANA TIMES TWO, PWID LSD, 1980,
10 RECEIVING STOLEN GOODS, SELLING MARIJUANA, '83, DRIVING
11 UNDER SUSPENSION, UNINSURED VEHICLE, GAMBLING, CARRYING A
12 PISTOL, VIOLATION OF PROBATION, PWID MARIJUANA, '87, FAILURE
13 TO APPEAR, '88, BURGLARY, LARCENY, '89, FALSE NAME TO
14 POLICE, PWID SCHEDULE DRUG TIMES FIVE, ---

15 THE COURT: SLOW DOWN.

16 MR. NEWKIRK: SORRY, YOUR HONOR.

17 THE COURT: I'M UP TO '88. WHAT'S AFTER THAT?

18 MR. NEWKIRK: '89, FALSE NAME, PWID CONTROLLED
19 SUBSTANCE TIMES FIVE, PWID CRACK, PWID CRACK WITHIN ONE HALF
20 MILE, 2000, POSSESSION OF DRUG PARAPHERNALIA, 2002, PWID
21 CRACK, SHOPLIFTING, POSSESSION OF CONTROLLED SUBSTANCE, AND
22 ANOTHER SHOPLIFTING.

23 THE COURT: WHY ARE YOU ON THE STREET?

24 MR. AUSTIN: YOUR HONOR, IT WAS JUST A MOMENT OF
25 INSANITY, ME BEING ON DRUGS AND NOT BEING WELL.

1 THE COURT: ALL RIGHT. WHAT ELSE -- WHAT YOU WANT TO
2 TELL ME?

3 MR. ABDALLA: THANKS, JUDGE. MY CLIENT IS FORTY-NINE
4 YEARS OLD. HE PLANS TO GO BACK WORKING FOR HIS FATHER AS AN
5 ELECTRICIAN, WORKS WITH HIS FATHER WHO IS AN ELECTRICIAN.
6 HE ADMITS THAT HE'S GUILTY OF THIS. AND HE HAS TWO CHILDREN
7 THAT LIVE WITH THEIR MOTHER, AGE TEN AND TWELVE YEARS OLD.

8 OBVIOUSLY I CAN'T STAND BEFORE YOU AND SAY HE'S A FIRST
9 OFFENDER. HE HAS QUITE THE PRIOR RECORD. BUT I WOULD SAY
10 TO THE COURT THAT THESE OFFENSES, AT LEAST SITTING ALONE,
11 THEY'RE NOT SERIOUS OFFENSES. HE HAS AN ALCOHOL AND DRUG
12 PROBLEM. I'D ASK YOU TO GIVE HIM A SENTENCE CONSIDERING
13 THOSE THINGS, JUDGE.

14 THE COURT: OKAY. THREE YEARS ON EACH, RECOMMEND ATU.

15 MR. ABDALLA: THANKS, JUDGE.

16 THE COURT: GOOD LUCK TO YOU. TRY AND GET OFF THOSE
17 DRUGS.

18 MR. NEWKIRK: THANK YOU, YOUR HONOR.

19 (HEARING ENDED AT 12:29 PM)

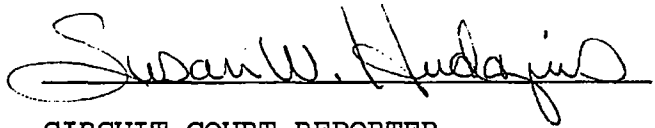
20 (END OF REQUESTED TRANSCRIPT OF RECORD)

1 CERTIFICATE OF REPORTER

2 I, THE UNDERSIGNED, SUSAN W. HUDGINS, OFFICIAL COURT
3 REPORTER FOR THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF
4 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
5 TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
6 PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL/HEARING
7 OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT
8 COURT FOR GREENVILLE COUNTY, SOUTH CAROLINA, ON THE 8TH DAY
9 OF MARCH 2005.

10 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,
11 NOR INTEREST TO ANY PARTY HERETO.

12 JANUARY 19, 2006

13
14 
15

CIRCUIT COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA)

County of)

Greenville

IN THE COURT OF COMMON PLEAS

Terrence Dimingo Terry #307935

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2005-CP-23-

7327

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Institution
2. Name and location of Court which imposed sentence Greenville County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) GS-23-1274

(b) GS-23-1157

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 3-08-05 / 20 years / concurrent

(b) 3-08-05 / 15 years / concurrent

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty Yes - Guilty Plea

(b) after a plea of not guilty No

(c) after a plea of nolo contendere No

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. None

ii. None

iii. None

(b) the result in each such Court to which you appealed:

i. None

ii. None

iii. None

(c) the date of each such result:

i. None

ii. None

iii. None

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. None

ii. None

iii. None

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) My attorney Failed to File an appeal

- (b) _____
 (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Prosecutorial Misconduct
 (b) Ineffective Assistance of Counsel
 (c) The Court Lacked Subject Matter Jurisdiction

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Solicitor prosecuted applicant without disclosure of a valid DNA analysis report or certified chain of custody
 (b) counsel failed to advise client of right to a direct appeal, also failed to investigate into applicant's case
 (c) the court lacked subject matter jurisdiction because of the evidence presented to the grand jury, fail to provide preliminary hearing, violating state and federal constitutional rights, due process and equal protection under the law.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered Ayes to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. No
 ii. No
 iii. No
 iv. No

(b) the name and location of the Court in which each was filed:

- i. No
 ii. No
 iii. No

- iv. No
- (c) the disposition thereof:
- i. No
- ii. No
- iii. No
- iv. No
- (d) the date of each such disposition:
- i. No
- ii. No
- iii. No
- iv. No
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. No
- ii. No
- iii. No
- iv. No

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

No

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:
- i. No
- ii. No
- iii. No
- (b) the proceedings in which each ground was raised:
- i. No
- ii. No
- iii. No

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: Ineffective Assistance of Counsel.

(a) Attorney Failed to inform me of my right to
 (b) appeal, and Failed to file for an appeal in my behalf
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? No / Yes
 (b) your trial, if any? No
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered Ayes to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Mr. Earnest Hamilton (Public Defender)
Greenville S.C.
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. plea - General Sessions Court
Sentencing - General Sessions Court
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

That my conviction and sentence be
reversed, vacated and dismissed.

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, Mr. Terrence D. Terry, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Terrence D. Terry

SWORN to and subscribed before me this 13
 day of November 2005.

Conrad Johnson (L.S.)
 Notary Public

My Commission Expires: 4-21-08

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Mr. Terrence D. Terry, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Terrence D. Terry
Applicant

SWORN or affirmed to and subscribed before me this
3 day of November, 2005.

Carrie Cohen
Notary Public

My Commission Expires: 4-21-08

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Terrence Dimingo Terry,)
 S.C.D.C. No. 307935,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2005-CP-23-7327

RETURN

In response to the post-conviction relief application filed November 11, 2005, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the February 2005 term of General Sessions for lewd act on a child (2005-CP-23-1157) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274. Ernest Hamilton, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen (15) years for lewd act on a child and twenty (20) years for first-degree CSC with a minor. The Applicant did not appeal his convictions or sentences.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The plea transcript will be forwarded upon receipt.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. Failed to advise of right to appeal.
 - b. Failed to investigate.
2. Prosecutorial misconduct:
 - a. "Solicitor prosecuted applicant without disclosure of a valid DNA analysis report or certified chain of custody."
3. Subject matter jurisdiction.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent submits the Applicant's assertion that the plea court lacked subject matter jurisdiction is without merit. The South Carolina Supreme Court has found that, in order to challenge an indictment in a PCR action, the Applicant must have first challenged the sufficiency of the indictment before the jury was sworn. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). There is no evidence the indictment was challenged prior to the

Applicant's plea hearing. The Respondent further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. The indictments in this case were true billed and clearly sufficient to put the Applicant on notice of the charges he was facing.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

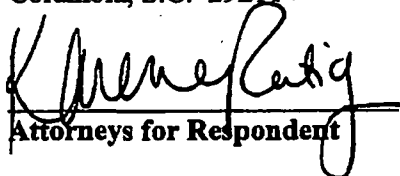
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

Jan. 6, 2006

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2005-CP-23-7327

TERRENCE DIMINGO TERRY, 307935)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

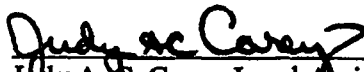
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Terrence Dimingo Terry, 307935
 McCormick Correctional Institution
 386 Redemption Way
 McCormick SC 29899**

DATED this 6th day of January, 2006


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2004-CP-23-7327
COUNTY OF GREENVILLE	)	
	)	FILED 11-13-05 P 4:09
RERRENCE TERRY	)	
APPLICANT,	)	
	)	FILED CLERK OF AMENDED APPLICATION
VS.	)	GREENVILLE CO. S.C.
	)	CLERK OF SUPERIOR COURT
THE STATE OF SOUTH CAROLINA	)	
RESPONDENT.	)	

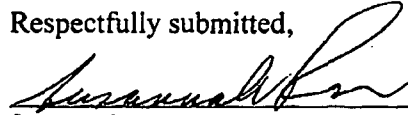
This matter comes before the Court by way of application of post conviction relief. On March 8, 2005, Mr. Terry pled guilty as indicted to two counts of Lewd Act on a Minor (2005-GS-23-1157 & -1158) and one count of Criminal Sexual Conduct with a Minor (2005-GS-23-1274) in front of Judge Edward W. Miller. He was sentenced to fifteen years on each of the Lewd Act charges and twenty years on the CSC charge. all to be served concurrently. Ernest Hamilton represented Mr. Terry.

Mr. Terry filed this action on November 11, 2005, alleging that his conviction and sentence were in violation of the Constitution of the United States and the Constitution or the laws of South Carolina due to prosecutorial misconduct, ineffective assistance of counsel, and lack of subject matter jurisdiction. This application is intended to incorporate the issues presented in the initial application and add an additional ground, violation of due process guarantees of the State and U.S. Constitutions in that Mr. Terry's plea was not knowingly, voluntarily, and intelligently made.

The record of his guilty plea shows that Mr. Terry was not made aware of the nature and crucial elements of the charge against him. See Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (SC 1999). This is especially problematic because Mr. Terry was

under the influence of prescribed mental health medications that affected his ability to comprehend what he was doing. The Judge also failed to inform Mr. Terry of his right to appeal. This failure to ensure that Mr. Terry understood the nature of what he was doing brings into question the validity of the guilty plea such that post-conviction relief should be granted.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
2435 E. North Street, #222
Greenville, SC 29615
(864) 242-0029

Greenville, South Carolina

This 5 day of February, 2007

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS :
2005-CP-23-7327

ORIGINAL

TERRENCE D. TERRY,)
APPLICANT,)

VS.

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,)
RESPONDENT.)

March 1, 2007
Greenville, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

A P P E A R A N C E S:

SUSANNAH C. ROSS, ESQ.
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.
Attorney for the Respondent

APRIL. HERRON
Official Court Reporter

I N D E X

(AW) - Denotes Applicant's Witness
 (RW) - Denotes Respondent's Witness
 (IC) - Denotes In Camera

(AW) TERRENCE TERRY:

Examination by the Court.....3
 Direct Examination by Ms. Ross.....15
 Cross-Examination by Ms. Ratigan.....41

(RW) ERNIE HAMILTON:

Direct Examination by Ms. Ratigan.....49
 Cross-Examination by Ms. Ross.....54

Certificate of Reporter.....78

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
	(Applicant's Exhibits)		
P-1	Booking Report.....		17
P-2	SLED Lab Report.....		20
P-3	Medical Request Form.....		25
P-4	Drug Record.....	30	30
P-5	Letter Dated 8-9-05.....	34	34
P-6	Letter Dated 1-18-05.....	34	36
P-7	Property and Evidence Report.....		60
P-8	Memorandum.....		64
P-9	Letter Dated 2-8-07.....		64

(Respondent's Exhibits)

There were no Respondent's Exhibits.

(Court's Exhibit's).

C-1 Two Letters Dated 2-23-05 and 1-18-05.....68

All Exhibits were retained by the Clerk of Court for
 Greenville County.

1 THE COURT: Ms. Ratigan, you're recognized.

2 MS. RATIGAN: May it please the Court, Your Honor. This
3 is Terrence Terry vs. The State, 2005-CP-23-7327. Mr. Terry
4 was indicted of two counts of lewd act on a child. And one
5 count is first degree CSC with a minor. He was represented
6 on these charges by Ernie Hamilton who is seated to my right.
7 On March 8th, 2005 he pled guilty before Judge Miller to the
8 charges as indicted. He received concurrent terms of 15
9 years on each count of lewd act, 20 years on CSC first with a
10 minor. Mr. Terry did not file an appeal. The application
11 alleges grounds on ineffective assistance of plea counsel,
12 prosectorial misconduct and subject matter jurisdiction.

13 THE COURT: All right.

14 Ms. Ross, be glad to hear from you.

15 MS. ROSS: Thank you, Your Honor. Initially Mr. Terry
16 would like to address the Court before this proceeding gets
17 started.

18 THE COURT: Mr. Terry, if you could, I'm going to ask you
19 if you could stand right where you are. I want you to raise
20 your right hand as the Clerk administers the oath.

21 Terrence Terry, after being duly sworn,
22 testified as follows:

23 EXAMINATION

24 BY THE COURT:

25 Q Mr. Terrence (sic), are you under the influence of any

1 drugs or alcohol here today?

2 A Today, no, Your Honor.

3 Q Are you experiencing any kind of physical, mental problem
4 that would prevent you from understanding what we're doing
5 here today?

6 A No, Your Honor, I believe I'm capable of comprehending.

7 Q Very good. I'll be glad to hear from you.

8 A I'm most thankful, Your Honor. I would like to
9 respectfully ask for a continuance. I prepared a brief in
10 accordance with the -- in accordance with the PCR application
11 which stated to state concisely the reasons and allegations
12 why you feel you are submitting this application. And also,
13 this is in response to the State's return which I received
14 three days after filing my brief. And they also say that
15 they -- they has written that they expressly deny these
16 allegations that I raised and admitted or otherwise
17 explained. This is what I have comprised to you and to ask
18 you into (sic) those two documentation. And I would like to
19 ask your permission, Your Honor, to have these -- have this
20 entered into the record and so -- to have where everybody can
21 have an opportunity to understand exactly where I'm coming
22 from.

23 THE COURT: Mr. Terrence, that's fair enough and I will
24 agree to allow to make that part of the record. We'll hear
25 all the issues that you have here today. However, your

1 motion for a continuance is denied.

2 MR. TERRY: Yes, sir.

3 THE COURT: Thank you, so much. We'll hear everything
4 you got to say here today. Is that fair enough?

5 MR. TERRY: That's fine. Thank you.

6 THE COURT: All right, thank you, so much.

7 MR. TERRY: Thank you, sir.

8 THE COURT: Yes, ma'am, Ms. Ross.

9 MS. ROSS: Thank you, may it please the Court. The
10 issues that I have, Your Honor, are ineffective assistance
11 counsel. In regard to that, I was told by defense counsel,
12 Ernie Hamilton, that he did not have the file any longer when
13 I requested that from him to review. Therefore, I subpoenaed
14 all discoverable evidence in the file from the State. And
15 they provided me a package. And I haven't called the
16 solicitor as a witness today and don't intend to unless you
17 have any questions about what I'm providing as discovery
18 provided to me through this subpoena.

19 THE COURT: Okay.

20 Ms. Ratigan, do you have any objection with regard to the
21 discovery information?

22 MS. RATIGAN: Ms. Ross said she received it from the
23 solicitor, I'm satisfied that she received it from the
24 solicitor's office. That's fine.

25 THE COURT: Very good. Thank you.

1 MS. ROSS: Judge, I carefully kept it in a separate file
2 marked discovery. As far as ineffective assistance of
3 counsel, there was some certainly competency issues that were
4 not raised and mental health mitigation that was not raised
5 or looked into at all. Mr. Terry was housed in the mental
6 health section of the law enforcement center for
7 approximately nine months before he was sentenced. He was
8 also on antipsychotic medication. None of this was brought
9 to the attention of the Judge. No evaluation was requested.
10 And according to Mr. Terry there was no discussion by Mr.
11 Hamilton with him about his mental health state whatsoever.

12 Secondly, there was a failure to evaluate the evidence.
13 Supposedly discovery was never requested from the State by
14 motion of the defense counsel. It was simply provided by
15 Bryna Seay, the Solicitor, at her own initiative after never
16 being requested it for over seven months. The physical
17 evidence was not viewed or signed out of property and
18 evidence. The rape kit with the doctor's evaluation was
19 never viewed. And all that physical evidence has since been
20 destroyed. Mr. Hamilton didn't attend a Family Court hearing
21 were supposedly Mr. Terry is alleged to have confessed.
22 However, in the State's file provided to me, there was no
23 confession by Mr. Terry. I believe what they refer to in
24 this plea of Mr. Terry admitting all the charges, were simply
25 that in the Family Court Order, Mr. Terry says that he's in

1 agreement that there was a finding of sexual abuse and
2 treatment was advised. An admission or agreement for finding
3 sexual abuse is quite different than a finding -- a in court
4 criminal finding of sexual battery, pleading to CSC which was
5 involved here.

6 Also, ineffective assistance of counsel because
7 Mr. Hamilton failed to mitigate. The act or whatever
8 happened at all. The victim wasn't at the plea. There was
9 no physical evidence. DSS talked about the victim's
10 condition as being good. There was no evidence that the
11 victim wanted substantial time. The victim's statement,
12 there wasn't really even a statement in discovery. Simply
13 sort of a hearsay in the incident report where she stated
14 that -- that she was anally and vaginally raped through her
15 shorts. Those shorts were never analyzed. That statement is
16 inconsistent with what was presented at the plea. And at the
17 factual -- and there was a failure to look into that
18 evidence. Would point out that the evidence didn't
19 corroborate the factual presentation made during the actual
20 guilty plea.

21 Also, there was no reference to Mr. Terry's 12 year
22 military history, lack of prior record. There was reference
23 made to his confession or statement. That again, was not
24 provided in discovery which, of course, it would have had to
25 have been if there was a confession or statement pursuant to

1 Rule 5. And that was not discussed at all. None of the
2 mitigation was presented. Nor the mental health mitigation.
3 Furthermore, Mr. Hamilton failed to keep Mr. Terry informed.
4 He wasn't shown the evidence. He wasn't made knowledgeable
5 of the collateral consequences of his guilty plea. And
6 finally, Mr. Hamilton failed to negotiate on Mr. Terry's
7 behalf. One of the -- it was a straight up plea. And one
8 of the plea offers Ms. Seay says I'm willing to discuss a
9 cap. No cap was presented.

10 This is almost the situation under -- a chronic situation
11 or Nancy Osmond situation where the adversarial process
12 completely broke down. But even if not, due to the state of
13 the evidence, there's certainly reason to believe that if
14 Mr. Terry had gone to trial, especially on the CSC case, he
15 would likely have won.

16 He's also alleging a due process violation. Stating that
17 his plea was not knowingly and voluntarily made. He was on
18 high dosage of meds, I think his competency was in question.
19 Also, there was no review of the meaning of sexual battery.
20 Which is especially important in light of his state of
21 depression and his state of competency that he understood
22 what he was pleading guilty plea to. And did not. He's also
23 alleging prosecutorial misconduct because -- there's reference
24 in the plea of some admission of statement and that was never
25 provided in discovery. There was a SLED report that said

1 there was no physical evidence found. Again, not provided in
2 discovery. And there's no testing of the physical evidence.
3 That could have certainly exonerated him. And those are the
4 basis of his hearing today, post-conviction relief request of
5 ineffective assistance of counsel, due process violation.

6 THE COURT: Very good.

7 Ms. Ratigan.

8 MS. ROSS: And he'll have some more.

9 THE COURT: Okay.

10 Ms. Ratigan, be glad to hear from you.

11 MS. RATIGAN: I have nothing to add.

12 THE COURT: Do you have anything with the regard to the
13 general presentation?

14 MS. RATIGAN: No.

15 THE COURT: All right, Ms. Ross, you may call your first
16 witness.

17 MS. ROSS: Thank you, Your Honor. We call Terrence Terry
18 to the stand.

19 THE COURT: Mr. Terrence, I'm going to ask you to place
20 your left hand on the Bible, raise your right hand -- before
21 we do that, let's allow the officer to help you with your
22 handcuffs.

23 Terrence Terry, after being duly sworn,
24 testified as follows:

25 THE CLERK: You may be seated.

1 THE COURT: Pull up a chair and.

2 Ms. Ross, is there ever been a test of competency done on
3 Mr. Terrence?

4 MS. ROSS: No there hasn't. When I met with him and
5 discussed this case with him nearly seven or eight months
6 ago, he was not on any psychotic drugs. He did not appear to
7 be suffering under a mental state such that I couldn't
8 communicate with him. Or I didn't understand what he meant
9 and he couldn't communicate with me. And I think he'd agree
10 with that.

11 Would you agree that was the state since we've been
12 dealing with each other?

13 MR. TERRY: Yes, ma'am, for the most part, yes, ma'am. I
14 would say that we do have a good communication. And I am
15 thankful for the way you've give me the opportunity.

16 MS. ROSS: Do you feel that mentally you understand
17 what's happening here today?

18 MR. TERRY: Yes, Susannah, mentally I do understand
19 what's going on. However, as, Your Honor, has asked of me
20 and as you have already stated, the circumstances which have
21 me here and the charges that were alligated against me, I
22 would have asked anyone to have given me an opportunity or
23 someone to assist me in the understanding that my
24 comprehension as far as dialect is concerned are in tact.
25 However, the situation, again, where the charges were

1 concerned, I think those things need to be addressed.

2 THE COURT: How would are you?

3 MR. TERRY: I am 47 years old, Your Honor.

4 THE COURT: And how far did you go in school?

5 MR. TERRY: I have 11 to 16 college credits, Your Honor.

6 THE COURT: Okay. And at one time you were on some
7 antipsychotic medication, were you on that medication when
8 the plea took place?

9 MR. TERRY: Absolutely, Your Honor. I have, and again,
10 with your permission, sir, each and every -- to conform with
11 the brief that I prepared and the application, each
12 allegation and issue that I raised, I have exhibits which I
13 would like to---

14 MS. ROSS: How about right now, would you hand me the
15 list of medication that you were taken in March.

16 MR. TERRY: Yes, ma'am, as a matter of fact, I just did.

17 THE COURT: All right, let me ask you, you were on
18 medications then but you're not on medications now?

19 MR. TERRY: That's correct, Your Honor. As a matter of
20 fact, when I was processed through SCDC they removed the
21 medications from me. And however, on my second time coming
22 to the courthouse although not having the ability to come
23 upstairs on the second time out. Ironically enough the
24 medications came back. I was -- this was after a years
25 period of being in SCDC but only the second time that I was

1 supposed to come before the Court. The medication came back
2 on that same, very same day. At which time I also denied it.

3 THE COURT: Okay, when you were taking medicine, have you
4 ever -- ever heard voices or anything such as that? Is that
5 why you were on medication?

6 MR. TERRY: Yes, sir. A part of it was being on the
7 voices, Your Honor. A part of it was for anxiety. A part
8 of, as there is document -- there is documentation from the
9 medical center where incidents had taken place at different
10 times while I was in isolation. Wherein an officer was
11 summoned and I wanted to explain to them what took place. I
12 have, Your Honor, all of my life, I have wanted to explain
13 some things.

14 THE COURT: All right, very good. We'll get to all that
15 now. But what I'm doing is trying to determine whether or
16 not you're competent to testify.

17 MR. TERRY: Yes, sir, I believe---

18 THE COURT: I'm going to have to ask you some questions
19 in that regard.

20 MR. TERRY: Yes, sir.

21 THE COURT: What does Ms. Susannah Ross, what is her job
22 here today?

23 MR. TERRY: It is my understanding that Ms. Ross is here
24 in representation of me for -- in the interest of presenting
25 to the Court the fact of number one, my guilt or innocence

1 and number two, the conditions by which I entered a guilty
2 plea in March of 2005.

3 THE COURT: Okay. Is she here to help you?

4 MR. TERRY: I would certainly hope and pray so, Your
5 Honor.

6 THE COURT: Very good. All right, Ms. Ratigan, who
7 represents the Attorney General's office over there, what is
8 her job?

9 MR. TERRY: Ms. -- from my understanding Ms. Ratigan
10 represents the Court system wherein to show that my
11 allegations are incorrect or that I am here to insight a
12 falsehood or that -- and, in fact, to defend Mr. Hamilton.

13 THE COURT: Right. All right.

14 MR. TERRY: And not defend me.

15 THE COURT: Right. So she's is supporting the position
16 against you; is that correct?

17 MR. TERRY: That's -- yes, sir, Your Honor, that's how I
18 perceive it.

19 THE COURT: What's my job here?

20 MR. TERRY: Your Honor, your job is to view the evidence
21 as presented by both sides and weigh the evidence as both
22 morally, spiritually and factually and by the Constitution of
23 the United States to render a decision that is adequate, fair
24 and just.

25 THE COURT: Okay, who is the President of the United

1 States?

2 MR. TERRY: That's awfully embarrassing as an ex-military
3 man not to be able to say that, Your Honor.

4 THE COURT: What year are we in?

5 MR. TERRY: I was in from 1978.

6 THE COURT: What year is this year?

7 MR. TERRY: Oh, forgive me, Your Honor, forgive me.

8 2007, Your Honor.

9 THE COURT: Do you know what month it is?

10 MR. TERRY: It is February of 2007, Your Honor.

11 THE COURT: All right.

12 MR. TERRY: And I, with your permission, I would state
13 again, as I stated into the record the last time I was before
14 the Judge, I am so thankful that you -- with the congeniality
15 that you're offering me because I am a bit nervous. However
16 nervous -- nervous and comprehending are two different
17 understandings.

18 THE COURT: All right, what city are we in now?

19 MS. ROSS: We're in Greenville, South Carolina, Your
20 Honor.

21 THE COURT: All right. I find that he's competent to
22 stand -- competent to testify here today.

23 Be glad to hear from you, Ms. Ross.

24 MS. ROSS: Thank you, Your Honor.

25 ///

DIRECT EXAMINATION

BY MS. ROSS:

Q Okay, you're here for post-conviction relief. Do you understand what will happen if you win today?

A It is my understanding that -- yes, ma'am, I do.

Q Okay. And what will happen?

A If I have receive the relief that I am after, which is reverse and remand, that my case will be reverted back to court for a new hearing.

Q And at that point you'd be potentially looking at more time because one of the charges against you carries up to 30 years, correct?

A Yes, I understand that.

Q And I've advised you of that and you understand that, right?

A Yes, ma'am, I do.

Q Why did you file your post-conviction relief action?

A My post-conviction relief action was filed due to the many errors in due process violations prior to my appearing at trial and or the plea hearing which were rendered not only through my counsel but also through the office -- office of the State of South Carolina as well as the Greenville County Detention Center.

Q All right. And you didn't file an appeal, why not?

A I had no knowledge of -- I am -- prior to being under --

1 turning myself in I was assistance manager at Wal-Mart. I
2 had no idea of what legal -- the legal sense or concept of
3 what my rights were or anything else. Nor was I advised by
4 my attorney that I should file for a direct appeal nor was I
5 -- I am not 100 percent sure even today what a direct appeal
6 is. Even though I was trying to ascertain it, in these two
7 and a half here.

8 Q So after receiving a 20 year sentence your lawyer said
9 nothing to you about you have a right to appeal, do you wish
10 to do so?

11 A That is absolutely correct.

12 Q All right. Now you've also -- or we have alleged
13 ineffective assistance of counsel in this case, is that
14 correct?

15 A That is also correct.

16 Q Okay. Let's talk about that a little bit. Was Ernie
17 Hamilton was appointed to represent you, correct?

18 A That's correct, yes, ma'am.

19 Q And he was appointed soon after your arrest as far as you
20 know?

21 A Your Honor --

22 Yes, ma'am, Susannah. Susannah, that's correct.

23 Q Do you know the exact date?

24 A Yes, ma'am. As a matter of fact I do.

25 I would ask, Your Honor, for permission to present this

1 to him and also ask you to present it and have it entered
2 into the record at this time. This is the booking report for
3 July 10th of 2004. Which states that Ernie Hamilton was
4 assigned to me at that point.

5 MS. ROSS: All right. I'd ask this to be marked and
6 entered as the applicant's exhibit 1 at this time.

7 THE COURT: That's entered into evidence. Plaintiffs
8 Exhibit 1 without objection.

9 MS. ROSS: I'll hand that up.

10 (WHEREUPON, Plaintiff's Exhibit No. 1 was
11 admitted into evidence.)

12 BY MS. ROSS:

13 Q Ernie Hamilton was appointed to represent you when you
14 were arrested on or about July 10th 2003, I believe, correct?

15 A To my understanding that's correct.

16 Q Or was it 2004?

17 A To my understanding today, that's correct. It was not my
18 understanding then.

19 Q Did he ever review the discovery with you?

20 A No, Susannah, he did not.

21 Q Now at this point have you had a chance to review the
22 discovery against you?

23 A I have had an opportunity through yourself.

24 Q All right.

25 A Excuse me, to review what has been presented in the

1 course of this last two and a half years, Your Honor. I've
2 been getting bits and pieces. And, of course, I'm not -- I
3 can't -- I'll get as to where that inconsistency falls or why
4 it falls but I've been managing to get bits and pieces so to
5 say that I believe that I have had an opportunity to review
6 the entire discovery, I would have to say no. But I believe
7 I have reviewed enough of the credible evidence for my
8 allegations.

9 Q All right. But before you pled guilty had you reviewed
10 your discovery?

11 A Absolutely not.

12 Q Did you ever see any SLED report such as this one?

13 A Absolutely not. Susannah, at this point I would like to
14 ask the Court, again, I would like to offer you another
15 exhibit. This is marked July 31st where I had written to
16 Michael J. Brown requesting, in fact, that SLED report, Your
17 Honor. After incarceration I became -- it was blessing to be
18 able to understand that I could -- what particular remedies I
19 could take in my own behalf before I was assigned Ms. Ross.
20 To come to understand what remedies I might be able -- what
21 my wrongs were and how I might be able to bring -- shed light
22 and get a justify ruling from them.

23 THE COURT: Very good, Mr. Terry. What I'm going to ask
24 you to do is Ms. Ross is going to ask you questions, I want
25 you to listen to her questions and answer them. And there is

1 going to be an opportunity for you to tell the Court anything
2 you want to tell me but for now, listen to Ms. Ross'
3 questions and answer them. Okay?

4 MR. TERRY: Yes, sir.

5 THE COURT: Then you'll have an opportunity to go over
6 anything else that you want to. Is that fair enough?

7 MR. TERRY: Yes, Your Honor. In saying at that point I
8 should---

9 THE COURT: You should listen to her questions and you
10 answer them.

11 MR. TERRY: Yes, sir.

12 THE COURT: Listen to what she asks and you answer them.

13 MR. TERRY: Yes, sir.

14 THE COURT: Very good.

15 MR. TERRY: Yes, Your Honor.

16 BY MS. ROSS:

17 Q All right. I just would go ahead, since we did bring
18 this up. Here is the South Carolina Law Enforcement
19 forensics report showing the results of the rape kit. No
20 evidence found. That Mr. Terry---

21 A You need the see this.

22 Q I don't think we need to put this in, frankly.

23 A You need to see this one. I don't think you've seen that
24 second letter, Ms. Ross. I appreciate it.

25 THE COURT: Once again, listen to her question. She

1 knows what she's doing.

2 MR. TERRY: Yes, sir.

3 THE COURT: Listen to her question, okay?

4 MR. TERRY: Yes, sir.

5 THE COURT: Very good.

6 MS. ROSS: This is a SLED report which I'd like to offer
7 into evidence.

8 THE COURT: Very good.

9 MS. ROSS: These are requests to SLED that Mr. Terry made
10 for those reports and they say that beyond this nothing else
11 has been done.

12 THE COURT: This SLED reports is into evidence as
13 Plaintiff's Exhibit 2 without objection.

14 Is that correct, Ms. Ratigan?

15 MS. RATIGAN: That's correct, Your Honor.

16 THE COURT REPORTER: Can I have a moment to mark these,
17 please?

18 THE COURT: Certainly.

19 (WHEREUPON, Plaintiff's Exhibit No. 2 was
20 admitted into evidence.)

21 BY MS. ROSS:

22 Q All right. Now, your guilty plea, I believe, was in
23 March of 2004, is that correct?

24 A That's correct.

25 Q Now, at the time of that guilty plea, how many times had

1 you met and discussed your case with Ernie Hamilton, your
2 defense attorney?

3 A That would come to a total of zero.

4 Q So it's your testimony that you never met with him?

5 A Until the day of my plea hearing for a 10 minute
6 consultation. That's my answer.

7 Q All right. And he had never provided or reviewed with
8 you discovery or the evidence against you?

9 A Absolutely not.

10 Q And at the time of your plea did he ever discuss the fact
11 that the SLED report came back with no evidence of semen or
12 anything like that?

13 A My recollection of our brief consultation prior to my
14 being called upstairs was him being on one side of the
15 petition, myself on the other. No paper work exchanged. A
16 brief conversation, unfortunately, which I cannot elaborate
17 back to you word for word.

18 Q All right. Now, at some point -- but then you did sign
19 up, sentencing sheets and you actually pled guilty in front
20 of the Judge, correct?

21 A I have -- as far as the signing of a sentencing sheets, I
22 have no recollection of signing a sentencing sheet.

23 Q Okay.

24 A And I have no -- simply state I have no recollection of
25 signing the sentencing sheet.

1 Q Do you have any recollection of your guilty plea?

2 A I have a recollection of being in the court.

3 Q Okay. But not exactly what was said?

4 A No, ma'am, not exactly what was said.

5 Q Okay. Do you understand that you did plead guilty? I
6 mean, did you know that you were pleading guilty that day in
7 court?

8 A Susannah, to answer that appropriately a part of me did
9 understand that I was pleading guilty but another part of me,
10 I was also needing to have what I'm having today, the
11 opportunity to explain, in fact, what did take place and what
12 did not and what I should or should not have been charged
13 with.

14 Q When you pled guilty did you understand what sexual
15 battery meant?

16 A Absolutely not.

17 Q All right. Were you advised about what sexual battery
18 meant by your attorney?

19 A Absolutely not.

20 Q All right, sir. Today do understand what that means?

21 A Yes. I have a definition of it, yes.

22 Q Sexual penetration however slight of any orifices
23 constitutes sexual battery?

24 A Understood.

25 Q All right. But at the time did you know that?

1 A I did not.

2 Q If you had known that would you have pled guilty?

3 A Absolutely not.

4 Q Now, if you had known that the SLED -- that there was no
5 forensic evidence of any kind of sexual battery, would you
6 have pled guilty?

7 A From what little I understand of legally, Susannah, I
8 think only someone would plea when there's evidence that
9 vindicates. No I would not have pled guilty.

10 Q Okay. Now, I want to talk to you about part of that
11 guilty plea, that's in the transcript, talks about the State
12 runs through a facts scenario. And, in fact, they said that
13 you had vaginal and anal intercourse with Minor1 And
14 then you confessed to this in Family Court. Now, you go on
15 to admit that's true. What were your -- why did you say
16 that?

17 A Susannah, the best way I can explain to you my state of
18 mind at was that while my body was in the court room going
19 through the emotion my mind was not. My mind was not. I was
20 there, I could hear, I could here, I could see but the
21 ability to comprehend and to adequately defend myself the
22 capability simply weren't there.

23 Q All right. Now, I want to talk about when you were put
24 in mental health at the law enforcement center, the mental
25 health area of law enforcement center after you were arrested

1 in July, why were you put there?

2 A First off, I was at the initial booking procedure, it was
3 stated -- it was stated that I was suicidal. That I had
4 tendencies to want to hurt myself. I was dressed out in a
5 suicide smock and placed in isolation.

6 Q And were you depressed as well?

7 A Quite much so.

8 Q And were you humiliated?

9 A Quite much so.

10 Q Did you feel guilty?

11 A I felt guilty for what took place not for what I was
12 charged with.

13 Q And did a sexual battery take place?

14 A Absolutely not, Susannah.

15 Q Did you ever commit a sexual battery on Minor 1

16 A Absolutely not, Susannah.

17 Q All right. Now you did -- I just want to talk about --
18 at the time the State says that you admitted to that in
19 Family Court, do you recall admitting to that in Family
20 Court?

21 A Unfortunately again, Susannah, I do not because also at
22 that time I had begun the treatments, the -- the---

23 Q Medications?

24 A Medications, exactly right.

25 Q All right. And I'll just -- do you recall the date of

1 your Family Court hearing?

2 A As a matter of fact I do because it was my birthday,

3 [REDACTED].

4 Q Okay. On that date, we have a sample of your handwriting
5 requesting an adjustment of your medication, is that correct?

6 A Yes, ma'am.

7 Q Is that your handwriting?

8 A Yes, as a matter of fact it is. Not proud to admit it
9 but it is.

10 MS. ROSS: I'd like to have this marked as Plaintiff's
11 Exhibit. And ask that it be -- be entered into evidence

12 MS. RATIGAN: No objection.

13 THE COURT: All right. That's Plaintiff's Exhibit 3 into
14 evidence without objection.

15 (WHEREUPON, Plaintiff's Exhibit No. 3 was
16 admitted into evidence.)

17 BY MS. ROSS:

18 Q All right, at that point your handwriting was fairly
19 shaky and you felt that you were over medicated; is that
20 correct?

21 A That is correct, Susan I did. And I was.

22 Q Now, an Order was entered in Family Court based on that
23 hearing, is that correct?

24 A Yes, Susannah, that's correct. In fact---

25 Q Have you ever seen this before?

1 A Yes, ma'am, I have.

2 Q Do you know what it is?

3 A I would upon reading it. At face value I would have to
4 go through it.

5 Q Okay. Well look at it.

6 A I do recognize it.

7 Q Okay. Well now in this it states, Terrence Terry is in
8 full agreement with the treatment plan and all the findings,
9 correct?

10 A That is correct.

11 Q And then turning over it states -- wait a minute I lost
12 it. Well, I'll get back to that in a second, I've lost it.

13 THE COURT: Take your time.

14 BY MS. ROSS:

15 Q There was, in fact, a finding of sexual abuse in Family
16 Court, wasn't there?

17 A Again, Susannah, to my knowledge I can't exactly state
18 what was and what the findings were because I was not myself
19 in companion -- competent to comprehend exactly what took
20 place. But according to the records and I will agree with
21 the record that it did say that that was the finding.

22 Q All right. I'll get back to that and address that in a
23 second. Was there -- haven't you reviewed your Family Court
24 records quite a bit since then, don't you have copies of
25 them?

1 A Actually, as a matter of fact I do, Susannah. To answer
2 your first question, yes I have reviewed them. Yes I do have
3 some exhibits from that -- from those records that I would
4 like to have entered.

5 Q Okay. But do you have any recollection of any finding of
6 sexual abuse being made?

7 A As a matter of fact I don't, Susannah.

8 Q Okay.

9 A Uh---

10 Q Nevermind, we'll move on. Now, was Ernie Hamilton there
11 at your Family Court hearing?

12 A No, he was not.

13 Q All right. And did he ever talk to you about anything
14 that was in property and evidence in your case? Did he ever
15 mention a rape kit or pair of shorts?

16 A No, Susannah, he did not.

17 Q Did he ever discuss the Sexually Violent Predator Act
18 with you prior to your guilty plea?

19 A No, Susannah, he did not.

20 Q Did he ever discuss conditional release with you prior to
21 your guilty plea?

22 A No, Susannah, he did not.

23 Q As far as the sexual registry, did he ever tell you
24 anything one way or the other about that as part of your
25 plea?

1 A No, Susannah, he did not.

2 Q Did you feel he was prepared?

3 A No, Susannah, I do not feel he was prepared.

4 Q Are you aware of him -- did he have any -- have the
5 shorts that were in evidence in underwear analyzed?

6 A No, Susannah, not to my knowledge. I have no records of
7 it, no. So no. To my knowledge he didn't.

8 Q Now, just going to the actual guilty plea, during the
9 guilty plea, at one point you said not guilty, page 9, not
10 guilty by reason of insanity, what were you starting to say?
11 Do you recall what you were trying to say there?

12 A Susannah, from reading the -- from reading the transcript
13 which is my most -- the most concrete foundation that I have
14 to recall that day, the statement of not guilty was to, in
15 fact, the fact that I was being charged with attacking my
16 step-daughter. But that, in fact, perhaps something -- some
17 inappropriate touching may have happened that had taken place
18 and for that I would -- had and would be willing to say that
19 this could have taken place and that I was guilty of.

20 Q So you were admitting to inappropriate touching?

21 A That is correct.

22 Q And you were guilty -- felt guilty and responsible about
23 that?

24 A That is also correct.

25 Q All right. I want to -- I believe you have a list from

1 the law enforcement center of the medications that you were
2 on in March when you pled guilty, do you have that list that
3 I provided to you?

4 A Yes, ma'am, I do. Along with a type-written description
5 of the---

6 Q Now you gave me a type-written description?

7 A That is correct.

8 Q That -- I want the records from the law enforcement
9 center of the medications you were on. Not your type-written
10 description of what they are?

11 A Well actually they excerpts from the book but I
12 understand you, Susan this would be from October.

13 Q Okay. Okay.

14 Beg the Court's indulgence.

15 Can I help you find it? Is in that group---

16 A I would certainly -- it's either there or it's at the
17 desk, Your Honor. I respectfully apologize. When they
18 brought us in they -- I had my exhibits in order and they got
19 scrambles liked eggs.

20 THE COURT: Don't worry about it.

21 A Thank you, Susannah. And I have February and also March.

22 Q I believe this is the same one in March?

23 A That's correct.

24 Q 9 milligrams of Risperdal, 500 milligrams of Depakote and
25 Pirfenidone---

1 A 75---

2 Q Go ahead.

3 A Pirfenidone, Amitriptyline, tranquilizers.

4 Q All right. And we would look for that after the hearing.

5 But according to my recollection and notes that's the same

6 prescription you were on in March. And the hearing was on

7 March -- I mean, the plea was on March 8th.

8 MS. ROSS: Mark these as Plaintiff's Exhibits -- can we
9 just call them 4?

10 THE COURT REPORTER: Yes.

11 (WHEREUPON, Plaintiff's Exhibit No. 4 was
12 marked for identification.)

13 THE COURT: Plaintiff's Exhibit 4 into evidence without
14 objection.

15 (WHEREUPON, Plaintiff's Exhibit No.4 was
16 admitted into evidence.)

17 BY MS. ROSS:

18 Q All right, how did that mental health treatment, how did
19 those drugs react with you?

20 A Susannah, I had several adverse reactions. So to include
21 anxiety attacks, hallucinations. Even points of muscle --
22 inability to control my reflexes and my muscles. To even --
23 even so much as to write my name. Certain medications that
24 were being administered particularly at bed time,
25 particularly on the night of March the 7th I was given a 500

1 milligram dose. And then only to be followed the following
2 morning with more medication. Which on days prior I can
3 remember one particular incident wherein I had laid down
4 after receiving the medication with the understanding of
5 waking up to have breakfast only to wake up to find out it
6 was dinner time.

7 Q Okay. Now Risperdal is an anti-psychotic like Haldol, is
8 that correct? Or do you know?

9 A Yes, ma'am. It is defined -- may I -- if I may Susannah.
10 I had the FDA book on medications, as you and I had
11 discussed, that I was going to bring with me. However, when
12 I got to the transportation station it was explained that
13 that was considered under SCDC policy as contraband of which
14 I was not aware.

15 Q Well let me put it this way. On the Risperdal that you
16 were taking, the levels, were you taking a fairly low level
17 or a fairly high level does of that drug?

18 A Well, Susannah, that comes down to the times I was taking
19 it along with the time I was taking it. It had elevated to a
20 quite nominal level, shall we say.

21 Q All right. Did Ernie Hamilton ever discuss the drugs
22 that you were taking with you?

23 A Mr. Hamilton could not have discussed the drugs because
24 Mr. Hamilton could not have known that I was on them because
25 Mr. Hamilton never made any contact with me. Had me made any

1 attempt to reach me at the detention center he would have
2 realized that he would have had to go through the medical
3 wing, the isolation medical wing to even reach me.

4 Q All right. Now, that's all my questions I have on
5 ineffective assistance of counsel. Just leading up we've
6 been taking about the medicines you were on, when you pled
7 guilty, the actual transcript of the guilty plea showing
8 admissions, discussions between you and the Judge, did you
9 understand fully what you were doing?

10 A Absolutely not, Susannah. My body was in a portion -- I
11 would be adverse to sit here and say that I was absolutely
12 100 percent incompetent as I was in that courtroom. What I
13 am saying is that I was not at a competent adequate level to
14 realize what I was doing.

15 Q And that was because you were on these medications?

16 A That is absolutely correct.

17 Q And also as far as admitting guilt to sexual battery, did
18 you understand what that meant or what you were doing?

19 A No, I didn't.

20 Q Did you understand the consequences of what you were
21 doing?

22 A No, I did not.

23 Q If you had understood, would you have admitted guilt or
24 pled guilty to those charges?

25 A I absolutely would not have.

1 Q Are you guilty of sexual battery of your daughter?

2 A No, I am not, Susannah.

3 Q Now you've also -- do you feel as far as Mr. Hamilton's
4 representation of you that -- that he was ineffective?

5 A Absolutely, Susannah. I have to wonder how Mr. Hamilton
6 -- I have to wonder how Mr. Hamilton -- I have to wonder how
7 Mr. Hamilton can in all good conscience, spiritual or morally
8 feel or -- I'm curious to understand how he's going to answer
9 that.

10 Q As far as -- you've also alleged prosecutorial misconduct,
11 what's the basis of that?

12 A That is based on the DNA reports, Susannah, and a letter
13 that I received from SLED on dated August 9th of 2005 which
14 states that a search of our data base reveals that all
15 testing has not yet been completed concerning the above
16 referenced case. Which I would like to offer to you. Also,
17 I'd like to go on record saying that I was at McCormick when
18 I received that.

19 MS. ROSS: All right. Move to -- mark this as
20 Plaintiff's Exhibit 5.

21 (WHEREUPON, Plaintiff's Exhibit No. 5 was
22 marked for identification.)

23 MS. ROSS: We offer this into evidence.

24 THE COURT: Plaintiff's Exhibit 5 into evidence without
25 objection.

1 (WHEREUPON, Plaintiff's Exhibit No. 5 was
2 admitted into evidence.)

3 A Susannah, I would like to say that with the results that
4 you have, in fact, are returned and if you'll notice the date
5 at the top it is dated March the 2nd. So my question --

6 My question is, Your Honor, had this analysis been
7 completed or had it not? My second request is why was it not
8 a part of my discovery? How come -- this information came to
9 me through researches of my own. And I'm at a lost. I'm
10 lost to understand it. Because with the letter that's
11 written they're saying the DNA was not completed. How could
12 the State come at me the way they did? And I believe because
13 of the emotional upset and the way I was, I wasn't able to be
14 prepared for it.

15 Q I'm showing the Assistant Attorney General a copy of what
16 was provided in your discovery.

17 A Understood.

18 Q The cover sheet.

19 MS. ROSS: I'd like to have this place into evidence at
20 this time.

21 Mark this as Plaintiff's Exhibit 6.

22 (WHEREUPON, Plaintiff's Exhibit No. 6 was
23 marked for identification.)

24 MS. ROSS: I'd offer this into evidence at this time.
25 This is a cover sheet of what the State provided as

1 discoverable material to Mr. Hamilton in January 2004. And
2 the SLED report is not in there.

3 BY MS. ROSS:

4 Q Now -- and you can't say whether there was a supplemental
5 discovery made by the State as far as the SLED report?

6 A That's right. That's absolutely correct, Susannah.

7 Q But you didn't see the SLED report prior to your guilty
8 plea and had no knowledge of it?

9 A Absolutely correct, I did not.

10 Q And in the fact factual presentation during your guilty
11 plea they certainly didn't say anything about there was a
12 sexual battery except the SLED report shows there was no
13 evidence of this. I mean, they don't bring that to the
14 Judge's attention.

15 A That's absolutely correct. In fact, Susannah and, Your
16 Honor, it's -- it's -- it's terrible. I mean, what I wish to
17 say to the Court, Your Honor, is I went on record and plead
18 here in court, continually answering questions while under
19 the representation of counsel, I answered questions that I,
20 in fact, I knew that were -- that I now know, is the more
21 appropriate statement, were un -- and I would not have done.
22 Such as had I had an opportunity to review what the State had
23 to use against me and I said I did. And now I'm back here
24 saying that I hadn't. So that's kind of a -- that's not
25 exactly what you would call good marbles as far as to play a

1 fair game. And this is what I had counsel for. This is why
2 I'm back and this is what I'm alleging.

3 THE COURT: Plaintiff's Exhibit No. 6 is into evidence
4 without objection.

5 MS. ROSS: Thank you, Your Honor. I'm sorry to interrupt
6 you.

7 (WHEREUPON, Plaintiff's Exhibit No. 6 was
8 admitted into evidence.)

9 BY MS. ROSS:

10 Q I was going back to find -- now, also during the guilty
11 plea the State referred to you confession in Family Court, is
12 that correct?

13 A Yes, from what I read.

14 Q All right. And I'll just show you, here's the Order
15 which does state that you were in full agreement with the
16 treatment plan and all of its findings, correct?

17 A Yes, Your Honor -- Yes, Susannah.

18 Q And I'm showing you now the treatment plan. And in that
19 treatment plan the findings were that there was a finding of
20 sexual abuse, is that correct?

21 A That's correct, Susannah.

22 Q Now there was no findings of sexual battery, was there?

23 A No, there wasn't.

24 Q Or criminal sexual conduct with a minor, was there?

25 A No, there wasn't.

1 Q And the treatment plan consisted of an Order that you
2 undergo counseling not incarceration or anything like that?

3 A That's also correct, Susannah. And in addition, I don't
4 know, perhaps it's not in your records but there was an
5 initial treatment plan prior to the Family Court hearings
6 dated August of 2004, which will I would also like to have
7 your permission to enter into an exhibit and entered into
8 evidence. Also, the State requesting an Order for
9 psychological evaluation. So there were, in fact, two.

10 Q All right. Now, supposedly you somehow confessed by
11 agreeing to this treatment plan according to the State. And
12 they brought that up. Well let me put it this way. Did you
13 make any other admission in Family Court admitting to sexual
14 battery?

15 A I made no admissions in Family Court, Susannah. I was --
16 again, I was there as a body but I was not there competently
17 as myself.

18 Q And you weren't represented by counsel there, were you?

19 A I was not.

20 Q All right. And the State -- yet the State, I guess, part
21 of your prosecutorial misconduct is that the State presented
22 this Family Court Order has evidence of your confession in
23 Family Court?

24 A That's close to correct, Susannah. Yes, my allegation is
25 that the State brought a statement from the Family Court

1 against me. And I, again, from researches I have come to
2 learn that I'm not allowed to be -- I'm not to be held liable
3 for my own incriminating words.

4 Q And there was no -- there was no confession presented to
5 you in your discovery, was there?

6 A No, there was not.

7 Q Okay. Now, Mr. Terry, I don't think -- you've testified
8 to what's in these, I don't think it's relevant to offer into
9 evidence unless you want me to do that?

10 A I would like to have them entered into the record. Thank
11 you.

12 MS. RATIGAN: I'm going to object to relevance, Your
13 Honor. I don't know that any treatment plan from Family
14 Court has any bearing on this decision.

15 THE COURT: It does not, I'll sustain your objection.

16 MS. ROSS: All right. Thank you.

17 BY MS. ROSS:

18 Q All right, is there anything else that you want to tell
19 the Judge at this point? I've asked you all my questions, is
20 there anything else that you want the Judge to hear about
21 your post-conviction relief action?

22 A Yes, Susannah, as a matter of fact there is.

23 Your Honor, again, I would say like to say that the --
24 the reasons for my being here and the things that I was
25 charged with are not one in the same. I did not -- I did

1 not, I would not have attacked my daughter. That child
2 worshiped the ground that I walked on. And it was an honor
3 and privilege. I felt it an honor and privilege to be able
4 to take care of those children. Your Honor, also,
5 embarrassingly so, at the age of 6, what I was charged with I
6 had done to me. So I know -- I know, in fact, what type of
7 pain that would inflict. I know, in fact, what type of
8 animal it would take to do something like that, Your Honor.
9 And I cannot, as God is my witness, sit here before you and
10 declare myself that sort of an animal. I simply wouldn't.

11 And, Your Honor, further, as far as having defense in my
12 behalf, I simply had none. There simply was -- I was in the
13 detention center for 9 months. Which I believe more than
14 ample opportunity to have someone get in touch with me to --
15 to -- to let me know what I was coming up against and what I
16 was charged with. And, in fact, again, there -- there was --
17 there was a defense, someone op hear me, to hear my side
18 while I was of competent mind to be able to explain it. And,
19 Your Honor, and the -- the -- to attack the due process, the
20 due process issues which had took place prior to my -- prior
21 to the plea hearing, again, these are things I wanted to
22 bring up as well, Your Honor, because of my warrants. My
23 warrants, my Exhibits, they would back date my warrants.
24 There was error after error. A constitutional violation
25 after violation. They was said I was served my warrants. I

1 wish to enter into exhibit my booking record which says that
2 I was placed -- I was from the booking department -- from the
3 sally port at the booking department I was placed in
4 isolation. How was I served a warrant? How was I given
5 notice of the charges brought against me? It's my
6 understanding that I was to receive a copy or perhaps even my
7 attorney would have received a copy to be able to bring an
8 argument in my behalf rather than have to be here today
9 trying to do it myself.

10 But, again, this is a due process issue. I wish to have
11 this on the record for appellate review because I would like
12 to -- I would like to have someone address these issues, Your
13 Honor.

14 Q All right, you have anything further?

15 A Yes, ma'am. The my indictments. The fact of the matter
16 is my indictments have not been registered with the Clerk of
17 Court. They're in violations of South Carolina rules.
18 Criminal Procedure 3(b) and 3(c). It's the issue that with
19 my attorney that arguing this -- this letter saying that no
20 testing -- A search of out data base reveals that all testing
21 has not yet been completed. I needed an attorney to go to
22 the State on my behalf and say, Where are you coming from?
23 To this moment I'm not comprehending how they have it dated
24 March the 2nd and yet SLED is telling me that it's not
25 complete. I can only -- I can only assess this as

1 prosectorial misconduct according to the laws that I've read
2 upon, Christopher vs. State you can't do it.

3 Q Okay.

4 A My plea in the Court -- in the Courts, the pleas that I
5 gave says the laws state -- the laws and case law state
6 Marriott, Donald vs. Marriott says you cannot be induced
7 while one is under tranquilizers. I was under tranquilizers.
8 I was under tranquilizers, Your Honor, that rendered me not
9 myself.

10 Q Okay. And we've put those into evidence. I think we've
11 discussed that issue of your competency, is that all?

12 A Yes, ma'am. I would, with your permission, I would like
13 to reserve to have a moment to review and submit anything if
14 the Court is willing to accept. But have a moment to -- but
15 I believe you've covered everything. I'll say that I'm
16 satisfied.

17 THE COURT: Ms. Ratigan, you may cross-examine.

18 CROSS-EXAMINATION

19 BY MS. RATIGAN:

20 Q So your testimony is that you were on all sorts
21 psychiatric medications at the time of the plea; is that
22 correct?

23 A My testimony in the record state such. Yes, ma'am.

24 Q Well why didn't you tell Mr. Hamilton or Judge Miller
25 that you were psychiatric medication?

1 A Due to the fact -- you just answered that question.
2 Because I was on psychiatric medication which rendered me
3 incompetent to be able to speak for myself.

4 Q Didn't you tell Judge Miller you were on hypertension
5 medication?

6 A That is correct.

7 Q But you were competent to tell him that but you weren't
8 competent to tell him you were on medical -- psychiatric
9 medication?

10 A That is also correct. Due to the fact, again, that the
11 medication has, was and is and was in effect rendering me not
12 totally a nincompoop but incompetent to be able to present
13 all the arguments and defenses for myself since I did not
14 have an attorney to do it for me.

15 Q Why didn't you -- didn't Judge Miller ask you if you'd
16 ever had psychiatric treatment?

17 A Not to my knowledge.

18 Q Have you read the plea transcript?

19 A Excuse me?

20 Q Have you read the plea transcript?

21 A As a matter of fact I have.

22 Q And you don't recall Judge Miller asking you if you'd
23 ever had any kind of psychiatric treatment?

24 A As to the -- as to what the transcript says, it says that
25 I did. And thus I do stand behind that. But further, I also

1 say that why -- when he did ask me that -- if I had given an
2 answer I would have thought that that would have served as a
3 further warning to my attorney that quite possibly well maybe
4 my client -- maybe I had better checked with my client seeing
5 as how I never talked with him before any how.

6 Q So the answer is yes, you did tell the Judge that you had
7 psychiatric treatment?

8 A Yes, that is correct.

9 Q Did you tell him that you were still undergoing
10 psychiatric treatment?

11 A According to the transcript that's what I told him.

12 Q Are you sure?

13 A No, I am not sure. I cannot swear to anything that you
14 have in that transcript. Because, again, due to the
15 medication that I was on, only a portion of me was able to --
16 I can only swear to you today that a portion of me was there.
17 As to the -- not enough competent portion to attest to what I
18 said.

19 Q So you only remember bits and pieces?

20 A I can only go by what the transcript says.

21 Q That's not what I'm asking you. I'm asking you, can you
22 -- you can only remember bits and pieces; is that right?

23 A That is correct.

24 Q Okay. Is there any rhyme or reason as to what you can
25 remember and what you can't remember?

1 A There most certainly is.

2 Q Okay, tell me.

3 A Pirfenidone, Amitriptyline---

4 Q That's not what I asked?

5 A You asked me is there any rhyme or reason as to why I can
6 or cannot remember what took place at the trial and I'm
7 giving you the definition. Amitriptyline, Pirfenidone, 500
8 milligrams of Depakote, 77 milligrams of Risperdal. Those
9 are the reasons. That's all I can tell you.

10 Q And that's why you can only remember certain things?

11 A That's correct.

12 Q But you can remember things happened prior to that like
13 your adverse reaction to the medication, you can remember all
14 of that; can't you?

15 A No, as a matter of fact I can't remember all the adverse
16 reactions but I can remember some of them like being in
17 court. Like I remember -- as an individual could remember
18 getting -- having intravenous needles placed in his arm and
19 telling him to count back from 10. But some where between
20 the point 10 and 0, he's going to lose -- he's going to lose
21 the ability to be as competent level to recall that he was
22 counting. But he can go back in his memory and recall that
23 he was counting.

24 Q Didn't you state to Ms. Ross that part of you understood
25 you were plead guilty that day?

1 A Excuse me?

2 Q Didn't you tell Ms. Ross that part of you understood that
3 you were pleading guilty that day?

4 A What I told Ms. Ross was that part of me was there to
5 plead guilty.

6 Q So you knew you were there to plead guilty?

7 A Excuse me?

8 Q So you knew that day you were there to plead guilty?

9 A As to whether or not I knew -- I knew I was there in
10 court to plead guilty, that's correct.

11 Q Okay. Did you want to plead guilty that day?

12 A No, I did not.

13 Q Why didn't you tell the Judge you didn't want to plead
14 guilty?

15 A Why didn't I tell the Judge I didn't?

16 Q Why didn't you tell the Judge, Judge Miller, I don't want
17 to plead guilty, I'm not in my right mind---

18 A If you'll check the transcript -- if you'll check the
19 transcript, after us going through the whole colloquy of
20 Mr. Terry this, Mr. Terry that and are you this and are you
21 that, Mr. Terry. And then how do you want to plea. If
22 you'll note what came out of my mouth, if I had a true
23 understanding of being in there to plead guilty, enter a
24 guilty plea, it would be kind of asinine to turn around after
25 the Judge has given me the colloquy to establish that I am

1 going to plead guilty, for me to turn around and say not
2 guilty.

3 Q Well didn't you say twice on the record that you were
4 guilty on pages 9 and 11?

5 A I may have. If the transcript shows that I agreed to all
6 the formalities that took place in court.

7 Q And didn't you tell the Judge that you agreed with all
8 the facts that the Solicitor stated to the Court that day?

9 A The transcript shows that I did, in fact, say what the
10 transcript says I said.

11 Q And doesn't the transcript say that you told the Judge
12 you had ample opportunity to review the evidence against you?

13 A Well the way you're presenting these questions you're
14 saying me, but, again, I believe it's imperative that you
15 define the question of who are you. Me, you being me, that
16 was not there that day is not the you that is before you now.

17 Q Well I think you can answer the question then. Doesn't
18 the---

19 A Well---

20 Q --pardon me. Doesn't the transcript say that? That you
21 agree that you had ample opportunity to review the evidence
22 that the State had against you?

23 A No, what the transcript states is what I stated into the
24 transcript. The transcript does not state my frame of mind
25 or my mental capabilities to comprehend at that time. That's

1 what the transcript states.

2 THE COURT: Ms. Ratigan, I believe it's clear what the
3 transcript says. I think that speaks for itself.

4 BY MS. RATIGAN:

5 Q So you weren't---

6 THE COURT: I---

7 MS. RATIGAN: I'm sorry.

8 THE COURT: I think it's clear. I think it's clear to
9 everybody in the courtroom what he maintains the problem is.

10 MS. RATIGAN: Okay.

11 BY MS. RATIGAN:

12 Q And you're stating today, Mr. Terry, that you never
13 admitted your guilt to DSS?

14 A I'm stating today that I was not competent to entering a
15 guilty plea or admit anything else or even be in the
16 courtroom. And that my attorney, had he gotten in touch and
17 done a little bit of research he would have not had me in
18 that courtroom.

19 Q That's not what I'm asking you.

20 A And that's to my due process protections.

21 Q What I asked you was you're saying today that you never
22 went to Family Court and admitted your guilt, is that
23 correct?

24 A What I'm saying today is that I do not have recollection
25 of what took place in Family Court.

1 Q And you stated you were never served your arrest
2 warrants; is that correct?

3 A That is correct, I did state that. Based upon the fact
4 that, again, that upon entering the sally port I was placed
5 in isolation and that these records were never served upon me
6 and they very well could not have been. As I was told they
7 must be served by a Judge. And I don't recall seeing any
8 Judge. Of course, I may have, I can't say. I can only say
9 what I recall.

10 Q Were you in the medical health area of LEC the entire
11 time you were there or just when you were initially booked?

12 A I spent a greater portion -- if there was -- towards the
13 end -- towards the end, toward the time of the plea hearing,
14 they transferred me to the K wing however the medications
15 continued.

16 Q So you were there about -- you were there at least about
17 six months, how long would you say you were in the mental
18 health area?

19 A First of all, I was in the LEC at least approximately
20 eight months.

21 Q Well.

22 A And as far as being in the mental -- as far as being in
23 the mental health area, I can't recall without really
24 reviewing my records.

25 MS. RATIGAN: I have nothing further, Your Honor.

1 THE COURT: Redirect?

2 MS. ROSS: No, Your Honor.

3 THE COURT: You may step down, Mr. Terry.

4 Anything further from the applicant?

5 MS. ROSS: No, Your Honor.

6 THE COURT: Ms. Ratigan, you're recognized.

7 MS. RATIGAN: The State would call Mr. Hamilton.

8 THE COURT: Mr. Hamilton, come forward, place your left
9 hand on the Bible, raise your right hand as the Clerk
10 administers the oath.

11 Ernie Hamilton, after being duly sworn,
12 testified as follows:

13 THE CLERK: Thank you, you may be seated.

14 DIRECT EXAMINATION

15 BY MS. RATIGAN:

16 Q Mr. Hamilton, you recall Terrence Terry and the charges
17 that were pending against him?

18 A Yes, ma'am.

19 Q Mr. Terry stated you were appointed, is that correct?

20 A That's correct.

21 Q Do you recall how many times you met with Mr. Terry
22 before the plea?

23 A I do not recall how many times I met with him. I do
24 recall the time we did enter the plea that I went over the
25 materials that I had in my possession. But how many times I

1 met with him I don't.

2 Q Did you file a Brady Rule 5 in this case?

3 A I did not do a motion as the normal course. I'm a former
4 prosecutor, I know Bryna and I called her and she said she
5 would give it to me.

6 Q Did the solicitor in this case have an open file policy?

7 A She did.

8 Q Did you make copies of everything that was in her file?

9 A I did.

10 Q Was there a SLED report in that file?

11 A There wasn't a SLED report in there.

12 Q Were you ever made aware that there was a SLED report?

13 A Never made aware of a SLED report.

14 Q Were you aware that Mr. Terry had gone to a Family Court
15 hearing regarding this issue?

16 A I had that information that was sent to me that he had
17 been to a hearing but I didn't appear with him, no.

18 Q Now when you -- before he pled guilty did you review with
19 him the elements of charges that he was facing?

20 A Went over the allegations and what he was accused of
21 doing. And what the little girl, 11 years old, had said.

22 Q Did Mr. Terry tell you he was guilty?

23 A He was -- he told me something happened that it happened.
24 He was very calm like he is today. You know, he was
25 intelligent and kind of remorse. He was sorry that it

1 happened and he knew the child and wouldn't do nothing to
 2 hurt her. But it happened. Something happened. And I told
 3 him well, you know, you just tell the Judge that it happened.
 4 That, you know, you pleading guilty. And he never said he
 5 wasn't guilty, he just so remorse and evasive to the degree
 6 that I was satisfied that it happened, it's just that he
 7 didn't just want to say I did it but I'm going to plead
 8 guilty. I'm going to plead guilty. You know, I'm sorry.
 9 Just I'm just so embarrassed. Very calm. And calculated
 10 about it. Quite evasive. But I was satisfied that he wanted
 11 to plead guilty.

12 Q Did he ever tell you that he wanted to go to trial?

13 A He never said he wanted to go to trial.

14 Q Did he ever inform you that he was on any kind of
 15 psychiatric medication?

16 A Never detected that about him. He had told me how he had
 17 college credits, he was educated. And I believed him. He
 18 was like articulate and calm spoken. Wasn't excited about
 19 the problem he was in. He was remorseful about it. And
 20 concerned.

21 Q Did he appear to understand the conversations you were
 22 having with him?

23 A He did.

24 Q Was there any question in your mind that he did not
 25 understand what he was doing that day?

1 A There was no question in my mind that he wanted that to
2 -- he understood what he was doing there. He was there to
3 plead guilty and he stood in front of the Judge and was
4 comprehensive of what was going on.

5 Q Did he ever seem confused or not quite sure of what was
6 going on?

7 A The only thing that I would say that he -- he wanted to
8 admit without admitting that he did this act. You know. He
9 danced around it but I'm going to plead guilty. You know,
10 I'm going to plead guilty. But, you know, when you get into
11 specifics as to what he did, he would kind of be evasive but
12 something happened. And that's what he told me.

13 I said, Well you're going to plead guilty to it?

14 And he said, Yes.

15 Q Did he appear to understand Judge Miller's questions that
16 day?

17 A He did.

18 Q If he had appeared to be confused or not understanding
19 what was going on, would you have allowed him to plead guilty
20 that day?

21 A It's been my standard operating procedure and that is to
22 make, you know, give them the opportunity to understand that
23 he could go to trial. And that he did not have to plead
24 guilty. And I also told him and I recall -- and I don't mean
25 to confuse it with any other case but I said you can't go in

1 front the Judge and talk about how -- you know, admit to it
 2 without admitting to it. You know, you got to admit to that
 3 you what you did. And he's going to ask you, the Judge is
 4 going to ask you, Are you guilty? And you got to say you're
 5 guilty. You say something happened and that type of thing.
 6 And he understood that. And then when he got in front of the
 7 Judge he did that.

8 Q But again, to your knowledge he wasn't on any psychiatric
 9 drugs that day?

10 A Oh no, I didn't know anything about that.

11 Q Now Ms. Ross stated earlier on that you had lost your
 12 file, you since found your file?

13 A Yes, I did. I got one of my parallel legal to help me.

14 Q Was there copies of the warrants in the file?

15 A Yes, there was.

16 Q Was there an indication on return that they had been
 17 served on Mr. Terry?

18 A There was a return date on that file that they were
 19 served on him. The warrants.

20 Q Did you see any basis to challenge the indictments in
 21 this case?

22 A None.

23 MS. RATIGAN: That's all I have, Your Honor.

24 THE COURT: Cross-examination.

25 MS. ROSS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. ROSS:

Q All right, Mr. Hamilton, you were appointed to represent Mr. Terry on or around July 10 2005, is that correct?

A That's correct.

Q At that point you didn't notice that he been housed in the -- that he was housed mental health?

A Didn't have no knowledge of that.

Q Does your file reflect the dates that you visited Mr. Terry?

A I don't have anything to show that I visited.

Q All right. Did you ever request the law enforcement records and review the medications that Mr. Terry was taking?

A I just reviewed the files that I had in my possession, all the documents that I had. In other words, I didn't request about any medication, I'm sorry.

Q What you had in your position was the discovery package provided to you by the State?

A That is correct.

Q All right. And you stated before that discovery package did not include the SLED examination?

A It didn't have that in there.

Q All right. And you said you did receive something from Family Court?

A Yeah, I did get that.

1 Q I'm going to show you what Bryna Seay provided to me of
2 what was in her file recording Family Court, is that?

3 A That's what I got.

4 Q Okay. And that basically doesn't show a confession but
5 it does say in full agreement with treatment plan?

6 A Treatment plan and the finding.

7 Q And the finding. The finding was sexual abuse, treatment
8 plan, counseling?

9 A That's correct.

10 Q Okay. And were there plea offers provided to you by the
11 State?

12 A There was no plea, concurrent time was basically the only
13 thing I recall.

14 Q All right. Did you ever discuss a cap with Ms. Seay?

15 A Didn't discuss -- I don't recall discussing a cap.

16 Q All right. Despite the fact, I guess, her initial
17 January 18th, 2005 plea offer, does state that she was
18 willing to discuss a cap?

19 A Yeah, but I don't think we did.

20 Q All right. And then the transcript of the plea itself
21 doesn't reflect any cap?

22 A Cap.

23 Q Okay. Now, did you -- so just going through, as far as
24 the meds, getting back to that, you never asked for an
25 evaluation or anything like that?

1 A He was quite competent in my opinion. I'm not a doctor
2 but based on my -- he was communicating quite well. And then
3 indicated to me that he...

4 Q All right. And, in fact, in mitigation on your plea, you
5 stated that Mr. Terry knew that quote, Only a crazy person
6 would do such a terrible act?

7 A That's what he told me.

8 Q You said that to the Judge?

9 A Yeah, that's what he would tell me.

10 Q All right. But you never backed that up with any of the
11 real existing diagnosis of hearing voices and mental health
12 problems and depression he had been experiencing for the last
13 nine months documented at the jail?

14 A Well this is the first time that I heard that he had
15 voices.

16 Q Okay. And, again, the State referred in their case just
17 during the plea, in their presentation of the facts, the
18 State referred to Mr. Terry admitting guilt in Family Court
19 and you never challenged that saying, Well no, he admitted
20 sexual abuse not that he had vaginal and anal intercourse
21 with his daughter?

22 A Right. To me it's all the same.

23 Q So you didn't---

24 A Sexual conduct. Misconduct.

25 Q So you didn't make that distinction?

1 A I didn't make that distinction.

2 Q Because sexual abuse was the same as sexual battery?

3 A It's all the same.

4 Q Is that the way you discussed it with Mr. Terry as well
5 when you were going over it with him?

6 A Well, when I told him what the allegations were and he
7 was calm about it. And didn't just say, Okay. He
8 understand. That that's what he was charged with.

9 Q He seemed like he felt guilty?

10 A Yeah, he was sorry it happened. He was ashamed of
11 himself.

12 Q All right. Now you didn't hear -- didn't attend the
13 Family Court meeting -- I mean, I'm sorry, the Family Court
14 hearing in October, you didn't attend that?

15 A Didn't even know about it.

16 Q In fact -- so you didn't even know about it?

17 A Didn't know about it.

18 Q Okay. And reviewing that discovery that you received, I
19 believe it was on January 18th, 2005?

20 A Uh-huh.

21 Q And that's after he had been in jail for approximately
22 six months, is that correct?

23 A That is correct.

24 Q Did you -- did you ever take note of -- there's no actual
25 statement of the criminal sexual conduct victim but there is,

1 I guess, a supplemental report discussing what the officers
2 talked to her about?

3 A Yeah.

4 Q Do you recall what she said about her shorts?

5 A Suspect told --

6 Q Well this is -- just let you review it. Was she
7 saying---

8 A Tell me what she saying.

9 Q She said that he put her on top of him and started moving
10 her up and down on top of him while she was clothed. She
11 said she wanted to go out and play with her sister and she
12 left. And came back later. After returning to house she
13 said he told her to go in the bedroom, but hair -- hair---

14 A Hair grease.

15 Q Hair grease on her, prepare her for little boys. He took
16 the grease and rubbed it on her private parts. Said that he
17 did not take her clothes off but her shorts were big enough
18 so that he could get in them easily. She described the
19 suspect putting his penis in her bottom and his fingers in
20 her vagina. Described as nasty. So her description she had
21 her clothes on while this occurred?

22 A Yeah.

23 Q All right. And those clothes were actually taken and put
24 into property and evidence?

25 A Okay.

1 Q Are you aware of that? And I'll just show you. I'm just
2 going to show you all of the property and evidence sheets.

3 One is a rape kit for Minor1 the alleged victim,
4 along with paper work.

5 A Okay.

6 Q And this shows who signed it out. You never went down to
7 see that evidence, did you?

8 A At SLED?

9 Q Yeah, it was down at the law enforcement center, property
10 and evidence. It went to SLED for testing and that came back
11 negative, you said you didn't get that report?

12 A Let me see the -- yeah, discovery.

13 Q Okay. And yeah, this was in discovery except it didn't
14 have as many signatures because a new version after it had
15 been signed out. And then there was a pair of white shorts,
16 pair of pink juvenile panties and blue hair grease that was
17 also in discovery that you never went to see. And, in fact,
18 this is showing that that evidence is now destroyed. Okay.

19 MS. ROSS: I'd offer this as Plaintiff's Exhibit 6?

20 COURT REPORTER: 7.

21 MS. ROSS: 7. And this is the property and evidence
22 report showing that Mr. Hamilton didn't go down and review
23 that property and evidence.

24 THE COURT: Plaintiff's Exhibit 7 into evidence without
25 objection.

1 (WHEREUPON, Plaintiff's Exhibit No. 7 was
2 admitted into evidence.)

3 BY MS. ROSS:

4 Q All right, so you never had any independent testing done
5 or demanded the SLED results before prior to having Mr. Terry
6 plead guilty?

7 A Never.

8 Q Beg the Court's indulgence. And, of obviously, because
9 you didn't have the SLED report, you never advised Mr. Terry
10 prior to his plea that there was no semen or any kind of
11 physical hairs or anything found in the rape kit?

12 A Right.

13 Q And, in fact, you never viewed the rape kit at all to see
14 whether there was any doctors evidence of any findings of
15 tearing or anything like that?

16 A No. We talked about him appearing in court to plead
17 guilty and that he was guilty.

18 Q All right.

19 MS. ROSS: Beg the Court's indulgence.

20 BY MS. ROSS:

21 Q To your recollection, did you ever advise Mr. Terry about
22 the collateral consequences to a guilty plea, especially of
23 the criminal sexual conduct with a minor first degree?

24 A The collateral consequences?

25 Q Uh-huh. Like the fact that you have to be -- that you're

1 a sexually violent predator so there's a civil hearing or a
2 determination by a group of mental health experts has to be
3 made before he can be released from prison?

4 A No, we didn't talk about that.

5 Q Or that he'd have to be released on a conditional release
6 such that he's sort of on a parole, two year parole probation
7 when he completes this sentence, did you ever review that
8 with him?

9 A We didn't think that, you know, because of his record, we
10 didn't think that he would get a substantial amount of time.
11 We didn't anticipate the amount of time but we thought that
12 he was in a good position to get some leniency.

13 Q All right. So you were expecting -- you didn't -- you
14 were expecting a more lenient sentence so you didn't go over
15 those things because you didn't think that you could get
16 something like a 20 year---

17 A I know he was going to get some time but, yeah, we didn't
18 know how much. And I don't think he had a prior record.

19 Q Okay. And, in fact, did you point out just in
20 mitigation, things to the Judge during the guilty plea
21 itself? Did you point out to the Judge that none of the
22 victims were present in the courtroom? And they're not today
23 either. I mean, did you ever bring that to the Judges
24 attention that none of the victims were present in the
25 courtroom?

1 A No, I generally don't say, Judge, the victim's not here.
2 I don't know whether I would have said that was if I was
3 aware that they were there. I know the victim witness
4 advocate was there.

5 Q Okay. And you never brought it to the attention to the
6 Judge that -- especially the criminal sexual conduct
7 allegation had been -- it had been alleged that all this that
8 the State presented had occurred though the victim was
9 wearing a pair of short by her own statement?

10 A Yeah, she said she was wearing the shorts but they were
11 big enough where he can pull them down and do whatever he was
12 doing. It wasn't tight.

13 Q But you never had the shorts tested or the underwear
14 tested to determine whether they lacked any physical evidence
15 just as the rape kit lacked any physical evidence?

16 A Well, you know, my discussion with him was basically what
17 was alleged that happened. We talked about what he was
18 accused of doing and he wanted to plead guilty.

19 Q Yet he never said that he had anal sex with his daughter,
20 did he? To you. He never said that to you?

21 A No, he never said that.

22 Q All right. And again, I'm going to ask the question, Mr.
23 Terry's asking, did you go over the discovery with him prior
24 to -- of the day of the guilty plea?

25 A Yes, on the day of the -- yeah, on the day of -- the day

1 of the plea.

2 Q And yet you received it, I guess, two months prior to
3 that, about a month prior to that?

4 A Sure. I had time to review it and study it.

5 Q Approximately how long was your discussion before the
6 guilty plea and signing up? Did you spend five minutes
7 talking to him on the day of the guilty plea, 30 minutes or?

8 A I don't recall. It was enough time to go over the
9 discovery and go over the litany of what's going to be asked
10 by the Judge. And whether or not he wanted to plea guilty.
11 This was a very good opportunity for him not to plead guilty
12 on that day. He didn't have to plead guilty. He wanted to
13 plead guilty that day.

14 Q All right. And how -- do your notes reflect visiting him
15 any time prior to that day?

16 A No.

17 MS. ROSS: I've got no more questions.

18 THE COURT: Redirect?

19 MS. RATIGAN: No, Your Honor.

20 THE COURT: Okay, Mr. Hamilton, you may step down.

21 Thank, you.

22 MR. HAMILTON: Thank you, Judge.

23 MS. RATIGAN: State has no further witnesses, Your Honor.

24 THE COURT: All right.

25 MS. ROSS: Your Honor, I apologize, at the beginning of

1 the hearing Mr. Terry stated he had this that he wanted to
2 put into evidence.

3 THE COURT: Okay. And I'll allow you to do that.

4 MS. ROSS: Thank you, Your Honor.

5 THE COURT: Or they in the in the form of a brief or?

6 MS. ROSS: This is his law in support of his application.
7 I had seen a handwritten version, I believe of this, that he
8 mailed to me. And it was my opinion that it didn't bring up
9 any new areas of law that didn't fall into part of the
10 original application basic subject matter violation. I think
11 he originally had violation of due process and ineffective
12 assistance of counsel.

13 THE COURT: Any objection from the State?

14 MS. RATIGAN: No, Your Honor.

15 THE COURT: All right, entered as Plaintiff's Exhibit No.
16 8.

17 (WHEREUPON, Plaintiff's Exhibit No. 8 was
18 admitted into evidence.)

19 MS. ROSS: And then he wants in a letter from the Court
20 of Appeals telling him an appeal wasn't filed. But we know
21 an appeal was, in fact, filed in this case.

22 THE COURT: That's in evidence without objection,
23 Plaintiff's Exhibit No. 9.

24 (WHEREUPON, Plaintiff's Exhibit No. 9 was
25 admitted into evidence.)

1 MS. ROSS: Thank you, Your Honor.

2 THE COURT: All right, Ms. Ross, I'm going to give you
3 just a moment, I'm going to ask you, if you can, to delineate
4 all the -- all of the deficiencies that you're alleging.

5 MS. ROSS: All right. Basically, initially, first
6 ineffective assistance of counsel. And I wrote Subpart A,
7 not addressing the competency issues of mental health.

8 THE COURT: The mental health issues with regard to
9 competency and with regard to mitigation?

10 MS. ROSS: Mitigation, yes. And that failure to request
11 an evaluation. I'm sorry, and then B, I have failure to
12 evaluate the evidence, the discovery that was presented to
13 him.

14 THE COURT: And that would be particularly viewing the
15 shorts?

16 MS. ROSS: Yes, Your Honor. Initially never even
17 requesting discovery, never demanding -- never viewing the
18 rape kit or shorts. They're now destroyed. I went down to
19 see the shorts, curious whether they were -- certainly if
20 they were bermuda shorts. I just wanted see them because I
21 wanted to bring them into -- to show them because I thought
22 they were certainly relevant. There's a of case law out
23 there about sexual battery through clothes, that's what was
24 alleged here, and the facts presented by the State obviously
25 in the plea, the way that happened, it's very questionable

1 whether that could have happened while someone was wearing a
2 pair of shorts. So that's why the failure to evaluate the
3 evidence failure to have the shorts tested.. Supposedly there
4 was a spot, someone said there was spot on the shorts and
5 that they weren't tested. Didn't attend the Family Court
6 hearing or address that whole confession issue.

7 Then I have Subpart C, failure to just present mitigating
8 evidence to the Judge during the plea. Regarding the victims
9 not being there. Saying that the victims aren't here,
10 there's no evidence that they want substantial punishment.
11 Nothing in mitigation about the facts as presented, not
12 really being corroborated by the statement of the victim.
13 Nothing about his military history. Nothing to rebut the
14 State essentially alleging that he confessed in Family Court
15 when, in fact, he didn't confess to criminal sexual conduct.

16 THE COURT: I'm curious about why the SLED report was not
17 -- is there any indication that the SLED report was in the
18 Solicitor's file and it was withheld or is there any way to
19 tell that?

20 MS. ROSS: All I can say is it was in the State's file
21 back in, you know, April of 2006 when I requested a copy of
22 their file.

23 THE COURT: But it's clear that Mr. Hamilton never saw it
24 and it's clear the defendant never saw it?

25 MS. ROSS: And the date on it is March 2, 2005. Which

1 was approximately six days before the guilty plea. So I
2 don't know if that had reached her file by then or not.

3 THE COURT: And the letter was dated six days before the
4 plea?

5 MS. ROSS: Yeah, the date on the SLED report, which I
6 believe I put in itself, is signed by the Special Agent,
7 Rhonda Fields dated 3/2/05 which was less than a week before
8 the actual guilty plea. I'll hand up mine if you can't get
9 your hand on it.

10 THE COURT: Anything further?

11 MS. ROSS: Yes. I had Subpart D, failure to keep his
12 client informed. Just generally. Not going to see him, not
13 reviewing the evidence with him, not reviewing the collateral
14 consequences with him. Just not keeping in touch with his
15 client. And then finally, I had a Subpart E, failure to
16 negotiate. The Solicitor's offering nothing, a straight up
17 plea and there's no demand that any forensic evidence be
18 produced or done. There's no -- she offered to discuss a
19 cap, there's no decision of a cap.

20 THE COURT: I was looking at the letter, I this we're
21 looking at two different letters, talk about a cap.

22 MS. ROSS: Oh, I'm sorry. There were two different plea
23 offers. I believe I put the one from January 18th in. I'll
24 give you the two I have.

25 THE COURT: This is actually discovery. This is actually

1 discover.

2 MS. ROSS: Right. Two plea offers. And I put the
3 earlier one in, January 18th.

4 THE COURT: Were these offered into evidence?

5 MS. ROSS: I don't think I did.

6 THE COURT: I think there was testimony in that regard
7 but I don't think they were offered into evidence.

8 MS. ROSS: I don't think they were. I'll be happy to do
9 that at this time if you'd like me to.

10 THE COURT: You might want to.

11 MS. RATIGAN: I object that the her case is closed. I
12 mean, if you want to make it a Court's Exhibit that's one
13 thing but she had ample opportunity to and, in fact, had a
14 lot of evidence and her case has been closed, Your Honor.

15 THE COURT: I believe I will make that as a Court's
16 Exhibit.

17 MS. ROSS: All right.

18 (WHEREUPON, Court's Exhibit No. 1 was
19 admitted into evidence.)

20 THE COURT: Anything else?

21 MS. ROSS: Then I have another, due process violation.
22 Subpart 2. That is the plea was not knowingly and
23 voluntarily made. Due to the competency issues that he
24 discussed at length of time as well as the lack of the review
25 of the meaning of sexual battery. It sounds from the

1 testimony of his counsel that that really wasn't explained at
2 all. And therefore there was no review of that during the
3 discussion of the plea going to the fact that the plea wasn't
4 knowingly and voluntarily made. Then he's alleged
5 prosecutorial misconduct as well. The violation of failing to
6 produce the SLED report or testing the shorts or -- it sounds
7 like Mr. Hamilton did receive the Family Court statements
8 that supposedly amounted to the confession but that was not
9 originally provided with discovery evidence. And that would
10 be a violation not to put that if you're going to use a
11 statement made against -- any statement none of by the State
12 that a defendant makes against himself should be provided
13 Rule 5(a), the first part of the rule declares that he should
14 have been made aware of any statements against him. And
15 that's all I got.

16 THE COURT: Ms. Ratigan, be glad to hear from you.

17 MS. RATIGAN: I'm going to try to make this brief, we've
18 been at this will for a while. We would argue he hasn't met
19 his burden of proof. I mean, the plea record is clear,
20 unambiguous.

21 THE COURT: Ms. Ratigan, let me ask you about this, with
22 the issue about the competency.

23 MS. RATIGAN: Right.

24 THE COURT: I know the record's one thing but don't you
25 agree that there's some issue about competence there?

1 MS. RATIGAN: I don't. He seemed competent that day.
2 Mr. Hamilton stated that he no problems understanding him, he
3 seemed to understand what was going on. He was very clear,
4 coherent. Understood what he was pleading to that day. He
5 said today that he knew that day he was pleading guilty. He
6 never told Mr. Hamilton that he was on psychiatric drugs,
7 that he was undergoing treatment. He never told the trial
8 Court either of these things. He told selective bits and
9 pieces to the trial Court but not that he was currently
10 undergoing anything. Mr. Hamilton and Judge Miller are not
11 required to be clairvoyant. The burden is on him for -- to
12 some extent to make others aware of his situation. And I
13 would say that there's absolutely no competency question
14 here, Your Honor.

15 THE COURT: Well do you think it is incumbent upon the
16 defendant to do it if he's incompetent?

17 MS. RATIGAN: I think he was clearly aware at the time
18 that he was on drugs. Because he told Judge Miller I'm on
19 hypertension drugs. So he clearly could articulate that he
20 was taking medication every day. He clearly articulated to
21 Judge Miller he had prior psychiatric treatment. Why he
22 chose not to disclose the others, I do not know. He clearly
23 was competent enough to tell the trial Court about certain
24 things but not others. I mean, I don't know, maybe he
25 decided not to tell these things because he wanted to plea

1 and get it over with, I don't know. But I absolutely think
2 that what you have to judge is whether Mr. Hamilton that day
3 believed he was incompetent. And there's no evidence
4 presented either at the plea or to Mr. Hamilton that he was
5 incompetent to go forward and did not understand---

6 THE COURT: Well do you think there's some obligation on
7 his part to look into it and investigate it now?

8 MS. RATIGAN: I mean, there could be, Your Honor. But
9 again, if Mr. Terry's not going to help himself, I mean, I
10 think that he does bear some of the responsibility for that.
11 And again, just going back again to the transcript, the fact
12 that he kind of selectively chose what to tell Judge Miller.
13 I mean, he's not helping his case any if he is today saying
14 he was absolutely not competent but at the time I was kind of
15 competent to answer some questions. The ones that would help
16 me but not the ones that would hurt me. I think his
17 testimony is disingenuous. I think he remembers what he
18 wants to remember.

19 THE COURT: Okay.

20 MS. RATIGAN: And as for some of the other issues, again,
21 he admitted his guilt, he said he was satisfied with
22 Mr. Hamilton, he wanted to plead guilty, he said that twice.
23 I think Ms. Ross had talked about the term confession in
24 Family Court several times, that's not what was stated at the
25 hearing. The Solicitor stated at the hearing that he

1 admitted his guilt, which is different. He admitted the
2 guilt of touching a child inappropriately which is different
3 from confessing I am guilty of first degree criminal sexual
4 conduct with a minor.

5 Regarding the guilty plea issue -- pardon me, the appeal
6 issue, case of Weathers vs. State, that's a 95 case, says
7 that trial counsel, it is not incumbent upon them to advise
8 the rights of a guilty plea. That's long standing criminal
9 court allow. Terms of collateral consequence of the plea,
10 terms of conditional release---

11 THE COURT: That law that you said about appealing a
12 guilty plea, doesn't that essentially say that there has to
13 be some meritorious appeal or you're just saying that's a
14 blanket? A blanket rule that no one is ever required to tell
15 a defendant that they have a right to appeal?

16 MS. RATIGAN: Weathers v. State says that although a
17 defendant has the right to appeal a guilty plea, there's no
18 constitutional requirement that he be advised of his right
19 absent extraordinary circumstances. And going back to the
20 issue of collateral consequence, Ms. Ross stated that
21 Mr. Hamilton should have advised of the consequences as
22 something like a conditional release or something like a
23 community supervision program. The Supreme Court held in
24 2002 in Jackson v. State that trial counsel is not required
25 to inform him of that. As collateral consequences of

1 sentencing he would be required to participate in community
2 supervision. So the State thinks that would apply that here
3 as well.

4 Let's see, family court transcript, can't be ineffective
5 assistance of counsel if the trial attorney didn't have it
6 and the State didn't have it. I think it's a different issue
7 it if turns out that the State withheld, that was
8 prosectorial misconduct, that's not an ineffective assistance
9 of Mr. Hamilton. Obviously he cannot challenge what he does
10 not have and does not know of.

11 I think Mr. Hamilton stated correctly, the plea day was
12 the opportunity for Mr. Terry to decide whether or not to
13 plead guilty, whether or not he wanted go forward. He was
14 not feeling like he wanted to admit his guilt that day and he
15 did not want to accept responsibility, then that was his
16 opportunity to say that. He admitted here even today that
17 there was inappropriate touching. So at the very least he
18 admitted in the court today inappropriate touching and we
19 believe at the very least the lewd act charges.

20 THE COURT: All right. Well that does go to a very
21 important question about the difference in definition of a
22 sexual battery. And how do you explain that that's not
23 important that there be a discussion about sexual battery and
24 how it increases the penalty significantly. How do you---

25 MS. RATIGAN: I absolutely don't say that's not

1 important, Your Honor. Your Honor, I said that Mr. Hamilton
2 stated he discussed the charges with his client. Now whether
3 or not he used legal---

4 THE COURT: Well I think he did indicated that he never
5 discussed the definition of sexual battery.

6 MS. RATIGAN: Yeah, but what I'm saying, Your Honor, is
7 there's a difference between discussing a legal definition of
8 something and saying this is what it means. I mean, you were
9 a defense attorney, Your Honor, and you know that spouting
10 legal definitions of somebody who is not an expert in the law
11 is different from saying what the common place understanding
12 over it is. Mr. Hamilton stated he explained the charges
13 that were pending, what they meant, what that was.

14 THE COURT: Didn't Mr. Hamilton say that sexual battery
15 and inappropriate touching were the same thing?

16 MS. RATIGAN: I don't recall that, Your Honor.

17 MS. ROSS: That's what I recall, Your Honor.

18 MS. RATIGAN: I don't recall that. But just because he
19 didn't explain---

20 THE COURT: Well suppose he did say that. How does that
21 -- how do we address that?

22 MS. RATIGAN: I mean, I don't know. I mean, I don't
23 know. I mean, Your Honor -- I mean, I don't know what to
24 tell you. The State would simply argue that Mr. Hamilton
25 explained the charges to him, what that meant, what he was

1 facing, what the evidence was. And that based on these
2 discussions Mr. Terry, according to Mr. Hamilton, stated
3 several times he wanted to plead guilty, get it over with.
4 And he got his wish. He got before Judge Miller, pled guilty
5 and got his sentence, Your Honor.

6 THE COURT: All right.

7 Briefly, I'll allow you to reply.

8 MS. ROSS: Just briefly. I know the State said that --
9 how would -- something about how would Mr. Hamilton know a
10 SLED report was out there, and that would simply be because
11 it was a rape case involving a rape kit which consist of hair
12 samples and samples. That's what it is and there's going to
13 be a SLED report out there any time there's an allegation of
14 actual penetration and taken to the hospital and a rape kit
15 done, as there was here. And also, should have knew and
16 should have known from the discover that there were shorts
17 out there and underwear that would also be tested for
18 evidence of sexual battery or rape.

19 And then my hearing too was that Mr. Hamilton did say
20 that basically they were the same thing, sexual battery and
21 touching. And that definitely is the crux of this case from
22 the beginning and from my discussions with Mr. Terry. He has
23 stated that now that he understands what sexual battery
24 means, that is not what he did. He had stated that
25 inappropriate touching is what happened. And that's why he

1 felt so guilty.

2 MS. RATIGAN: And to clarify, Your Honor, that -- the
3 statement about sexual battery and the meaning the same,
4 Mr. Hamilton has refreshed me. What he was referring to was
5 regarding the Family Court hearing. That admitting guilt in
6 the Family Court hearing. That's what he was talking about.
7 He wasn't talking about in any prevalent sense that that
8 meant the same thing. Just going into Family Court and
9 admitting that he did that was functionally the same. That
10 was his point.

11 And also, in regards to this SLED report that should have
12 been on notice that there was a SLED report, Your Honor, it
13 is not necessary to have the SLED report completed on a case
14 such as that or even like a drug case before a defendant
15 decides to plead guilty. It happens all the time. Somebody
16 will be arrested with a white powdery substance, they decide
17 they want to plead guilty before the SLED report even comes
18 back. So I think the fact that Mr. Terry said he wanted to
19 plead guilty several times, wanted to go through with it, I
20 think the fact that this happened before the SLED report came
21 back is irrelevant.

22 THE COURT: I can't think of anything else, can y'all?

23 MS. ROSS: No, Your Honor. I was just thinking that he
24 couldn't have requested to go several times because
25 Mr. Hamilton hadn't really talked to him until that day.

1 MS. RATIGAN: I was talking about the transcript, he said
2 several times.

3 MS. ROSS: Oh, okay. I misunderstood.

4 THE COURT: Very good. Thank y'all. We'll --

5 Ms. Ratigan, what's the schedule for this afternoon?

6 MS. RATIGAN: We just have that one case that was
7 originally in the afternoon that we bumped to the morning but
8 it looks like it's getting bumped back.

9 THE COURT: It is bumped back, all right. We'll
10 reconvene at 2:30.

11 MS. RATIGAN: Okay.

12 MS. ROSS: Thank you Your Honor.

13

14 (WHEREUPON, the proceedings were concluded.)

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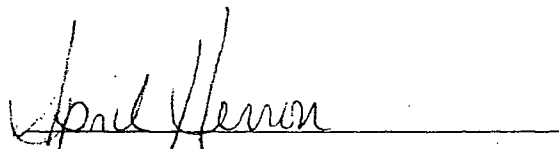
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, April Herron, Official Court Reporter for the 13th
Judicial Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative to
appeal, in the Court of Common Pleas for Greenville County,
South Carolina, on the 1st day of March, 2007.

I do further certify that I am neither of kin, counsel
nor interest to any party hereto.

October 15, 2007

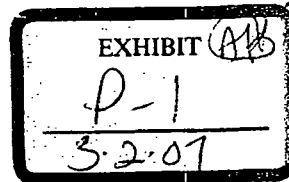


April Herron, Court Reporter

My Commission Expires: 11-17-07

JAMR060
03/09/05 02:18

Greenville County Detention Center
Inmate Booking Report



Page 1

Jail #: 0212 Pack #: 208305 Juv#: Cell: MHC03 Custody Level: MED SS

Name (L/F/M/S): TERRY TERRENCE DIMINGO

Addr: [REDACTED] C: GREENVILLE S: SC ZIP: 29605
POB: WA DOB: [REDACTED] Age: 45 Race: B Sex: M WgtIn: 129 HgtIn: 509
SSN: [REDACTED] Hair: BLK Eyes: BRO Wgtout: HgtOut:
Phone: 864-000-0000 Rel Pref: COT Educ: XXX Ins:
Attorney: HAMILTON, ER Photo#: 11100719 B.Money: \$0.00

NextKin (L/F/M/S): HARRIS JACQUELINE
Phone: [REDACTED] Relationship: CO
Addr: [REDACTED] C: BALTIMORE S: MD ZIP: 21217

Notify Victim?: Y Arrs Off: CLARK Records Clerk: DGLENN
Booked: 10:41 07/10/2004 B.ORI: 000 B.Off: DGLENN S.Off: RLAUPER

Charges:	Warrant	Case	Court & Judge	Ori
LEWD ACT: COMMIT ON MINOR U/16	I466187	04098072	1 SIMMON HUDSON	000
Indict: 2005GS2301157	Arrest: 07/10/2004 10:41		RR: 03/09/2005 02:17 Y	
(CC) Sentenced on 03/08/2005 to 15 yrs				
LEWD ACT: COMMIT ON MINOR U/16	I466191	04098089	1 SIMMON HUDSON	000
Indict: 2005GS2301158	Arrest: 07/10/2004 10:41		RR: 03/09/2005 02:17 Y	
(CC) Sentenced on 03/08/2005 to 15 yrs				
CRIMINAL SEXUAL CONDUCT W/MINR 1ST	I466186	04097620	1 SIMMON HUDSON	000
Indict: 2005GS2301274	Arrest: 07/10/2004 10:41		RR: 03/09/2005 02:17 Y	
(CC) Sentenced on 03/08/2005 to 20 yrs				

Date: 3/9/05

Judge: WILK

Release Where? COURT

Released Off-> P: [REDACTED]

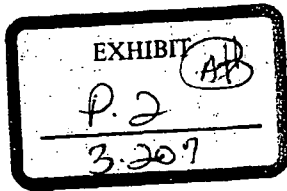
BFO ADULTING

3: [REDACTED]

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

Department of Forensic
Serology and DNA Analysis
March 2, 2005
SLED Lab No.: L05-2011
Your Case No.: 0400097620
Incident Date: 7/4/04
(V) Minor I
(S) Terrence Terry

INVESTIGATOR TY BRACKEN
GREENVILLE COUNTY SHERIFF'S OFFICE
4 MCGEE STREET
GREENVILLE, SC 29601

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED:

RESULTS OF EXAMINATIONS:

1.	Sexual Assault Evidence Collection Kit from Minor I		
1.1	Known head hairs	1.1	No analysis performed.
1.4	Blood	1.4	No analysis performed.
1.5	Smears (Vaginal, Rectal)	1.5	No spermatozoa identified.
1.6	Vaginal swabs	1.6	No semen identified.
1.7	Oral swabs	1.7	No semen identified.
1.8	Rectal swabs	1.8	No semen identified.
1.9	Miscellaneous Body Fluids	1.9	No semen identified.



Page 2 of 2
SLED LAB NO.: L05-2011
March 2, 2005

ITEM(S) SUBMITTED:

1.10 Fingernail scrapings

RESULTS OF EXAMINATIONS:

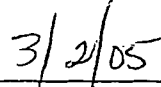
1.10 Nothing of apparent
 serological evidentiary value
 found.

Any additional evidence retained by your agency that might contain serological or trace evidence can be submitted at this time.

These examinations were conducted by S/A Rhonda R. Fields, Forensic Analyst, South Carolina Law Enforcement Division.



Rhonda R. Fields
Special Agent



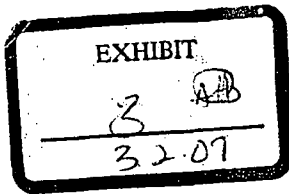
Date

jmj

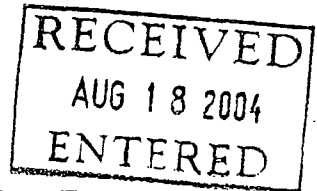
cc: Greenville County Solicitor's Office

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.



Medical category MB61
 (Records use only)

 GREENVILLE COUNTY DETENTION CENTER
 MEDICAL CLINIC

INMATE MEDICAL REQUEST FORM


 (Medical staff) please check one of the following: ☐ Dental ☐ Medical ☒ Mental Health

Print Only		Terrence Terry 44		[REDACTED]		200305	
INMATE NAME		DATE OF BIRTH		ID PACK#		MH & Red	
DATE OF REQUEST		TIME		JAIL ID#		CELL#	
PROBLEM (IN YOUR OWN WORDS)		Need adjustment of Medication					
Severe Depression		7:00 p.m. - 9:00 p.m.					
Nighttime Medicine working, Daytime stops		when needed most (3 attacks last 48 hrs.)					
Memory floods		DO NOT WRITE BELOW THIS LINE		Anxiety			

STAFF SECTION

DISPOSITION

PERSON TRIAGING

 Pt being followed by MH in Red pod
 Julie Moore, RN DATE 8/17/04 TIME 9:36

For Staff Use Only

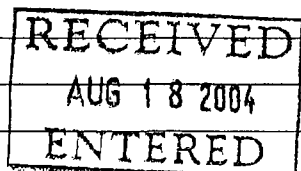
S:

 GREENVILLE COUNTY
 O: DETENTION CENTER - RECORDS

 CERTIFIED COPY
 ES 4/11/06

A:

P:


 MEDICAL RECORD
 CONFIDENTIAL

Date _____ Medical Staff Signature _____

A \$5.00 fee may be charged for this service.

Inmate account debited: ☐ Yes ☐ No

DOCUMENTATION RECORD

TERRY, TERRENCE 208305 GREENVILLE CO. DETENTION CTR (1)

MEDICATIONS	HOUR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29
PRO F/C 20MG TABLET TAKE 1/2 TAB BY MOUTH IN THE MORNING	09/14/04 AM 0900	[Handwritten notes and initials across the grid]																												
RISPERDAL 4MG TABLET TAKE 1/2 TAB BY MOUTH THREE TIMES DAILY 2mg TID	09/14/04 AM 0900 PM 1300 PM 2100	[Handwritten notes and initials across the grid]																												
VALPROIC ACID 250MG CAPSULE (RP: DEPAKENE) E 1 CAP BY MOUTH THREE TIMES DAILY	08/23/04 AM 0900 PM 1300 PM 2100	[Handwritten notes and initials across the grid]																												
PERPHENAZINE/AMITRIPTYLINE 4-25MG TABLET TAKE 3 TABS BY MOUTH AT BEDTIME	09/13/04 PM	[Handwritten notes and initials across the grid]																												
1/20 Motrin 200mg PO TID x 10d PRN		[Handwritten notes and initials across the grid]																												

EXHIBIT
P-4
3207

GREENVILLE COUNTY
DETENTION CENTER - RECORDS

CERTIFIED COPY
ES 4/11/06
CURRENT DATE

MEDICAL RECORD
CONFIDENTIAL

MEDICATIONS	HOUR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29
NURSE'S ORDERS, MEDICATION NOTES, AND INSTRUCTIONS ON REVERSE SIDE																														
CHARTING FOR 10/01/04 THROUGH 10/31/04															PAGE 1 OF 1															
Physician Dr. Richard Sherman															Telephone No. 864-675-6421										Medical Record No.					
All. Physician															Alt. Telephone															
Allergies NO ALLERGIES DEFINED															Rehabilitative Potential															
Diagnosis DIAGNOSIS NOT SPECIFIED																														
Medicaid Number										Medicare Number										Complete Entries Checked:										
By:										Title:										Date:										
RESIDENT										DOB: 10-12-57										Title: RESIDENT CODE										
TERRY, TERRENCE 208305										DOB: 07/13/04										TERRY										
0212										ROOM NO.										BED FACILITY										
																				3123										

DOCUMENTATION RECORD

TERRY, TERRENCE 212/208505

GREENVILLE CO. DETENTION CTR (11)

MEDICATIONS	HOUR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29
ISPERDAL 4MG TABLET TAKE 1/2 TAB BY MOUTH THREE TIMES DAILY	10/25/04 AM PM PM																													
DEPAKOTE 500MG TABLET DR TAKE 1 TAB BY MOUTH AT BEDTIME	12/06/04 PM																													
PERPHENAZINE/AMITRIPTYLINE 4-25MG TABLET TAKE 3 TABS BY MOUTH AT BEDTIME	11/22/04 PM																													
RISPERDAL 5MG TABLET TAKE 1 TAB BY MOUTH AT BEDTIME	12/06/04 PM																													
Tums & meds																														

GREENVILLE COUNTY
RECORDS

COPY

ES 4/11/06

CURRENT DATE

MEDICAL RECORD
CONFIDENTIAL

MEDICATIONS	HOUR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29																													
NURSE'S ORDERS, MEDICATION NOTES, AND INSTRUCTIONS ON REVERSE SIDE																																																											
CHARTING FOR 02/01/05		THROUGH 02/28/05		PAGE 1 OF 1																																																							
Physician DR. RICHARD SHERMAN														Telephone No. 864-875-8421										Medical Record No.																																			
Alt. Physician														Alt. Telephone																																													
Allergies NO KNOWN ALLERGIES														Rehabilitative Potential /K																																													
gnosis DIAGNOSIS NOT SPECIFIED																																																											
Medicaid Number										Medicare Number										Complete Entries Checked:																																							
By:																																																											
RESIDENT										DOB: 10/12/59										RESIDENT CODE										ROOM NO.										BED										FACILITY									
TERRY TERRENCE 212/208505										ADM: 07/15/04										TERRT										1										51																			

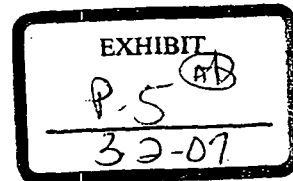
SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor



ROBERT M. STEWART
Chief

August 9, 2005



Mr. Terrence D. Terry, #307935
McCormick C. I. / F2-150-B
386 Redemption Way
McCormick, SC 29899

RE: SLED LAB NO.: L05-2011
TERRENCE D. TERRY / CORSHA L. JOHNSON

Dear Mr. Terry:

A search of our database reveals that all testing has not yet been completed concerning the above referenced case.

You may wish to check back with me in a month or so.

Sincerely,

M. J. Brown / mcp

Michael J. Brown, Lieutenant
Supervisory Special Agent
FOIA/Subpoena Compliance Coordinator

MJB/mcp/FOI#2005-418

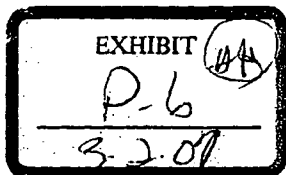


State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185



Solicitor
Robert M. Ariail

January 18, 2005

Ernie Hamilton, Esq.
311 Mills Ave.
Greenville, SC 29605

5265

Re: State of South Carolina vs. Terrance Dimingo Terry
Warrant(s) 1466191, 1466187, 1466186

Dear Ernie:

Although I do not have a discovery request from you at this time, I am providing the following documents:

1. Above-referenced ticket (or warrant);
2. GCSO Incident Report by Officer RF Wright, dated 7-7-2004, 1 page;
3. GCSO Supplemental Report by Officer RF Wright, dated 7-4-2004, 1 page;
4. GCSO Supplemental Report by Officer D Kettelson, dated 7-7-2004, 1 page;
5. Property and Evidence Report, 1 page;
6. GCSO Supplemental Report by Inv. TD Bracken, dated 7-7-2004, 1 page;
7. GCSO Supplemental Report by PG Clark, dated 7-10-2004, 1 page;
8. GCSO Supplemental Report by Inv. TD Bracken, dated 7-8-2004, 2 pages;
9. Property and Evidence Report, 1 page;
10. GCSO Incident Report by Officer Jim Austin, dated 7-8-2004, 1 page;
11. GCSO Supplemental Report by Officer Jim Austin, dated 7-8-2004, 1 page;
12. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
13. GCSO Victim/Witness Statement by Minor 2, dated 7-8-2004, 1 page;
14. GCSO Incident Report by Inv. Cheryl Cromartie, dated 7-8-2004, 1 page;
15. GCSO Supplemental Report by Inv. Cheryl Cromartie, dated 7-8-2004, 2 pages;
16. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
17. GCSO Supplemental Report by Officer PG Clark, dated 7-10-2004, 1 page;
18. NCIC Criminal History.

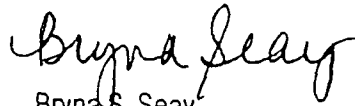
Ernie Hamilton, Esq.
January 18, 2005
Page 2

Please contact our office regarding a mutually convenient time for you to view evidence which may be contained in the Property and Evidence Room at the Law Enforcement Center here in Greenville County. Pursuant to discovery rules, we will allow you to inspect the evidence which may be utilized at trial.

Also, please find enclosed the State's Request for Reciprocal Discovery and the State's Request for Notice of Alibi and/or Insanity Defense, pursuant to Rule 5, South Carolina Rules of Criminal Procedure.

If you have any questions regarding this defendant's case(s), please do not hesitate to call me. I look forward to working with you.

Sincerely,



Bryna S. Seay
Assistant Solicitor
Thirteenth Circuit Solicitor's Office

BSS/lmb

Re: Terrence Dimingo Terry

*** Please acknowledge receipt of discovery by signing here and returning a copy of this to me within 10 days. If I do not hear from you or receive a copy of this acknowledgement within the allotted time, I will assume you received the enclosed documents and have no objections.

Attorney for Defendant

**Greenville County Department of Public Safety
Criminal Justice Support - Property Report**

- 1 - Greenville SO
☐ 2 - Greenville PD
☐ DCS - Detention
☐ Other _____

1. Status - Check one only: ☒ AGS Evidence ☐ MM Evidence ☐ Found ☐ Recovered ☐ Safekeeping ☐ Other _____		2. Case No. 1-04-097620	
3. Date and Time Impounded 7-7-04 / 1820		4. Case Type Sexual Assault	
5. Found or Recovered From ☐ Location ☐ Suspect ☐ Complainant ☐ Victim ☐ Person reporting ☐ AKA ☒ Other ER staff		6. Where property was impounded (Give exact location - address) 701 Grove Rd. (Children's ER) Greenville SC 29605	
7. Owner's Name Sarah Brem (Nurse, GMEER)		8. Owner's Address Gille SC	
9. Owner's Phone # unknown		13. NCIC Hit Yes No	
10. Item #	11. Quantity	12. Description (include make, model, serial numbers and drug weights)	
A	1	Child's Rape Kit for Minor 1 (dob 1-5-95) and paperwork	
End			
Drug weight/grams _____		Officer's initials _____	
14. I hereby acknowledge that the above lists represent all property taken from my possession and that I have received a copy of this report		P & E Use only Gross weight _____ Evidence clerk's initials _____	
Signature _____		15. Impounding Officer (print full name) D. Kettekan	
16. Star No. 689		17. Unit No. C43	
18. Signature D. Kettekan		19. Investigating Officer	
20. Received by (print name)	21. Signature	22. Reason	23. Date and Time Received
Leahann Callahan	Leahann Callahan	Temp Storage	7-7-04 7:15PM
R. Pruitt	R. Pruitt	RECEIVED - Storage	7/08/04 0745
J McDonald	Jamie McDonald	SLCD	2/23/05 0715
EDDIE HUCK'S	Eddie Huck's	Storage Box	2-23-05 1658
EDDIE HUCK'S	Eddie Huck's	Desk Box	8-9-05 1520
RECORDS COPY			
2-28-07			
AUTHORIZATION FOR DISPOSITION			
TYPE OF DISPOSITION: ☐ Cleared for destruction/auction Items _____ ☐ Release item #s _____ to: _____		AUTHORIZED BY: Name (print) _____ Signature _____ Date _____	
Name _____ Address _____ ID# _____		EXHIBIT AD P-7 3-2-07	
It is the authorizing officer's responsibility to notify owners to claim property.			

ORIGINAL

Investigating Officer: 00546 BRACKEN TD
Date & Time Impounded: 07/07/2004 18:20
Impounded Addr: GROVE RD

No: 701 Unit: Case Type: 061 SEXUAL CRIMES
City: GREENVILLE, SC Prop Status: EVIDENCE-GS COURT

Case Number: 01-2004-097620

Name List	
N# Name	Ty Description
02 Minor I	11 OWNER OF PROPERTY

Property List	
R# Item S# Qty Item Type	Make/Model/Color
02 A	01 0001 SEXUAL ASSAULT COLLE
	Storage: REF

Property List	
R# Item S# Qty Item Type	Make/Model/Color
02 A	01 0001 SEXUAL ASSAULT COLLE
	Storage: REF

Property List	
R# Item S# Qty Item Type	Make/Model/Color
02 A	01 0001 SEXUAL ASSAULT COLLE
	Storage: REF

AUTHORIZATION FOR DISPOSITION

Disposition Type: DISPOSE OF HOLD DEPOSIT
(Circle one)

Items see

Authorized By: Ty Bracken

Please Print Name Ty Bracken

Signature [Signature]

Star No. 514 Date 062005

RECORDS COPY [Signature]

* NOTE: PLEASE REPORT TO P&E TO SIGN ALL AUTHORIZATIONS FOR RELEASE TO OWNER. *

**Greenville County Department of Community Services
Criminal Justice Support - Property Report**

- ☒ 1 - Greenville SO
☐ 2 - Greenville PD
☐ DCS - Detention
☐ Other _____

1. Status - Check one only:

☒ EGS Evidence
 ☐ MM Evidence
 ☐ Found
 ☐ Recovered
 ☐ Safekeeping
 ☐ Other _____

2. Case No.

1-04-97620

3. Date and Time Impounded

7-7-04 1403

It is mandatory to submit a laboratory analysis request form for all articles requiring laboratory or forensic processing.

P & E Use only

22-3

4. Case Type

CSC w/ a Minor

5. Found or Recovered From ☐ Location ☐ Suspect ☒ Complainant ☐ Victim

☐ Person reporting ☐ AKA ☐ Other

6. Where property was impounded (Give exact location - address)

Greenville, SC 29605

Name Zelma Zelphins Terry

7. Owner's Name

Zelma Zelphins Terry

8. Owner's Address

1 Woodmont Ln. Greenville SC

9. Owner's Phone #

None

10. Item #

11. Quantity

12. Description (include make, model and serial numbers)

13. NCIC Hit
Yes No

A

1

Pair of White Juvenile Shorts

B

1

Pair of Pink Juvenile Panties

C

1

Blue Magic Hair & Goggles

End of List

Drug weight/grams

Zelma Terry Officer's initials ERT

P & E Use only
Gross weight

Evidence clerk's initials

14. I hereby acknowledge that the above lists represent all property taken from my possession and that I have received a copy of this report.

15. Impounding Officer (print full name)

Randall F Wright

16. Star No.

853

17. Unit No.

C47

Signature Zelma Z. Terry Johnson

18. Signature

Randall F Wright

19. Investigating Officer

20. Received by: (print name)

FORTE HUCKS

21. Signature

Edwin Hucks

22. Reason

Storage

23. Date and Time Received

7-7-04 1720

1/25/06

AUTHORIZATION FOR DISPOSITION

TYPE OF DISPOSITION:

- ☐ Cleared for destruction/auction Items _____
☐ Release item #s _____ to: _____

Name _____

Address _____

ID# _____

AUTHORIZED BY:

Name (print) _____

Signature _____

Date _____

It is the authorizing officer's responsibility to notify owners to claim property.

ORIGINAL

UCPR003T
06/15/2005

Property and Evidence Disposition Report
for the Period of 01/01/1980 to 06/15/2005

Page 1

Investigating Officer: 00546 BRACKEN TD
Date & Time Impounded: 07/07/2004 14:03
Impounded Addr: WOODMONT LN

Case Number: 01-2004-097620 Report No: 01

No: 1 Unit:
City: GREENVILLE, SC

Case Type: 061 SEXUAL CRIMES
Prop Status: EVIDENCE-GS COURT

N#	Name	Ty	Description	D#
01	TERRY, ZELMA ZELPHINS	11	OWNER OF PROPERTY	00

R#	Item S#	Qty	Item Type	Make/Model/Color	Description	Disp
01	A	01	0001 CLOTHING Storage: 22-3	Val Out	WHITE JUVENILE SHORTS	
01	B	01	0001 CLOTHING Storage: 22-3	Val Out	PINK JUVENILE PANTIES	
01	C	01	0001 MISC Storage: 22-3	Val Out	BLUE MAGIC HAIR GREASE	

Warrant#	Name	DOB	R S	Offense
I466186	TERRY, TERRENCE DIMINGO	10/12/1960	B M	CRIMINAL SEXUAL CONDUCT W/LEGAL SPOUSE 1ST
	Court: CLERK Terry, Terrence D			Status: Plead Guilty
	Disp: Plead Guilty/Clerk Criminal			Judge: Hudson
	Sentence: Sentenced			Date: 03/08/2005
I466186	TERRY, TERRENCE DIMINGO	10/12/1960	B M	CRIMINAL SEXUAL CONDUCT W/LEGAL SPOUSE 1ST
	Court: SCC2 Terry, Terrence D			Status: Outstanding
	Disp:			Judge:
	Sentence:			Date:

AUTHORIZATION FOR DISPOSITION

Disposition Type:
(Circle one)

DISPOSE OF

HOLD

DEPOSIT

ALL
Items

Authorized By:

Please Print Name

Signature

Star No.

Date

* NOTE: PLEASE REPORT TO P&E TO SIGN ALL AUTHORIZATIONS FOR RELEASE TO OWNER. *

CID

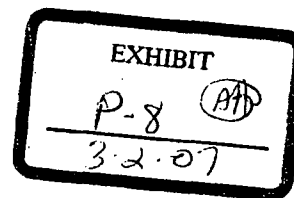
2-78-07
RECORDS
COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	Case No.: 2005-CP-23-7327
Terrence D. Terry,	)	
Applicant,	)	
v.	)	MEMORANDUM OF LAW IN SUPPORT
	)	OF PCR APPLICATION
State of South Carolina,	)	
Respondent.	)	

Now comes, the above-named Applicant to present his Memorandum of Law in Support of PCR Application, and would show the following unto the Court:

On March 8, 2005, Mr. Terry pled guilty to two counts of Lewd Act on a Minor (2005-GS-23-1157 and -1158) and one count of Criminal Sexual Conduct with a Minor (2005-GS-23-1274), before the Honorable Edward W. Miller. He was sentenced to fifteen (15) years on each of the Lewd Act charges and twenty (20) years on the CSC charge, to be served concurrent.

Barnest Hamilton was appointed as counsel for Mr. Terry.



Ref: PCR Application - 11(a): Prosecutorial Misconduct

Notwithstanding with respect to this issue, the S.C. Supreme Court in Jackson v. State, 489 S.E.2d 915 (S.C. 1995) held that an applicant who alleges that he is suffering effects from his conviction had standing to bring an action for PCR. In State v. Quattlebaum, 527 S.E.2d 105 (S.C. 2000), the S.C. Supreme Court held that "a prosecutor has special responsibilities to do justice and is held to the highest standard of professional ethics... and that deliberate prosecutorial misconduct which threatens rights... fundamentally, to liberty and justice will not be tolerated." Accordingly, the standard for reviewing a claim of prosecutorial misconduct is whether the prosecutor's actions are of such a nature to render the trial fundamentally unfair. Donnelly v. DeChristofaro, 614 U.S. 637, 94 S.Ct. 1868 (1974).

While prosecutors may strike hard blows, they are not at liberty to strike foul ones, Berger v. U.S., 78, 55 S.Ct 629 (1935).

The solicitor's duty is to see that no conviction takes place except in strict conformity with law, that the accused is not deprived of any constitutional rights, and that nothing is done to prevent the accused from obtaining a fair trial under the law. State v. King, 71 S.E.2d 793, (S.C. 1952).

Due process of law requires the state to establish each element of each offense by proof beyond a reasonable doubt. In

re. v. Winship, 397 U.S. 358 (1970).

The applicant asserts that the state initiated a SLED investigation in order to further or actually substantiate, the charges that the applicant was indicted for. However, the applicant will show that not only was the investigation/analysis incomplete at the time of the applicant's conviction and sentence, but that upon completion, the analysis proved substantially favorable to the applicant's defense. Further, at no time prior to or during the procedural period of evidence gathering was the applicant informed by his counsel or the state prosecutor of SLED involvement.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the court held that the solicitor's suppression of evidence favorable to the accused violated due process where evidence is material to either guilt or punishment. See also, Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984).

Reversal of a conviction is required if the undisclosed evidence is material and the omission deprived the defendant of a fair trial. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In defining materiality, the United States Supreme Court stated:

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. It necessarily follows that, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional

error has been committed."

Under Rule 5 of the SCRCrimP it states, in relevant part, that "Upon request of a defendant or his counsel, the solicitor shall permit the defendant to inspect and copy any results or reports of scientific tests... which are material to the preparation of the defense or are intended for use by the solicitor as evidence in chief at trial..."

Moreover, Rule 6 of the SCRCrimP states, in relevant part, that "In a criminal prosecution, any report of chemical analysis and certified or sworn statement establishing physical custody or control of evidence shall be made available to the defendant or his attorney at the preliminary hearing, or if no hearing is held, no later than eleven (11) days prior to the trial of the case..."

The applicant will show the Honorable Court that the state allegedly pursued prosecution while:

(1) Disregarding the eleven (11) day window to notify the applicant of the SLED analysis results, and provide the appropriate chain of custody documentation.

(2) Disregarding a lower court's mandate (court order) for a mental evaluation and treatment which clearly brought the applicant's presumption of sanity or mental stability into question. This not only pertains to the initial plea, but the plea given in General Sessions Court as well.

The basic rule is that one cannot be convicted of an offense unless his mental state was that required by the particular

offense. State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994).
See also, S.C. Code Ann. §16-3-510 (Supp. 2000).

The applicant asserts that the basic protection of his Sixth Amendment rights were violated when there were used against him at his trial evidence of his own incriminating words, (absent his counsel) from Family Court. U.S. v. Fellers, 124 S.Ct. 1019 (2004).

Ref: PCR Application - 11(b): Ineffective Assistance of Counsel

For a successful ineffective assistance of counsel claim, the applicant must show counsel's performance fell below a reasonable standard; and that there is a reasonable probability that but for counsel's deficient performance, the result would have been different.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The applicant alleges that his counsel violated his due process rights in that counsel failed to file for a motion of discovery on the applicant's behalf.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Also, State v. Flood, 257 S.C. 141 184 S.E.2d 549 (1971).

The applicant submits, that prior to research done within the confines of a South Carolina Correctional Institute, he had no knowledge of what a motion of discovery was, nor was he made privy to what his contained. IN addition, the applicant respectfully questions: Can a defendant be made sufficiently knowing and intelligent enough to voluntarily waive all of his constitutional rights or mount a suitably productive defense at trial - having no knowledge of legal practice - with a ten (10) minute colloquy with counsel on the day of trial, or hearing?

Pitman v. State, Cite as 524 S.E.2d 623 (S.C. 1999). See also, Van Moltke v. Gillies, 332 U.S. 708, 68 S.Ct 316, 92 L.Ed. 309 (1948) (Short and harried interviews in the courtroom have

been discouraged.)

The applicant submits that his counsel decided that nothing presented by the State in its discovery or any evidence "allegedly," gathered by himself (counsel) in a defense file, singularly or consolidatedly supported a "suppression" or not guilty defense. Further, counsel denied the applicant the right to review any evidence, good or bad (such as hearsay testimony from the witnesses, and the SLED/DNA Analysis results), as well as any say, as to whether or not to proceed to a jury trial.

The applicant prays to show the Honorable Court through testimony and speaking exhibit - documentation and discovered case law - that at the appropriate time, and given a suitable understanding of the suppression defense, he would not have pled guilty and would have opted to proceed to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 306 (1985).

Some claims of ineffectiveness are legally presumed to result in a presumption of prejudice, such as actual or constructive denial of assistance of counsel altogether, which has been interpreted to mean that where counsel is denied at a "critical stage" of the proceedings, prejudice will be legally presumed. Strickland v. Washington, Id. at 692, 104 S.Ct. at 2067, 30 L.Ed.2d at 696. See also, State v. Wheeler, 193 S.E.2d 515 (S.C. 1972).

The right to be represented by counsel at all critical stages of the criminal prosecution is one of substance, not form, and the right to the effective assistance of appointed counsel is not

a welfare gratuity benevolently bestowed by an indulgent father.
U.S.C.A. Const. Amendment 6.

The failure of appointed counsel to investigate, research and prepare is equivalent to no representation at all. Also, U.S.C.A. Const. Amendment 6.

Consultation with the defendant to elicit information and to inform him of his rights is imperative. Braxton v. Peyton, supra, 365 F.2d at 564.

The applicant asserts that his counsel shirked in his affirmative duty to conduct a factual and legal investigation. In so doing, counsel's ineffectiveness became the foundation of the circumstances that not only rendered the applicant mentally and informatively incompetent to appear in Family Court, but at the plea hearing as well.

These prejudices could have only been avoided by counsel making some form of a contact to establish an initial consultation at the beginning stages of counsel's assignment, as well as during the applicant's eight months at the detention center.

To try the accused without procedures adequate to protect his right not to be tried while incompetent to stand trial would deprive him of his due process rights to a fair trial. Pate v. Robinson, 383 U.S. 375 (1966).

The right to effective assistance of counsel may in a particular instance be violated by an isolated error of counsel if that error is sufficiently egregious and prejudicial.

Strickland, supra; see also, Frett v. State, 378 S.E.2d (S.C. 1988).

Termination of the trial does not terminate a lawyer's duty, for the attorney has an important function in the sentencing process. [Section 6.1(b)] - The Defense Function.

The applicant further asserts that he was denied effective counsel in that his attorney failed to advise or notify the applicant of his ten (10) day right to file for a direct appeal, or give reason as to why or why not the applicant would exercise this right. Thus, the applicant could not knowingly or intelligently waive the right. State v. Walker, 269 S.C. 349, 237 S.E.2d 583 (1976); Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979).

The court has reasoned that the failure of counsel to advise an applicant of his right to appeal constitutes ineffective assistance of counsel. See generally, Davis v. State, 342 S.E.2d 60 (S.C. 1986); State v. Rich, 239 S.E.2d 731 (S.C. 1977).

The court distinguished the Washington case of State v. Maryott, 492 P.2d 239 (Wa. 1971) as a case in which the apparent incompetency had been induced by tranquilizers which have the effect of suppressing the cognitive processes, as well as other brain functions. See also, Jackson v. Deno.

The applicant asserts that, again, because of not only failing to investigate this aspect of the case, but failing to establish any communication whatsoever, until the day of the hearing, his counsel could not have recognized the severity of his

(applicant's) incoherent condition, nor the depth of the "yes" answer when asked about any medication taken at the detention center, 24 hours prior to the plea hearing.

Further, the applicant would submit that the court-ordered "psychological evaluation" (which has yet to take place) should have served as a "warning inference" to his counsel of possible inadequacy in his (applicant's) well-being.

The applicant asserts that his counsel should have had the guilty plea withdrawn, and that by not doing so, counsel again rendered ineffective representation.

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294; 454 S.E.2d 312, 313 (1992).

The applicant would respectfully submit that his counsel - Mr. Earnest Hamilton - in failing to provide even a "perfunctory" representation to ensure protection against violation of "due process" towards his client, prior to, during, or after any of the aforementioned proceedings, cannot in good conscience or "honorable recognition" of the judicial system, protest or validate his actions as a trusted officer of the court.

Ref: PCR Application - 11(c): Subject Matter Jurisdiction

The applicant contends that his warrant(s) must be issued in accordance with established law with his true offense, and taken before the magistrate to determine "due weight of the evidence, the nature, and the circumstances of the event," as required by S.C. Const. Art 1, §15 (1998).

The applicant would state that S.C. Code Ann. §17-13-50 and S.C. Code Ann. §22-3-710 and S.C. Code Ann. §22-5-200 "imposes" a special running duty to the Greenville County Police to give the applicant a "prompt" fair, and reasonable determination of probable cause before a "detached and neutral" magistrate as required by Article 1, §10 of the State Constitution and the Fourth Amendment to the United States Constitution, of which failure violated the applicant's right to procedural due process as well as equal protection of the laws.

The applicant further asserts that the preceding statutes compel the state to ensure compliance by the police with these laws to protect the applicant from due process violation, as well as the magistrate and county solicitor.

This is the applicant's FIRST trial as of right on his warrant of arrest, and that S.C. Const. Art. 1, §14 and the Sixth Amendment guarantees him the right to due notice of the nature and cause of the accusation, the right to confront his accuser(s) and witness(es) against him; the right to compulsory process for obtaining witnesses in his favor, and the right to the

"assistance of counsel" for his defense. Where the applicant never received this trial, he could not be appropriately informed of his right to counsel as required by §17-3-10 (1999) and this violated his Sixth Amendment right to a fair trial guaranteed him through the Fourteenth Amendment.

The applicant would respectfully ask the Honorable Court: "Where he (applicant) was denied this trial on his warrant, was his bond excessive and "unreasonable", and was he not subjected to an Eighth Amendment violation of his right against cruel and unusual punishment?

Finally, the applicant contends and prays to show the Honorable Court that where his warrant of arrest were not returned to and endorsed by the magistrate and these pretrial proceedings due to the applicant and due to be transmitted to the clerk of court's office, as required by S.C. Code Ann. §22-5-540 (1999) and SCRCrimP Rule 3(a), where the permanent record currently should show denial of applicant's:

First Amendment right of access to the courts, Fourth Amendment right against unreasonable seizures, Fifth Amendment right against self-incrimination and double-jeopardy, Sixth Amendment right of due notice and trial counsel for his defense, Eighth Amendment right of reasonable bail, and Fourteenth Amendment right of due process and equal protection of law before losses of liberty, according to S.C. Code Ann. §14-13-10 (Supp. 1985) - clearly, the actions rendered by all parties concerned at this point to secure and maintain the applicant's arrest and

incarceration strongly support vacating the sentence and conviction.

The state must establish some proof of the corpus delicti within the magistrate's court upon the prosecution of the criminal case according to §22-3-710. Accordingly, the applicant's arraignment, like the issuance of his warrant, is jurisdictional, for his crime or offense assigned by the magistrate cannot be waived according to §22-3-710 and S.C. Const. Art. 1, §10.

Denial by the state's officers to grant the applicant a prompt judicial determination of probable cause as a pre-requisite to an extended restraint of the applicant's liberty before a detached and neutral magistrate is unconstitutional. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975); County of Riverside v. McLaughlin, 111 S.Ct. 1661 (1991). It is required that the applicant be carried and presented to the magistrate, without any further unreasonable delay. Gerstein, Id. at 114, 95 S.Ct. at 863.

The applicant asserts that his arrest warrant(s) - 1-466186 and 1-466187 are invalid because the investigating officer stated that he appeared before the magistrate judge and presented probable cause to arrest the applicant for CSC-1, on 7-4-04, and signed on 7-7-04, and Lewd Act on 5-31-04 and signed on 7-8-04 by the judge, but the judge would not back-date the warrants.

According to the S.C. Constitution, an officer has 24 hours to obtain a warrant and according to the U.S. Supreme Court they have 48 hours.

Section 22-3-710 deprives the Circuit Court of jurisdiction to hold the applicant by way of indictment according to 17-19-10, subsections (1) and (2), and South Carolina Constitution, Article 1, Section II, because it is the applicant's relative right to not be held to answer for his crime or offense when it is not within the jurisdiction of the magistrate's court.

Accordingly, the applicant has been tried, convicted, and sentenced in violation of Article 1, Section II, and his indictments - being unfiled - are nullity.

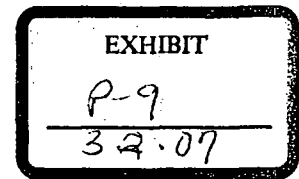
Wherefore, based on all aforementioned issues, the applicant seeks PCR relief.

Respectfully Submitted,

Terrence D. Terry, #307935
 McCormick Correctional Inst.
 336 Redemption Way, F-2A #256
 McCormick, SC 29899

SWORN TO and subscribed before me
 this ____ day of _____, 2007.

Notary Public For South Carolina
 My Commission Expires: _____



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1850
FAX: (803) 734-1839
www.sccourts.org

February 8, 2007

Mr. Terrence D. Terry, #307935
McCormick Correctional Inst.
F2-A-256
386 Redemption Way
McCormick, Sc 29899

Re: Letter received by this office

Dear Mr. Terry:

We are in receipt of your letter, dated February 5, 2007 concerning an appeal filed on your behalf.

According to our records there is no indication that an appeal has been filed in your behalf. If you were represented at trial by a Public Defender, appointed counsel or by retained counsel, you should immediately contact that individual and advise them of your desire to appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

CLERK

KAR/ab

cc: Ernest Hamilton, Esquire

State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2165

Solicitor
Robert M. Ariail

2/23/2005

JAIL

ERNEST HAMILTON
311 MILLS AVENUE
GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in, order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

I466186	CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE
I466187	LEWD ACT ON A CHILD
I466191	LEWD ACT ON A CHILD

The State will make the following sentence recommendations/negotiation:

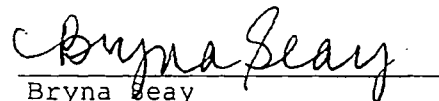
CONCURRENT ON ALL.

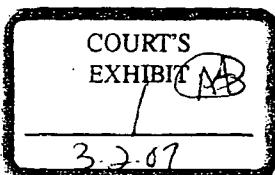
Other conditions/comments:

DEFENDANT HAS BEEN IN THE LEC SINCE 7-10-04. MADE COMPLETE ADMISSION OF GUILT IN FAMILY COURT. SENTENCE SHEETS ENCLOSED FOR YOUR CONVENIENCE.

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

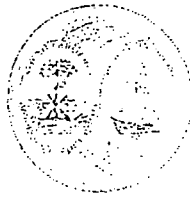
Yours very truly,


Bryna Seay
Assistant Solicitor



State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185

Solicitor
Robert M. Ariail

1/18/2005

ERNEST HAMILTON
311 MILLS AVENUE
GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466191	Sex / Lewd Act, committing or attempting
1466187	Sex / Lewd Act, committing or attempting
1466186	CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE

The State will make the following sentence recommendations/negotiation:

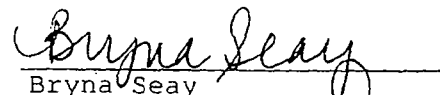
I WILL RECOMMEND THAT ALL SENTENCES RUN CONCURRENT. I AM WILLING TO DISCUSS A CAP ON ACTIVE TIME IF YOU WISH.

Other conditions/comments:

DEFENDANT HAS BEEN IN LEC SINCE 7-10-04. HE ADMITTED COMMITTING CSC 1ST W/A MINOR. SENTENCE SHEETS ENCLOSED. PLEASE ADVISE. THANKS, BRYNA

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,


Bryna Seay
Assistant Solicitor

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2005-CP-23-7327
COUNTY OF GREENVILLE	)	REF. 2005-GS-23-1157 & 8, -1274
	)	
TERRENCE DIMINGO TERRY,	)	
APPLICANT,	)	
	)	ORDER
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

2007 APR 11 12:46
 ENTERED COMPUTER
 CLERK OF COURT
 GREENVILLE, SC

This matter comes before me by way of application of post-conviction relief filed November 11, 2005, alleging prosecutorial misconduct, ineffective assistance of counsel, and lack of subject matter jurisdiction. An amended application was filed February 5, 2007, incorporating the issues presented in the initial application and adding the additional ground that the plea was not knowingly and voluntarily made in violation of the due process guarantees of the South Carolina and U.S. Constitutions. The Respondent filed its Return on June 6, 2006. A continuance was granted April 19, 2006, and an evidentiary hearing was held on March 1, 2007, at the Greenville County Courthouse. The applicant was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Assistant South Carolina Attorney General represented the Respondent. The applicant testified on his behalf and Ernest Hamilton, Esq. testified for the State.

PROCEDURAL HISTORY

The applicant is presently confined at McCormick Correctional Institution of the South Carolina Department of Corrections. Mr. Terry was indicted by the Greenville County Grand Jury at the February 2005 term of General Sessions for two counts of lewd

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act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274). On March 8, 2005, the applicant pled guilty before the Honorable Edward W. Miller to all three indictments receiving fifteen years concurrent on the lewd act upon a child indictments, and a twenty year concurrent sentence for the one count of criminal sexual conduct with a minor, first degree. Ernest Hamilton, Esq. represented the applicant. No appeal was filed.

ALLEGATIONS

The applicant requested post-conviction relief for the following reasons:

- I. Prosecutorial misconduct
 - a. Violation of Brady and Rule 5 SCRCrimP
 - b. Failure to test and destruction of evidence
 - c. Use of uncounseled "admission" not in discovery
- II. Ineffective assistance of counsel
 - a. Failure to address mental health issues
 - b. Failure to investigate
 - c. Failure to present mitigating evidence
 - d. Failure to effectively negotiate with the solicitor
 - e. Failure to adequately advise the applicant
- III. Lack of subject matter jurisdiction
 - a. Invalid arrest warrants and indictments
 - b. No preliminary hearing

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. Pursuant to S.C. Code Ann. § 17-27-80 (2003), following are the relevant finding of facts and conclusions of law.

Prosecutorial Misconduct

The applicant alleged that the solicitor engaged in prosecutorial misconduct by not providing the SLED lab report for the rape kit analysis pursuant to Brady and Rule 5 of the South Carolina Rules of Criminal Procedure, failing to submit a pair of underpants

and shorts in evidence for forensic testing, and stating during the guilty plea that Mr. Terry admitted guilt in Family Court when the alleged admission was only as to the finding sexual abuse not sexual battery and was not provided in discovery. I find that the allegations of prosecutorial misconduct are without merit.

The applicant submitted as an exhibit the SLED lab report for the rape kit analysis which was dated March 2, 2005. It showed no sperm or semen found and was neither exculpatory nor incriminating. The applicant pled guilty March 8, 2005. No evidence was presented as to whether the solicitor had received the report prior to the guilty plea. However, the report was present in the solicitor's file over one year later when the file was subpoenaed by the applicant. The applicant and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. While a Brady violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by the applicant failed to adequately support a Brady claim because he failed to demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999).

The applicant alleged that the solicitor failed to submit a pair of underpants and shorts collected as evidence to SLED for forensic testing and presented a property and evidence report showing that the potentially exculpatory evidence was destroyed in 2005. Because the applicant failed to prove the evidence was exculpatory or that the solicitor acted in bad faith, the solicitor's actions did not amount to prosecutorial misconduct. The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d

281 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, supra; State v. Jackson, supra.

The transcript of the applicant's guilty plea states in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17). According to the applicant's testimony, he was not represented by counsel at the DSS proceedings and any admission was only the general admission of and agreement with the family court's finding of sexual abuse, not an admission of guilt of sexual battery which Mr. Terry expressly denied. The applicant submitted a family court order contained in the file subpoenaed from the solicitor which said that Mr. Terry was in agreement with the finding of sexual abuse of his three step-daughters to support the assertion that the solicitor was aware that any admission was of sexual abuse only. I find that this did not entail prosecutorial misconduct, a "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Ineffective Assistance of Counsel

The applicant alleged counsel's performance was deficient because of the following:

- (1) failure to request an evaluation or discover mental health issues apparent due to the applicant's housing in the mental health sector of the law enforcement center and the fact the applicant was on prescription mental health medications for the nine months he was incarcerated prior to his guilty plea and at the time of his plea;
- (2) failure to investigate by meeting with the applicant to discuss the case only once, the day of the guilty plea, not filing discovery, failing to review the evidence in property and evidence or request independent testing of that evidence, and failing to attend the family court hearing on the matter of alleged sexual abuse when the applicant appeared without counsel;
- (3) failure to present mitigating evidence at Mr. Terry's guilty plea by not mentioning the applicant's twelve year military background, depression and mental health background, or the failure of the victims to attend the plea or recommend incarceration;
- (4) failing to effectively negotiate with the solicitor pleading "straight up" despite lack of any physical or forensic evidence of sexual battery and the victim's statement that the sexual battery happened with her clothes on; and
- (5) failing to adequately advise the applicant providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery.

I find that these allegations are without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. The applicant stated that at the time of his guilty plea he had not been advised that sexual battery does not mean any battery of a sexual nature, but, rather, is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some

sort. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (S.C. 2001) *rev'd on other grounds*.

The applicant stated that he did not commit a sexual battery on his step-daughter and would not have pled guilty to criminal sexual conduct with a minor if he had known that it involved sexual penetration. Plea counsel testified that he met with the applicant one time, the day of his guilty plea, during the nine months he represented him. Counsel admitted that he did not review the meaning of sexual battery with the applicant saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children. Plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented the applicant. Based upon the testimony of trial counsel and the applicant, I find that the plea attorney did not advise the applicant of the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree. Considering the entire record including the guilty plea transcript, I find that the error was not cured by the colloquy during the guilty plea.

To receive post-conviction relief for ineffective assistance of counsel a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Reasonable and prevailing professional norms would require that a lawyer advise a criminal defendant of the elements of the crime and that he ensure that the defendant understands the nature of the offense to which he is charged. The applicant's plea counsel did not do this. Where there has been a guilty plea, as here, the applicant must prove prejudice by showing that the result of the proceeding would

have been different and, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991). Upon hearing the testimony and reviewing the transcript of the plea, I find that the applicant has shown prejudice. Had the Applicant known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial.

Subject Matter Jurisdiction

The Applicant argues that the State lacked subject matter jurisdiction because of invalid arrest warrants and indictments as well as the fact that his case did not receive a preliminary hearing. I disagree and find that the indictments contain the necessary elements of the intended charge to confer subject matter jurisdiction regardless of any alleged errors in the warrants and the failure to have a preliminary hearing. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The applicant presents no evidence that a preliminary hearing was properly requested pursuant to Rule 2(b) SCrimP and even if it was properly requested, subject matter jurisdiction exists upon the proper indictment of the case even if a preliminary hearing is not held. State v. Ballington, 551 S.E.2d 280, 346 S.C. 262 (2001).

All Other Allegations

This Court finds that the applicant failed to prove any other allegations that were raised in the application or at the hearing in this case and not specifically addresses herein. Therefore, all such allegations are without merit and denied.

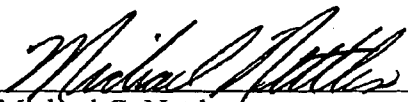
CONCLUSION

This Court grants Mr. Terry's motion for post-conviction relief based on ineffective assistance of counsel. The cases are reversed and remanded for a new trial and Mr. Terry is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

IT IS HEREBY ORDERED:

1. That the applicant's motion for post-conviction relief is granted;
2. That applicant's convictions of two counts of lewd act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274) are reversed and remanded; and
3. That the applicant is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

AND IT SO ORDERED this 26 day of March, 2007


Michael G. Nettles
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2005-CP-23-7327
COUNTY OF GREENVILLE	)	
	)	
Terrence Dimingo Terry,	)	
S.C.D.C. No. 307935,	)	
	)	
Applicant,	)	
	)	MOTION TO ALTER OR AMEND
v.	)	THE FINAL ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

TO: SUSANNAH C. ROSS, ESQ., ATTORNEY FOR THE APPLICANT

The Respondent, by and through undersigned counsel, would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief action filed November 11, 2005.
2. An evidentiary hearing was convened on March 1, 2007 at the Greenville County Courthouse.
3. The Applicant was present at the hearing and was represented by Susannah C. Ross, Esquire. The Applicant testified in his own behalf and his plea attorney, Ernest Hamilton, Esquire, also testified.
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated March 26, 2007 granting the Applicant's application for post-conviction relief. This order was filed on April 11, 2007 and received by the Respondent on April 17, 2007.
5. The Respondent moves this Court to alter or amend the relief granted in the final

order.

6. The Applicant told the plea judge he was guilty of the charges and agreed with the solicitor's recitation of the facts. (Plea transcript, p.9, p.11, p.12). The Applicant also told the plea judge he had not been coerced or pressured into pleading guilty. (Plea transcript, p.9). The plea record indicates the Applicant clearly knew he was at court that day to plead guilty to 2 counts of lewd act and one count of first-degree criminal sexual conduct with a minor.

7. The Applicant, in fact, admitted at the PCR hearing that he was guilty of "improper touching." This statement alone is an admission of guilt for the 2 lewd act charges. At the very least, the Respondent would argue the final order should be amended to deny relief on those 2 indictments.

8. When asked at the guilty plea hearing, the Applicant told the plea judge he was on hypertension medication only. (Plea transcript, p.6). The Applicant did not inform the plea judge at that time that he was currently taking any psychiatric medication. The Applicant also informed the plea judge that he had received prior treatment "for drugs and psychiatric." (Plea transcript, p.6). The Applicant did not inform the plea judge at that time that he was currently undergoing any kind of psychiatric treatment.

9. The Respondent would argue the Applicant was fully competent the day he pled guilty and simply entered his plea in order to receive the recommendation and put an end to this matter. The Respondent would argue this is supported by the fact that the Applicant gave clear and detailed answers to the plea judge's questions about medications and treatment yet somehow managed to forget to mention the psychiatric drugs and treatment he was currently receiving.

10. Accordingly, the Respondent would ask the Court to alter or amend the final order of dismissal in order to deny post-conviction relief on all 3 indictments.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

Columbia, South Carolina

April 24, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2005-CP-23-7327

TERRENCE DIMINGO TERRY, 307935)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

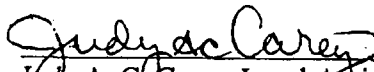
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Motion to Alter or Amend the Final Order in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah C. Ross, Esquire
 2435 East North Street; #222
 Greenville SC 29615-1442

DATED this 24th day of April, 2007.


 Judy A. C. Carey, Legal Assistant
 For Respondent

State of South Carolina)

County of Greenville)

Terrence D. Terry)

Applicant)

v.)

State of South Carolina)

Respondent)

In The Court of Common Pleas

Thirteenth Judicial Circuit

C.A. No. 2005-CP-23-7327

59(e) Motion to Alter or Amend

PROCEDURAL HISTORY

This matter comes before the court by way of Application for Post Conviction Relief, filed on November 11, 2005. The State made its return on June 6, 2006. A hearing on the Motion was held on March 1, 2007. The Applicant was present at this proceeding and represented by Susannah Ross, Esquire, of the Greenville County Bar. Karen C. Rattigan, Assistant Attorney General represented the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Applicant is incarcerated in the South Carolina Department of Corrections pursuant to an order for commitment from the Greenville County Clerk of Court.

The Greenville Grand Jury indicted the Applicant at the february 2005 of General Session for lewd act on a child (2005-CP-23-1157) and first degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Earnest Hamilton, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen (15) years for lewd act on a minor and twenty (20) years for first degree (CSC) with a minor. The Applicant did not appeal his convictions or sentences.

II

In this current application, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Prosecutorial Misconduct.
2. Ineffective Assistance of Counsel.
3. Subject Matter Jurisdiction.

III

The Applicant presented several issues and exhibits at his post-conviction relief hearing, and indicated that he did not wish to waive any of these issues for further appellate review.

Prosecutorial Misconduct

The Applicant testified that his guilty plea was uninformatively and unintelligently entered, as well as, involuntarily.

The Applicant testified that the prosecutor committed misconduct by using invalid arrest warrants that the Magistrate would not "backdate" in accordance with the (24)twenty-four hour statute of the Const. of the United States.

The Applicant also testified that he was denied (upon request) his right to a preliminary hearing before, the issuing Magistrate according to Gerstein v. Pugh; County of Riverside v. McLaughlin, as well as, in violation of his 1st, 4th, 5th, 8th and 14th Amendments rights, which the records (or lack there of) will substantiate, and of which the prosecutor was aware.

The Applicant also submitted that his indictments were not valid, in that, the prosecution failed to file them with the clerk of court-before and after-presentment to the grand jury in violation of rules 3(b) and (3c), of the SCRCrimP; also S.C. Code Ann. §14-17-530. Citing State v. Quattlebaum 338 S.C. 441, 527 S.E. 2d 105 (S.C. 200); Burger v. U.S. 295 U.S. 78, 55 Ct. 629 (1935), and State v. King, 71 S.E. 2d 293 (S.C. 1952).

The Applicant testified, and entered into the record the sled rape analysis report as a speaking exhibit, (dated March 2, 2005), to show both "reasonable doubt", and prove that the prosecutor was made aware of its existence (See second page of report). Citing: Inre v. Winship, 397, U.S. 358 (1970); State v. Quattlebaum, 527 S.E. 2d 105 (S.C. 200)

Ineffective Assistance of Counsel

The Applicant testified that his assigned counsel-Mr. Earnest Hamilton-failed to investigate into(Applicant's)case in that:

A.Mr.Hamilton failed to file a Motion for Discovery in the Applicant's behalf.

B.Mr.Hamilton failed to present any portion of the discovery to the Applicant for review.

C.Mr.Hamilton failed to inform the Applicant of his rights to an arraignment hearing or provide representation therein.

The Applicant testified that these action clearly rendered the Applicant informatively incompetent to enter a guilty plea. Boykin v. Alabama, 395 U.S.238(1969)Pittman v. State, 337 S.C.597, 524 S.E.2d 628(1999);and White v. State, 263 S.C.110, 208 S.E.2d 60(1975).

The Applicant further testified that his counsel's failure to acknowledge the defects of his warrants and indictments-being unfiled-and failure to file a "Motion for Suppression" of the evidence;provide(1)one 10-15 minute collquy between the Applicant's(8)eight month detainment;and the plea hearing(on the day of the hearing)and failure to protect Applicant's(6th) sixth and(14th)forteenth Amendment rights of "due process" showed absolute prejudice.Strickland v. Washington;see also Johnson v. State, 325 S.C.182, 480 S.E.2d 733(1977);Hill v. Lockhart ,474 U.S.52, 106 S.Ct.366, 88 L.Ed.2d 203(1985).

The Applicant testified that Mr. Hamilton's failure to "secure" the DNA Analysis results prior to advising a guilty plea as well as, an appropriate "chain of custody" report (which would have revealed destroyed evidence) and not being able to present these facts to the court, and the Applicant, as grounds for "reasonable doubt" in defense, satisfies the "two pronged" requirements in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and that he Mr. Hamilton would have "competently" not advised a guilty plea, and opted for a trial. Cherry v. State, 300 S.C. at 117 386 S.E.2d at 625.

The Applicant testified that his counsel had no knowledge of the court orders requiring the Applicant to have a "psychological evaluation" to determine his mental stability nor made any effort to fulfill the established prerequisite in the Applicant's behalf, to again protect the Applicant from "due process" violation.

The Applicant testified that his counsel advised a guilty plea and allowed the hearing to proceed through to its entirety, when at the onset, the Applicant stated that he had taken mental health medication less than (24) twenty-four hours prior to attempting to plea. State v. Maryott, 492 P.2d 239 (Wa. 1971); see also Jackson v. Denno; and the (14th) fourteenth Amendment right of "equal protection"

The Applicant asserted that his counsel should have requested a recess to assess the Applicant's "true" state of mind or requested that the guilty plea hearing be discontinued.

Lastly, the Applicant testified that his counsel never advised him of his right to a Direct Appeal, and allowed possible self incriminating testimony into court without objection. Davis v. State, 342 S.E.2d 60 (S.C. 1987); State v. Rich, 239 S.E.2d 731 (S.C. 1977).

Subject Matter Jurisdiction

The Applicant testified that the court lacked jurisdiction due to inconsistencies pertaining to his warrants, being.

A. The warrants was never served, nor was mandatorially given (read) "Miranda Rights" implemented (officer's signature appears, rather than the Applicant's).

B. The Magistrate Judge would not "backdate" the warrants to the date of the offense, (alleged), in accordance with 22-5-510 of the S.C. Code of Laws, and Art. 1§ 15 of the S.C. Constitution.

C. Falsified document - (warrant no. -1-466191) - judge's signature.

Further, The Applicant testified that his indictments was never filed with the Clerk of Court for authoritative / authenticity purpose, in accordance with rules 3(b), and (c) SCRCrimP, and State and Federal Laws.

Lastly, the applicant testified that due to the influence of "tranquilizers" that rendered him incompetent to knowingly, intelligently, and voluntarily enter a plea, or stand trial and by presenting several due process violations (on record), the jurisdiction of the court was/should have been nullified. State v. Maryott, 492 p.2d 239 (wa.1971).

Conclusion

For the forementioned reasons, the Applicant prays of the court the relief of reverse and remand for a new trial, or vacating of the case with prejudice.

S/ _____
Presiding Judge,
Thirteenth Judicial Circuit

This _____ day of _____, 2007.

In The Court of Common Pleas

Case No. 2005-CP-23-7327

Certificate of Service by U.S. Mail

The Applicant, Terrence D. Terry, #307935 hereby certifies that a true and correct copy of his 59(e) Motion to Alter or Amend Judgment is being forwarded to the Honorable Judge Michael Nettles; The Honorable Clerk of Court, Paul B. Wickensimer; the Honorable Clerk of the S.C. Supreme Court, Daniel E. Shearouse; and counsel for the Respondent, Karen C. Ratigan, by U.S. Mail, postage pre-paid and addressed as follows:

Hon. Judge Michael Nettles
c/o Paul B. Wickensimer
305 East North Street
Greenville, SC 29601

Hon. Paul B. Wickensimer
Greenville County Clerk of Court
305 East High Street
Greenville, SC 29601

Hon. Daniel E. Shearouse
Clerk of S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

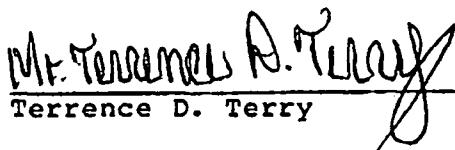
Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

SWORN TO and subscribed before me
This 25 day of April, 2007.



Notary Public for South Carolina

My Commission Expires: 3-30-2009



Terrence D. Terry
Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2005-CP-23-7327
COUNTY OF GREENVILLE	)	
	)	
Terrence Dimingo Terry,	)	
S.C.D.C. No. 307935,	)	
	)	
Applicant,	)	
	)	RETURN TO MOTION TO ALTER OR
v.	)	AMEND THE ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, by and through undersigned counsel, making Return to the Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief action filed November 11, 2005.
2. An evidentiary hearing was convened on March 1, 2007 at the Greenville County Courthouse.
3. The Applicant was present at the hearing and was represented by Susannah C. Ross, Esquire. The Applicant testified in his own behalf and his plea attorney, Ernest Hamilton, Esquire, also testified.
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated March 26, 2007 granting the Applicant's application for post-conviction relief. This order was filed on April 11, 2007;
5. The Applicant, acting pro se, moves the Court to alter or amend the order of dismissal;
6. The Respondent submits the Motion to revise the final order should be denied;

7. The Respondent submits the Applicant's Rule 59(e), SCRCP motion should be dismissed because it was a pro se filing made while the Applicant was represented by counsel. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (holding there is no constitutional right to hybrid representation either at trial or on appeal);

8. Further, the Respondent submits this Motion is untimely. The final order was filed on April 11, 2007 and served upon counsel. The ten-day time limit for post-trial motions begins when counsel receives the final order, not the Applicant. As this pro se motion was dated April 25, 2007, it is clearly not timely.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

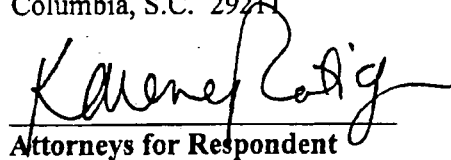
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

Columbia, South Carolina

April 26, 2007

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

TERRENCE DIMINGO TERRY, 307935

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2005-CP-23-7327

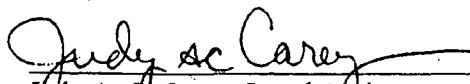
AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return to Motion to Alter or Amend the Order of Dismissal in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Susannah C. Ross, Esquire
2435 East North Street; #222
Greenville SC 29615-1442

Terrence Dimingo Terry, 307935
McCormick Correctional Institution
386 Redemption Way
McCormick SC 29899

DATED this 26th day of April, 2007.


 Judy A. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)
TERRENCE D. TERRY,)
S.C.D.C. No. 307935,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
2005-CP-23-7327

**ORDER DENYING RULE 59(e) MOTION
TO ALTER OR AMEND THE FINAL ORDER**

2007 JUL -11
FILED
CLERK OF COURT
WILKES COUNTY S.C.

The above-captioned case is a post-conviction relief matter arising from an application filed November 11, 2005. An evidentiary hearing was convened on March 1, 2007, and the final order of dismissal was signed by this Court on March 26, 2007.

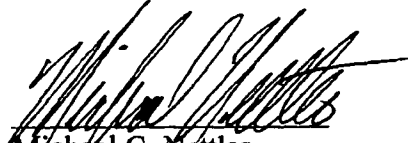
This matter is back before the Court by way of the Respondent's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 24, 2007; and Applicant's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 25, 2007. The Respondent made its return to this motion on April 26, 2007.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Respondent and Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment¹. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. The previous order fully comports with the requirements of Rule 52(a) SCRCP.

IT IS THEREFORE ORDERED:

1. That the Respondent and Applicant's motion are denied and dismissed.

AND IT IS SO ORDERED this 2nd day of July, 2007.


Michael G. Nettles
Presiding Judge
12th Judicial Circuit

¹ In addition, the Applicant's motion to reconsider pursuant to Rule 59(e), SCRCP, is ineffective and void because Applicant is currently represented by counsel. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Terrence D. Terry, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the following two (2) orders issued by the Honorable Michael G. Nettles in this post-conviction relief matter:

- (1) Order granting relief dated March 26, 2007 and filed April 11, 2007.
- (2) Order Denying Rule 59(e) Motion to Alter or Amend the Final Order dated July 2, 2007 and filed July 6, 2007.

The State received notice of entry of the first order on April 17, 2007 and entry of the second order on July 9, 2007. Copies of the orders on appeal are attached to this notice.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By:


Attorneys for the Petitioner

Columbia, South Carolina

July 12, 2007

Other counsel of record:

Susannah C. Ross, Esquire
2435 East North Street, #222
Greenville, SC 29615-1442

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Terrence D. Terry, ... Respondent,

v.

State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Karen C. Ratigan, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Susannah C. Ross, Esquire
2435 East North Street, #222
Greenville, SC 29615-1442

I further certify that all parties required by Rule to be served have been served this 12th day of July, 2007.


KAREN C. RATIGAN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

2005-CP-23-7327

Terrence Dimingo Terry, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding Respondent would not have pled guilty if plea counsel had explained the definition of a sexual battery?
2. Did the PCR judge err in finding any ineffective assistance of counsel was not cured by the plea colloquy?

STATEMENT OF THE CASE

The February 2005 term of the Greenville County Grand Jury indicted Respondent for two (2) counts of lewd act upon a child (2005-CP-23-1157, -1158) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). (App.pp.127-28; pp.130-31; pp.133-34). Ernest Hamilton, Esquire represented Respondent.

On March 8, 2005, Respondent pled guilty. The Honorable Edward W. Miller sentenced Respondent to concurrent terms of fifteen (15) years for each count of lewd act upon a child and twenty (20) years for first-degree CSC with a minor. (App.pp.124-26). Respondent did not appeal his convictions or sentences.

Respondent filed an application for post-conviction relief on November 11, 2005 (2005-CP-23-7327) and an amendment dated February 5, 2007. (App.pp.17-23; pp.29-30). An evidentiary hearing was held at the Greenville County Courthouse on March 1, 2007. (App.pp.31-107). Respondent was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable Michael G. Nettles granted Respondent a new trial on all three charges in an order dated March 26, 2007. (App.pp.109-16). Though the State filed a motion to alter or amend the judgment, Judge Nettles issued an order denying the motion on July 2, 2007. (App.pp.117-19; pp.120-21).

STANDARD OF REVIEW

The proper standard for review of a post-conviction relief (PCR) evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-

conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge erred in finding Respondent met his burden of proving ineffective assistance of counsel.

At the evidentiary hearing, Respondent stated he did not know the definition of “sexual battery” but that he would not have pled guilty if he had known it. (App.pp.52-53). Respondent stated the family court finding of sexual abuse did not mention sexual battery. (App.p.66). Respondent stated he did not perform a sexual battery on ^{Minor}₁ the nine-year-old victim in the first-degree CSC with a minor charge. (App.p.54, 63).

Plea counsel testified he copied all the discovery material in the assistant solicitor’s file and reviewed these materials with Respondent. (App.pp.79-80; pp.92-93). Plea counsel testified he reviewed the allegations with Respondent and “what he was accused of doing” and that Respondent wanted to plead guilty. (App.pp.92-93). Plea counsel testified Respondent was remorseful and embarrassed for what he had done and wanted to plead guilty. (App.pp.80-81; p.87). Plea counsel testified Respondent never told him he wanted to go to trial. (App.p.81).

In granting Respondent’s application for post-conviction relief, the PCR judge found plea counsel “did not advise [Respondent] of the meaning of sexual battery” and that, if Respondent had known this definition, “he would not have pled guilty and would have insisted on going to trial.” (App.p.113-15).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The PCR judge erred in finding plea counsel failed to discuss the definition of a sexual battery with Respondent. Sexual battery is defined as "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." S.C. Code Ann. § 16-3-651(h) (Supp. 2003). One is guilty of first-degree CSC with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655 (Supp. 2003). Plea counsel testified they reviewed the discovery material and the nature of Respondent's pending charges. Plea counsel testified Respondent knew what he was accused of and wanted to plead guilty. In reviewing the discovery materials and the charges, it is clear plea counsel explained the nature of a sexual battery but may not have used that exact term.

Regardless, Respondent failed to prove prejudice, as he has admitted his

misconduct at every step of these proceedings. In prior family court proceedings, the family court judge found Respondent sexually abused his step-daughters and Respondent admitted this. (App.p.12; p.56). After being placed under oath at the guilty plea hearing, Respondent admitted he was guilty and that the facts presented by the assistant solicitor were true. (App.pp.11-12). In discussing the first-degree CSC with a minor charge during the plea colloquy, the assistant solicitor stated Respondent “penetrated [the victim’s] vagina with his finger and her anus with his penis” and Respondent did not dispute this. (App.p.12). This clearly satisfies the definition of sexual battery under section 16-3-651(h). At the PCR evidentiary hearing, admitted he was guilty of the “improper touching” of his step-daughters. (App.p.58).

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

As Respondent failed to meet this burden of proving ineffective assistance of plea counsel on this issue, the PCR judge erred in granting Respondent’s application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy.

In granting Respondent's application for post-conviction relief, the PCR judge found any ineffective assistance of plea counsel "was not cured by the colloquy during the guilty plea." (App.p.114). This was error.

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy. It is clear Respondent entered knowing, voluntary, and intelligent guilty pleas to the three charges. Respondent told the plea judge it was his decision to plead guilty and that it was a free and voluntary decision. (App.pp.9-10). Respondent told the plea judge he understood the indictments and their maximum sentences and that he wanted to waive his various trial rights. (App.pp.7-8; p.10). Respondent admitted his guilt to the plea judge. (App.p.11). Respondent told the plea judge both that he was satisfied with plea counsel and that he has had ample opportunity to review the evidence against him. (App.p.11).

The assistant solicitor recited the facts of the case. Regarding the charge of first-

degree CSC with a minor, the assistant solicitor stated Respondent “penetrated [the victim’s] vagina with his finger and her anus with his penis.” (App.p.12). As to the two counts of lewd act upon a child, the assistant solicitor stated Respondent assaulted the two victims “by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs.” (App.p.12). The assistant solicitor also stated Respondent admitted his guilt in family court. (App.p.12). Respondent admitted all these facts were true. (App.p.12). After plea counsel told the judge that Respondent acknowledged doing these things but “can’t explain” why he did them, Respondent was given an opportunity to further address the judge and chose not to do so. (App.p.13).

It is a solemn admission of guilt when a defendant enters a guilty plea. Further, a guilty plea and sentence bring finality to the process. There is a presumption of regularity in final judgments that should prevent challenges to the validity of convictions. See Parker v. State Highway Dep’t, 224 S.C. 263, 272-73, 78 S.E.2d 382, 386 (1953) (“Upon . . . conviction, there is no longer a presumption of innocence. There then arises a ‘legal as well as laical presumption’ that the conviction is just.”); State v. Payne, 332 S.C. 266, 271, 504 S.E.2d 335, 337 (Ct. App. 1998) (“[O]ur case law has a long history of embracing the presumption of regularity that attaches to final judgments.”). It is well-settled that, in general, one cannot collaterally attack his voluntary guilty plea:

[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

State v. Tucker, ___ S.C. ___, 656 S.E.2d 403, 406 (Ct. App. 2008) (quoting United

States v. Broce Constr. Co., Inc., 488 U.S. 563, 565, 109 S. Ct. 757, 102 (1989)).

It is clear from the record that Respondent's guilty pleas were both counseled and voluntary. See id. Plea counsel testified at the evidentiary hearing that he was not aware Respondent was on any medications and did not detect any problems. Plea counsel testified Respondent understood their conversations and understood the plea judge's questions. (App.pp.81-83; pp.85-86). While Respondent stated he was on psychiatric medication the day of the plea and did not understand what was happening, this is simply not credible. (App.pp.41-42; p.62). When asked by the plea judge whether he was taking any kind of medication, Respondent replied that he was taking hypertension medication but did not mention any psychiatric drugs of any kind. (App.pp.5-6). When asked by the plea judge whether he had undergone any prior psychiatric treatment, Respondent answered that he completed a program the previous year "for drugs and psychiatric" but did not mention any current psychiatric medication or treatment. (App.pp.6-7). It is clear Respondent was able to articulate specific answers to the plea judge's questions – rather than simply answering yes or no – and simply chose not to inform the plea judge of any current psychiatric medication or treatment. Respondent admitted at the evidentiary hearing that he knew he was in court that day to plead guilty. (App.p.75). As Respondent never informed plea counsel he was taking such medication, it was incumbent upon him to inform the plea judge of his situation. Plea counsel and the plea judge were not required to be clairvoyant.

Respondent entered a knowing and voluntary guilty plea to the three charges. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712. Accordingly, the PCR judge

erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR PETITIONER

March 10, 2008

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

2005-CP-23-7327

Terrence Dimingo Terry, ... Respondent,

v.

State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 10th day of March, 2008.


KAREN C. RATIGAN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Michael G. Nettles, Circuit Court Judge

COPY

RECEIVED

MAY 5 2008

S.C. SUPREME COURT

TERRANCE D. TERRY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

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QUESTION PRESENTED

Whether there was any evidence to support the PCR judge's findings that plea counsel was ineffective in failing to explain to respondent the meaning of sexual battery?

STATEMENT OF THE CASE

Respondent's adopts petitioner's statement of the case.

ARGUMENT

There was evidence to support the PCR judge's findings that plea counsel was ineffective in failing to explain to respondent the meaning of sexual battery prior to his guilty plea.

This Court has repeatedly held that it must uphold the findings of the PCR judge if there is any evidence of probative value to support them. Roberts v. State, 361 S.C. 1, 602 S.E.2d 768 (2004); Caprood v. State, 335 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985); Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984); Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

Respondent testified at the evidentiary hearing that the only time he ever saw plea counsel was on the day of the plea for a ten (10) minute consultation. (App. p. 50, line 25 – p. 51, line 6) When he pled guilty he did not understand what the term “sexual battery” meant. Plea counsel did not explain what it meant. If respondent had known what it meant he would not have pled guilty. (App. p. 52, line 14 – p. 53, line 3) He testified that he did not commit a sexual battery on the victim. (App. p. 54, lines 13-16) While there had been a finding in family court of sexual abuse there was no finding of sexual battery or criminal sexual conduct with a minor. (App. p. 66, lines 10-25)

Plea counsel testified that to him sexual battery and sexual abuse were all the same and he never made a distinction. (App. p. 86, line 16 – p. 87, line 3)

The PCR judge found that respondent had not been advised of the statutory definition of sexual battery at the time of his guilty plea, that respondent's testimony was that he did not commit a sexual battery on the victim, and he would not have pled guilty to criminal sexual conduct with a

minor if he had known what it meant. The PCR judge also found that plea counsel did not advise respondent of the significance of the meaning of sexual battery. (App. p. 113 – p. 114) As a result, the PCR judge was ineffective in failing to advise respondent of the significance of what sexual battery meant, and respondent demonstrated prejudice in showing that he would not have pled guilty but would have insisted on going to trial. Thus, the claim of ineffective assistance of counsel has been met under the Sixth Amendment to the United States Constitution. Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991).

CONCLUSION

Petitioner's writ should be denied and the findings of the PCR judge should not be disturbed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 22nd day of April, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Michael G. Nettles, Circuit Court Judge

TERRANCE D. TERRY,

RESPONDENT,

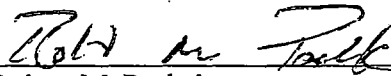
V.

STATE OF SOUTH CAROLINA,

PETITIONER

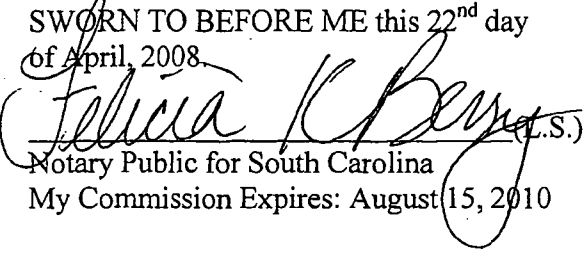
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Karen Ratigan, Esquire, this 22nd day of April, 2008.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 22nd day
of April, 2008.


Notary Public for South Carolina

My Commission Expires: August 15, 2010

The Supreme Court of South Carolina

Terrence D. Terry,

Respondent,

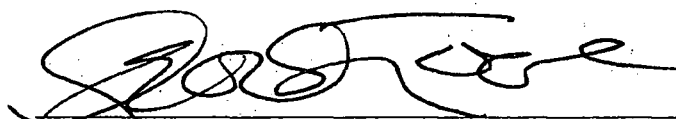
v.

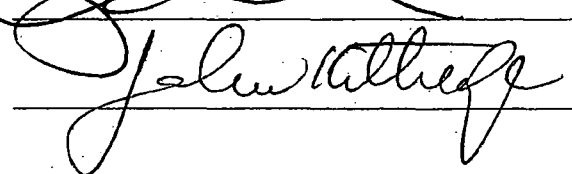
State of South Carolina,

Petitioner.

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 227(j), SCACR.


C. J.


J.

Columbia, South Carolina

November 6, 2008

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

2005-CP-23-7327

Terrence Dimingo Terry, ...Respondent,

v.

State of South Carolina, ...Petitioner.

BRIEF OF PETITIONER

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

7

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S.C. Code Ann. § 16-3-655 (Supp. 2003).....	6

STATEMENT OF ISSUES ON APPEAL

1. Did the PCR judge err in finding Respondent would not have pled guilty if plea counsel had explained the definition of a sexual battery?
2. Did the PCR judge err in finding any ineffective assistance of counsel was not cured by the plea colloquy?

STATEMENT OF THE CASE

The February 2005 term of the Greenville County Grand Jury indicted Respondent for two (2) counts of lewd act upon a child (2005-CP-23-1157, -1158) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). (App.pp.127-28; pp.130-31; pp.133-34). Ernest Hamilton, Esquire represented Respondent.

On March 8, 2005, Respondent pled guilty. The Honorable Edward W. Miller sentenced Respondent to concurrent terms of fifteen (15) years for each count of lewd act upon a child and twenty (20) years for first-degree CSC with a minor. (App.pp.124-26). Respondent did not appeal.

Respondent filed an application for post-conviction relief (PCR) on November 11, 2005 (2005-CP-23-7327) and an amendment dated February 5, 2007. (App.pp.17-23; pp.29-30). An evidentiary hearing was held at the Greenville County Courthouse on March 1, 2007. (App.pp.31-107). Respondent was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable Michael G. Nettles granted Respondent a new trial on all three charges in an order dated March 26, 2007. (App.pp.109-16). Though the State filed a motion to alter or amend the judgment, Judge Nettles issued an order denying the motion on July 2, 2007. (App.pp.117-19; pp.120-21).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction

relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge erred in finding Respondent met his burden of proving ineffective assistance of counsel.

At the evidentiary hearing, Respondent stated he did not know the definition of “sexual battery” but that he would not have pled guilty if he had known it. (App.pp.52-53). Respondent stated the family court finding of sexual abuse did not mention sexual battery. (App.p.66). Respondent stated he did not perform a sexual battery on ^{Minor}₁ – the nine-year-old victim in the first-degree CSC with a minor charge. (App.p.54, 63).

Plea counsel testified he copied all the discovery material in the assistant solicitor’s file and reviewed these materials with Respondent. (App.pp.79-80; pp.92-93). Plea counsel testified he reviewed the allegations with Respondent and “what he was accused of doing” and that Respondent wanted to plead guilty. (App.pp.92-93). Plea counsel testified Respondent was remorseful and embarrassed for what he had done and wanted to plead guilty. (App.pp.80-81; p.87). Plea counsel testified Respondent never told him he wanted to go to trial. (App.p.81).

In granting Respondent’s application for post-conviction relief, the PCR judge found plea counsel “did not advise [Respondent] of the meaning of sexual battery” and that, if Respondent had known this definition, “he would not have pled guilty and would have insisted on going to trial.” (App.p.113-15).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The PCR judge erred in finding plea counsel failed to discuss the definition of a sexual battery with Respondent. Sexual battery is defined as "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." S.C. Code Ann. § 16-3-651(h) (Supp. 2003). An individual is guilty of first-degree CSC with a minor if "the actor engages in sexual battery with a victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655 (Supp. 2003). Plea counsel testified they reviewed the discovery material and the nature of Respondent's pending charges. Plea counsel testified Respondent knew what he was accused of and wanted to plead guilty. In reviewing the discovery materials and the charges, it is clear plea counsel explained the nature of a sexual battery but may not have used that exact term.

Regardless, Respondent failed to prove prejudice, as he has admitted his

misconduct at every step of these proceedings. In prior family court proceedings, the family court judge found Respondent sexually abused his stepdaughters – the three (3) child-victims in this case – and Respondent admitted this. (App.p.12; p.56). After being placed under oath at the guilty plea hearing, Respondent admitted he was guilty and that the facts presented by the assistant solicitor were true. (App.pp.11-12). In discussing the first-degree CSC with a minor charge during the plea colloquy, the assistant solicitor stated Respondent “penetrated [child-victim #3’s] vagina with his finger and her anus with his penis” and Respondent did not dispute this. (App.p.12). These uncontroverted facts clearly satisfy the definition of sexual battery under section 16-3-651(h). Even at the PCR evidentiary hearing, Respondent admitted he was guilty of the “improper touching” of his stepdaughters. (App.p.58).

Accordingly, Respondent failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

As Respondent failed to meet this burden of proving ineffective assistance of plea counsel on this issue, the PCR judge erred in granting Respondent’s application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

II. The PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy.

In granting Respondent's application for post-conviction relief, the PCR judge found any ineffective assistance of plea counsel "was not cured by the colloquy during the guilty plea." (App.p.114). This was error.

In considering an allegation a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997). To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991).

The PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy. It is clear Respondent entered knowing, voluntary, and intelligent guilty pleas to the three charges. Respondent told the plea judge it was his decision to plead guilty and that it was a free and voluntary decision. (App.pp.9-10). Respondent told the plea judge he understood the indictments and their maximum sentences and that he wanted to waive his various trial rights. (App.pp.7-8; p.10). Respondent admitted his guilt to the plea judge. (App.p.11). Respondent told the plea judge both that he was satisfied with plea counsel and that he has had ample opportunity to review the evidence against him. (App.p.11).

The assistant solicitor recited the facts of the case. Regarding the charge of first-

degree CSC with a minor, the assistant solicitor stated Respondent “penetrated [child-victim #3’s] vagina with his finger and her anus with his penis.” (App.p.12). As to the two counts of lewd act upon a child, the assistant solicitor stated Respondent assaulted child-victim #1 and child-victim #2 “by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs.” (App.p.12). The assistant solicitor also stated Respondent admitted his guilt in family court. (App.p.12). Respondent admitted all these facts were true. (App.p.12). After plea counsel told the judge that Respondent acknowledged doing these things but “can’t explain” why he did them, Respondent was given an opportunity to further address the judge and chose not to do so. (App.p.13).

It is a solemn admission of guilt when a defendant enters a guilty plea. Further, a guilty plea and sentence bring finality to the process. There is a presumption of regularity in final judgments that should prevent challenges to the validity of convictions. See Parker v. State Highway Dep’t, 224 S.C. 263, 272-73, 78 S.E.2d 382, 386 (1953) (“Upon . . . conviction, there is no longer a presumption of innocence. There then arises a ‘legal as well as laical presumption’ that the conviction is just.”); State v. Payne, 332 S.C. 266, 271, 504 S.E.2d 335, 337 (Ct. App. 1998) (“[O]ur case law has a long history of embracing the presumption of regularity that attaches to final judgments.”). It is well-settled that, in general, one cannot collaterally attack his voluntary guilty plea:

[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

State v. Tucker, 376 S.C. 412, 418, 656 S.E.2d 403, 406 (Ct. App. 2008) (quoting United States v. Broce Constr. Co., Inc., 488 U.S. 563, 569, 109 S. Ct. 757, 762 (1989)).

It is clear from the record that Respondent's guilty pleas were both counseled and voluntary. See id. Plea counsel testified at the evidentiary hearing that he was not aware Respondent was on any medications and did not detect any problems. Plea counsel testified Respondent understood their conversations and understood the plea judge's questions. (App.pp.81-83; pp.85-86). While Respondent stated he was on psychiatric medication the day of the plea and did not understand what was happening, this is simply not credible. (App.pp.41-42; p.62). When asked by the plea judge whether he was taking any kind of medication, Respondent replied that he was taking hypertension medication but did not mention any psychiatric drugs of any kind. (App.pp.5-6). When asked by the plea judge whether he had undergone any prior psychiatric treatment, Respondent answered that he completed a program the previous year "for drugs and psychiatric" but did not mention any current psychiatric medication or treatment. (App.pp.6-7). It is clear Respondent was able to articulate specific answers to the plea judge's questions – rather than simply answering yes or no – and simply chose not to inform the plea judge of any current psychiatric medication or treatment. Respondent admitted at the evidentiary hearing that he knew he was in court that day to plead guilty. (App.p.75). As Respondent never informed plea counsel he was taking such medication, it was incumbent upon him to inform the plea judge of his situation. Plea counsel and the plea judge were not required to be clairvoyant.

Respondent entered a knowing and voluntary guilty plea to the three charges. See

Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712. Therefore, any perceived errors of plea counsel were clearly cured by the thorough and comprehensive colloquy at the guilty plea hearing. See Wolfe v. State, 326 S.C. at 165, 485 S.E.2d at 370. Accordingly, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief judge's decision to grant relief to Respondent in the form of a new trial.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 
ATTORNEYS FOR PETITIONER

November 19, 2008

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

2005-CP-23-7327

Terrence Dimingo Terry, ... Respondent,

v.

State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Brief of Petitioner upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert M. Pachak, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.
This 19th day of November, 2008.



KAREN C. RATIGAN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Michael C. Nettles, Circuit Court Judge

TERRANCE TERRY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

BRIEF OF RESPONDENT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589
(803)734-1343

ATTORNEY FOR RESPONDENT

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<u>Knight v. State</u> , 284 S.C. 138, 325 S.E.2d 535 (1985)	5
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STATEMENT OF ISSUES ON APPEAL

Whether there was any evidence to support the PCR judge's findings that plea counsel was ineffective in failing to explain to respondent the meaning of sexual battery?

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case.

ARGUMENT

There was evidence to support the PCR judge's findings that plea counsel was ineffective in failing to explain to respondent the meaning of sexual battery prior to his guilty plea.

This Court has repeatedly held that it must uphold the findings of the PCR judge if there is any evidence of probative value to support them. Roberts v. State, 361 S.C. 1, 602 S.E.2d 768 (2004); Caprood v. State, 335 S.C. 103, 525 S.E.2d 514 (2000); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986); Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985); Daniel v. State, 282 S.C. 155, 317 S.E.2d 746 (1984); Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984).

Respondent testified at the evidentiary hearing that the only time he ever saw plea counsel was on the day of the plea for a ten (10) minute consultation. (App. p. 50, line 25 – p. 51, line 6) When he pled guilty he did not understand what the term “sexual battery” meant. Plea counsel did not explain what it meant. If respondent had known what it meant he would not have pled guilty. (App. p. 52, line 14 – p. 53, line 3) He testified that he did not commit a sexual battery on the victim. (App. p. 54, lines 13-16) While there had been a finding in family court of sexual abuse there was no finding of sexual battery or criminal sexual conduct with a minor. (App. p. 66, lines 10-25)

Plea counsel testified that to him sexual battery and sexual abuse were all the same and he never made a distinction. (App. p. 86, line 16 – p. 87, line 3)

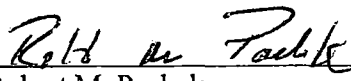
The PCR judge found that respondent had not been advised of the statutory definition of sexual battery at the time of his guilty plea that respondent's testimony was that

he did not commit a sexual battery on the victim, and he would not have pled guilty to criminal sexual conduct with a minor if he had known what it meant. The PCR judge also found that plea counsel did not advise respondent of the significance of the meaning of sexual battery. (App. p. 113 – p. 114) As a result, the PCR judge found plea counsel was ineffective in failing to advise respondent of the significance of what sexual battery meant, and respondent demonstrated prejudice in showing that he would not have pled guilty but would have insisted on going to trial. Thus, the claim of ineffective assistance of counsel has been met under the Sixth Amendment to the United States Constitution. Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991).

CONCLUSION

Petitioner's writ should be dismissed and the findings of the PCR judge should not be disturbed.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 12th day of December, 2008.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Michael G. Nettles, Judge

TERRANCE D. TERRY,

RESPONDENT,

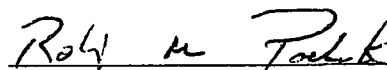
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

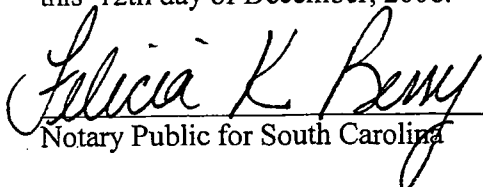
The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of December, 2008.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2008.



(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Terrence D. Terry, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 26683
Submitted May 28, 2009 – Filed July 13, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Salley W. Elliott and Assistant Attorney
General Karen C. Ratigan, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina
Commission on Indigent Defense, of Columbia, for
Respondent.

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review the post-conviction relief (PCR) judge's order reversing Terrence Dimingo Terry's (Respondent's) plea of guilty to criminal sexual conduct (CSC) with a minor, first degree and two counts of lewd act upon a child. We reverse.

FACTUAL/PROCEDURAL HISTORY

After Respondent's nine-year-old stepdaughter disclosed to her mother that Respondent had sexually abused her in July 2004, Mother confronted Respondent about the allegations. During this confrontation, it was revealed that Respondent's two other stepdaughters, ages eleven and twelve years old, had also been sexually abused by Respondent.

Subsequently, a family court proceeding brought by the Department of Social Services was conducted wherein Respondent admitted to the allegations. As a result, a treatment plan was put into effect to address Respondent's conduct.

In February 2005, a Greenville County grand jury indicted Respondent for two counts of lewd act upon a child involving the older two stepdaughters and one count of CSC with a minor, first degree regarding the allegations of the nine-year-old stepdaughter.

The next month, Respondent pled guilty to each of the three indicted offenses. At the plea proceeding, the circuit court judge inquired about Respondent's background in terms of his age, education level, and marital status. In terms of his health, Respondent indicated that he was currently taking medication for hypertension but that he felt fine and had not taken any medication, drugs, or alcohol within the twenty-four hours before the proceeding. Respondent acknowledged that he had previously been treated for "drugs and psychiatric." He did not, however, elaborate on this treatment.

After the introductory questions of the plea colloquy, the judge informed Respondent of the offenses for which he was charged¹ and the maximum possible sentences for these offenses. Respondent indicated that he understood the charges and intended to plead guilty to each of the offenses. The judge then instructed Respondent that by pleading guilty he would waive the following constitutional rights: the right to a jury trial, the State's burden of proof, his right to cross-examine the State's witnesses, his right to present a defense, and his right against self-incrimination. Respondent stated that he understood these rights but had made the decision to plead guilty.

After admitting his guilt, Respondent indicated that he was satisfied with his counsel's representation and had been given ample time to review the State's evidence.

The solicitor then provided the following factual basis for Respondent's guilty plea, stating:

On July 4th of 2004, [Respondent] put hair grease on his penis and on the victim's vagina and attempted to have sexual intercourse with her. When he was unable to do so he then penetrated her vagina with his finger and her anus with his penis. This victim was the [Respondent's] nine year old step-daughter.

¹ The judge read excerpts from the indictments. In terms of the charge of CSC with a minor, first degree the judge informed Respondent that the indictment "alleges you did in Greenville County July 4, '04 engage in sexual battery with Minor 1 less than eleven years of age."

As to one of the charges of lewd act upon a child, the judge stated that the indictment "alleges you did in Greenville County on or about - - between June 1st and June 25th, '04 being over the age of fourteen willfully and lewdly committed a lewd and lascivious act upon the body or its parts of child-victim #2, a child under the age of sixteen with the intent of arousing, appealing to, gratifying the lusts, passions, or sexual desires of yourself or the child." The judge reiterated this language as to the second count of lewd act upon a child with the exception that the date of the offense was May 31, 2004, and involved child-victim #1.

In May and June, 2004 [Respondent] also committed numerous lewd acts on his other two step-daughters, eleven and twelve years old by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs. All these incidents occurred while the family resided at [REDACTED] in Greenville County.

The [Respondent's] wife, the mother of all three victims confronted the [Respondent] when the nine-year-old victim disclosed her abuse. And the [Respondent] stated that he did not know why he did it. The [Respondent] admitted guilt in the DSS family court proceedings.

Following the solicitor's recitation of the facts, the judge asked Respondent whether the solicitor's statements were true. Respondent stated that they were true. Respondent's counsel then informed the judge that Respondent had admitted his guilt, but had told him "only a crazy person would do something like that." Counsel clarified that Respondent was not insane but recognized the "terrible act."

Subsequently, the judge sentenced Respondent to twenty years imprisonment for CSC with a minor, first degree and fifteen years for each count of lewd act upon a child. The sentences were to be served concurrently.

Respondent did not file a direct appeal of his guilty plea. Eight months after the plea, Respondent filed an application for PCR. In his application, Respondent requested relief on the following grounds: prosecutorial misconduct, ineffective assistance of counsel, and the plea court's lack of subject matter jurisdiction. In an amended application filed by his PCR counsel, Respondent asserted the following additional grounds for relief: his plea was not knowingly, voluntarily, and intelligently made; his plea counsel did not make him aware of the "nature and crucial elements of the charge against him"; at the time of the plea he was under the influence of prescribed mental health medications that affected his ability to comprehend what he was

doing; and his plea counsel failed to inform him of the right to appeal his guilty plea.

On March 1, 2007, the circuit court held a hearing on Respondent's PCR application. At the start of the proceeding, Respondent's counsel outlined Respondent's bases for his request for PCR. Counsel primarily focused her argument on Respondent's allegations of ineffective assistance of counsel.

Specifically, PCR counsel alleged that plea counsel was ineffective in the following respects: (1) he failed to bring to the court's attention Respondent's mental health issues, particularly the fact that Respondent was housed in the mental health section of the Greenville County detention center for nine months prior to the plea proceeding and was taking "antipsychotic" medication; (2) he failed to evaluate the State's evidence in that he did not make a discovery request and he did not view the physical evidence or the "rape kit"; and (3) he failed to offer any mitigation evidence, such as the lack of physical evidence, the absence of the victims at the plea proceeding, the Respondent's lack of a prior record, and the Respondent's twelve-year military history. Additionally, PCR counsel emphasized that Respondent's plea counsel failed to review the meaning of "sexual battery" with Respondent prior to the plea. Counsel asserted that the failure to review a crucial element of the offense was particularly significant given Respondent's competency was in question.

PCR counsel then called Respondent as a witness. Respondent testified that he met with plea counsel only once, the day of the plea proceeding, for a ten-minute consultation. He further stated that plea counsel never provided or reviewed discovery with him. Because he did not review any discovery materials, Respondent claimed he was unaware of the SLED report stating that no physical evidence was found on the clothing of the nine-year-old victim. Although Respondent acknowledged that he pled guilty, he claimed that he did not understand the nature of the charges, particularly the meaning of "sexual battery." Respondent stated that his plea counsel did not

explain the meaning of this term. He further testified that had he known the definition of "sexual battery," he would not have pled guilty.

Throughout his direct examination, Respondent repeatedly emphasized that he was unable to adequately comprehend the plea proceeding due to his mental health issues and the medications he was taking to treat these issues. Respondent contended that he admitted to the truth of the solicitor's factual recitation at the plea proceeding because he lacked the ability to comprehend and adequately defend himself at that time.

Although Respondent specifically denied committing a sexual battery on the nine-year-old victim, he admitted there was inappropriate touching. Despite the State's assertion that Respondent admitted to committing a sexual battery during the family court proceeding, Respondent testified he could not recall such an admission. Respondent acknowledged that the family court's order included a treatment plan stemming from a finding of sexual abuse. Respondent, however, noted that there was no finding of sexual battery or CSC with a minor.

On cross-examination, Respondent maintained that he did not inform the plea judge of the extent of his mental health problems because the "psychiatric medication . . . rendered [him] incompetent to speak for [himself]." Although Respondent acknowledged that he was aware of the plea proceeding, he contended he did not want to plead guilty and only did so due to his diminished "mental capabilities."

Respondent's plea counsel was the second and final witness to testify. Counsel testified that he could not recall how many times he met with Respondent prior to the plea proceeding. He did remember that "he went over the materials [he] had in his possession." Plea counsel explained that he did not file a discovery motion because the solicitor had an open file policy and he copied the solicitor's file. Counsel, however, was not aware of the SLED report which indicated that there was no physical evidence found regarding the CSC with a minor offense. Counsel testified he was aware that Respondent had

gone to a family court hearing, but he did not appear with Respondent because he did not know about the hearing at the time it was conducted. Plea counsel further stated that prior to the plea proceeding he went over the allegations with Respondent who told him that "something happened." Plea counsel testified Respondent was evasive and remorseful but never said he was not guilty. Based on this discussion, plea counsel was "satisfied that it happened" but Respondent did not want to say he did it. When questioned whether Respondent appeared confused about the plea proceeding, plea counsel explained:

The only thing that I would say that he—he wanted to admit without admitting that he did this act. You know. He danced around it but I'm going to plead guilty. You, know I'm going to plead guilty. But, you know, when you get into specifics as to what he did, he would kind of be evasive but something happened. And that's what he told me. I said, "Well you're going to plead guilty to it?" And he said, Yes.

On cross-examination, plea counsel testified that at the time he was appointed he was not aware that Respondent was being housed in the mental health section of the Greenville County detention center. He further stated that his file did not reflect that he had met with Respondent prior to the day of the plea hearing. In terms of the contents of his file, plea counsel testified that he had the "discovery package" provided by the solicitor's office. Counsel, however, acknowledged that this package did not include the SLED examination and he did not go to the law enforcement center to review the evidence. According to plea counsel, the package included the family court order in which there was a finding of sexual abuse. When asked why he did not object to the solicitor's statement that Respondent admitted his guilt in the family court proceeding, plea counsel stated, "To me it's all the same . . . sexual conduct. Misconduct. I didn't make that distinction." When specifically questioned as to whether sexual abuse is the same as sexual battery, plea counsel responded "It's all the same."

With respect to his pre-plea discussions with Respondent, plea counsel stated that he told Respondent what the allegations against him were and that Respondent understood the charges. Plea counsel admitted that he did not discuss the SLED report, the rape kit, or the victim's statement. Instead, counsel "talked about [Respondent] appearing in court to plead guilty and that he was guilty." Counsel believed he had enough time to go over the discovery, the plea judge's questions, and whether or not Respondent wanted to plead guilty. Counsel maintained that Respondent wanted to plead guilty.

By order dated March 26, 2007, the PCR judge granted Respondent's application and, in turn, reversed and remanded his convictions for CSC with a minor, first degree and two counts of lewd act upon a child. In so holding, the PCR judge found plea counsel was ineffective for failing to advise Respondent regarding the meaning of "sexual battery."² The judge noted that plea counsel "admitted that he did not review the meaning of sexual battery with the [Respondent] saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children." Based on plea counsel's testimony, the judge found counsel "demonstrated a lack of knowledge of the nature of the crimes for which he represented the [Respondent]." In light of this testimony and Respondent's testimony, the judge concluded that plea counsel did not advise Respondent of "the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree." The judge further found that plea counsel's error was not cured by the plea colloquy. Ultimately, the judge held that plea counsel's performance fell below reasonable and prevailing professional norms given counsel did not advise Respondent of the elements of CSC with a minor and did not ensure that Respondent understood the nature of the offense. Finally, the judge found that Respondent proved he was prejudiced by plea counsel's deficient performance given Respondent demonstrated that he would have insisted on going to trial had he known the definition of "sexual battery."

² The PCR judge found Respondent's remaining allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction to be without merit.

The PCR judge denied the State's motion to alter or amend the order. Subsequently, this Court granted the State's petition for a writ of certiorari to review the PCR judge's order.

DISCUSSION

The State argues the PCR judge erred in finding Respondent would not have pled guilty if plea counsel had explained the definition of a "sexual battery." Because plea counsel reviewed the pending charges and the discovery material with Respondent prior to the plea proceeding, the State contends counsel's failure to use the term "sexual battery" did not render counsel's performance deficient. Even if counsel's performance was deficient, the State claims that Respondent did not prove prejudice given he had admitted his misconduct and any error was cured by the plea colloquy. Ultimately, the State seeks a reversal of the PCR judge's decision to grant Respondent a new trial on all of his convictions.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases- i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)).

“When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel.” Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy v. State, 339 S.C. 29, 31, 528 S.E.2d 418, 420 (2000).

“This Court gives great deference to the post-conviction relief (PCR) court’s findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court’s decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Section 16-3-655 of the South Carolina Code outlines the crime of first-degree criminal sexual conduct with a minor as follows: “A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.” S.C. Code Ann. § 16-3-655(1) (2003).³

“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, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h) (2003).

³ Because the alleged sexual misconduct occurred in July 2004, we cite to this version of the statute given there have been substantive changes made to section 16-3-655 in subsequent years.

In contrast to “sexual battery,” “sexual abuse” has been defined as “(a) actual or attempted sexual contact with a child; or (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child’s participation in prostitution or in a live performance or photographic representation of sexual activity or sexually explicit nudity; by any person including, but not limited to, a person responsible for the child’s welfare, as defined in Section 20-7-490(5).” S.C. Code Ann. § 17-25-135(B)(2) (2003 & Supp. 2008).

The term “sexual abuse” has been used to generally describe conduct which precipitates a charge of CSC with a minor. See, e.g., State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (affirming conviction for first-degree CSC with a minor and discussing victim’s statement and medical evidence indicating victim’s injuries were consistent with sexual abuse). This general use, however, has never equated “sexual abuse” with “sexual battery.”

Clearly, a severe incident of child sexual abuse may constitute a “sexual battery” and, in turn, CSC with a minor. However, one who sexually abuses a child is not necessarily guilty of CSC with a minor. For example, an inappropriate touching of a child without penetration of the child’s “genital or anal openings” would constitute sexual abuse, but would not necessarily rise to the level of a “sexual battery” and a charge of CSC with a minor. Instead, such sexual abuse would warrant a charge of lewd act upon a child. See S.C. Code Ann. § 16-15-140 (2003) (“It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.”). Thus, the terms “sexual abuse” and “sexual battery” are not synonymous.

In the instant case, plea counsel testified at the PCR hearing that he believed the terms were the same. Because plea counsel did not differentiate between the two terms or correctly explain them to Respondent, there is evidence to support the PCR judge’s decision that plea counsel’s performance was deficient. Given plea counsel did not

comprehend this distinction and did not inform Respondent of a crucial element of the offense of CSC with a minor, first degree, we agree with the PCR judge that counsel's representation fell below an objective standard of reasonableness.

We find, however, plea counsel's deficient performance was cured by the plea colloquy even though there was no specific discussion of the term "sexual battery." Notably, the PCR judge found that any allegations regarding Respondent's competency were not meritorious. In light of this decision, the PCR judge implicitly found that Respondent had the requisite mental capacity to comprehend the plea proceeding.

At the plea proceeding, the judge read the indictments and Respondent acknowledged that he understood these charges. The indictment for CSC with a minor, first degree identified the elements of the offense which included a reference to a "sexual battery." After Respondent affirmatively stated that he understood the charges and admitted his guilt, the solicitor gave a detailed factual basis for the charges. In his factual recitation, the solicitor identified conduct which would constitute the elements of first-degree CSC with a minor. Specifically, the solicitor conveyed that Respondent had penetrated the nine-year-old victim's vagina with his finger and her anus with his penis. Both of these acts clearly meet the definition of a "sexual battery." Respondent admitted that the solicitor's statement of facts was true. Therefore, we find Respondent knowingly and voluntarily entered a plea as to the charge of CSC with a minor, first degree. See Roddy, 339 S.C. at 33-34, 528 S.E.2d at 421 (recognizing that for a guilty plea to be voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him (citing Boykin v. Alabama, 395 U.S. 238 (1969))).

In view of our decision, we further conclude the PCR judge erred in granting Respondent a new trial for the two counts of lewd act upon a child. As previously stated, the PCR judge's primary reason for granting Respondent's petition for relief was plea counsel's failure to

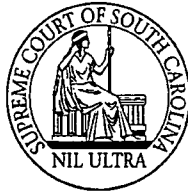
correctly inform Respondent of "sexual battery," an element of CSC with a minor, first degree. Given a "sexual battery" is not an element of lewd act upon a child and Respondent admitted to inappropriately touching his stepdaughters, the two charges for lewd act upon a child should not have been affected by plea counsel's deficient performance with regard to the definition of a "sexual battery." Accordingly, we find there is no evidence to support the PCR judge's decision to grant Respondent's relief on these two convictions.

CONCLUSION

In terms of Respondent's conviction for CSC with a minor, first degree, we find any deficient performance by plea counsel was cured by the plea colloquy. As to the remaining two charges, we hold there is no evidence to support the PCR judge's reversal of the two counts of lewd act upon a child given any deficient performance by plea counsel regarding his failure to inform Respondent of the term "sexual battery" would not have affected Respondent's plea of guilty to the charges of lewd act upon a child. Accordingly, the decision of the PCR judge is

REVERSED.

TOAL, C.J., WALLER, PLEICONES and KITTREDGE, JJ., concur.



514-09 223

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 29, 2009

REMITTITUR

The Honorable Paul B. Wickensimer
305 E. North Street
Greenville, SC 29601-2120

Re: Terry, Terrence D. v. The State
2005-CP-23-7327

Dear Mr. Wickensimer:

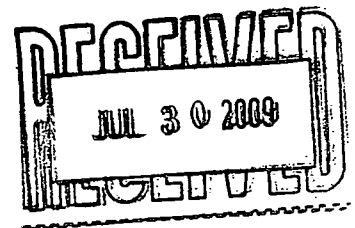
The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/klb

cc: Assistant Attorney General Karen C. Ratigan
Appellate Defender Robert M. Pachak ✓



**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court		District <u>South Carolina</u>
Name (under which you were convicted): <u>Mr. Terence Dimingo Terry</u>		Docket or Case No.:
Place of Confinement: <u>McCollum Correctional Institution</u>	Prisoner No.: <u>307935</u>	
Petitioner (include the name under which you were convicted) <u>Mr. Terence Dimingo Terry</u>		Respondent (authorized person having custody of petitioner) <u>Mr. Leroy Cartledge</u>
The Attorney General of the State of		<u>South Carolina</u>

RECEIVED
USDC CLERK, COLUMBIA, SC
2005 JUL 29 P 2:39

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging:
Greenville County Court of General Sessions
Greenville, South Carolina
- (b) Criminal docket or case number (if you know): 2005-CS-23-1157, 1158, 1274
- (a) Date of the judgment of conviction (if you know): March 8, 2005
- (b) Date of sentencing: March 8, 2005
- Length of sentence: (20) Twenty years (concurrent)
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case:
Criminal Sexual Conduct w/Minor - 1 Count
Lewd Act - 2 Counts
- (a) What was your plea? (Check one)

(1) Not guilty ☐	(3) Nolo contendere (no contest) ☐
(2) Guilty ☒	(4) Insanity plea ☐
- (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Greenville County Court of Common Pleas

(2) Docket or case number (if you know): 2005-CP-23-7327

(3) Date of filing (if you know): November 11, 2005

(4) Nature of the proceeding: Post-Conviction Relief Hearing

(5) Grounds raised:

A.) Prosecutorial Misconduct

B.) Ineffective Assistance of Trial Counsel

C.) Lack of Subject Matter Jurisdiction

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☒ No ☐

(7) Result: Reverse and Remand - I.A.C. / Release on "Original Bond"

(8) Date of result (if you know): March 26, 2007 (Filed April 11, 2007)

- (b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Same as 11. (a) (1)

(2) Docket or case number (if you know): Same as 11. (a) (2)

(3) Date of filing (if you know): April 25, 2007 (Filed May 2, 2007)

(4) Nature of the proceeding: PCR / 59(a) Motion - (Pro Se)

(5) Grounds raised:

59(a) - Motion To Alter Or Amend The Final

Order / Same as 11. (a) (5)

(Cont'd)-

-(Cont'd)- Abandonment of PCR counsel before submission
of Post-Trial Motion(s) / 59(c) and Motion To Comply.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☒ No ☐

(7) Result: 59(c) denied (See exhibit 1)

(8) Date of result (if you know): July 2, 2007 (Filed July 6, 2007)

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Greenville County Court of Common Pleas

(2) Docket or case number (if you know): 2005-CP-23-7327

(3) Date of filing (if you know): July 2007 (see exhibit 2)

(4) Nature of the proceeding: Motion To Comply To 59(c)-(Pro Se)

(5) Grounds raised: Prosecutorial Misconduct
Ineffective Assistance of Counsel
Lack of Subject Matter Jurisdiction
Time-default on 59(c) Motion response

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☒ No ☐

(3) Third petition: Yes ☐ No ☒

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

Question 11.(d)(2)- Submission of 59(c) Motion brought to attention of the
S.C. Supreme Court and Appellate Counsel. 11.(d)(3)- Motion To Comply
Forwarded to Clerk of Court and PCR Judge. Got no response. (See exhibit 2)

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Prosecutorial Misconduct - Violation of Rule 5-Brady / Rules 5 and 6 - SEACrimP. Withholding of SLED results: (See Memorandum)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. County Sheriff's Dept. retrieved from hospital "1 rule kit" (See exhibit 3).
2. Investigator prepared property control and chain of custody reports for transference of kit to SLED for DNA testing for General Sessions Court (marked ORIGINAL copy). Reports prepared for clothing as well.
3. DNA results completed and returned to sheriff/solicitors office via cc: -
(6) six days prior to G.S. appearance of March 8, 2005. (See exhibit P-2)
4. 1-18-05/discouraged itemized cover sheet shows no SLED results: (Exhibit P-6)

(b) If you did not exhaust your state remedies on Ground One, explain why: No Direct Appeal - I was never informed by either the General Sessions Court nor my defense counsel of this right (remedy). Had no knowledge to do so in my own behalf, or at my own accord, within the ten-day time limit.

(c) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: Due to making a guilty plea, my counsel never petitioned for one. It was stated that he was not required to do so. (See also; Ground One (b)).

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Greenville County Court of Common Pleas

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: March 26, 2007 / (Filed April 11, 2007)

Result (attach a copy of the court's opinion or order, if available): (See exhibit 6)

Reverse: Remand for a new trial - ineffective assistance of counsel.
Release to Greenville County Sheriff's Dept. / Original bond reinstated

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The State appealed as the "Petitioner." Due to relief, I became the Re-

spondent. Expressed "extreme desire" to appeal this issue with appointed
appellate counsel. Counsel declined to raise issue. Petitioned S.C. Supreme
Court for "pro se" status to raise issue. Was denied. (See exhibit 7)

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: Petitioned

the Common Pleas - (PCR) Judge through a 59(e) Motion to Reconstitute
or a Motion to Compel - (both pro se submissions) (See exhibit 8)

Also filed a grievance with the Office of Disciplinary Counsel (See exhibit 9)

GROUND TWO: Prosecutorial Misconduct - Use of "affirmed admission"
by Applicant from Family Court (See Memorandum), without appointed counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. Applicant attended a Family Court hearing on October 12, 2004 without ap-
pointed counsel. (See Transcript - (PCR) p. 87, l. 18-25; p. 88, l. 1-3)

2. A court order was issued on August 26, 2004 and October 12, 2004. (Trans-
(PCR) - p. 85, l. 1-9). The "Orders" were "Treatment Plans" (See exhibits 9(a) & b)

3. There was "no transcript" in discovery or Forwarded to G.S. Court.
4. The "Solicitor" stated in the guilty plea transcript (in the recitation of Facts) - that "The defendant admitted guilt in family Court." (R.p. 12, 1. 17).
- (b) If you did not exhaust your state remedies on Ground Two, explain why: No Direct Appeal - Same - (Please see Ground One (b)).

(c) Direct Appeal of Ground Two:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why: Same - (Please see Ground One - Direct Appeal (2)).
(See also; Ground One (b)).

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Granville County Court of Common Pleas

Docket or case number (if you know): 2005-08-23-7327

Date of the court's decision: March 26, 2007 / (Filed April 11, 2007)

Result (attach a copy of the court's opinion or order, if available): (See exhibit 6)

Reverse and Remand For a new trial - Ineffective Assistance of Counsel.

- (3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

- (4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

- (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

- (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Same - (Please see (7) - Ground One).

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

Same - (Please see Other Remedies - Ground One).

GROUND THREE: Ineffective Assistance of Counsel - Issues 2, 3, and 4. - (Please see PER Order) (See also Memorandum-Argument III)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
 1. Failure to investigate - met with Applicant once, (the day of the plea - 10 minutes) (Plea Transcript - p. 84, 9-11; p. 50, 1-25; p. 51, 1-9) - No Brady request.
 2. Failure to address the fact of my two court appearances under psychiatric medications (Family and B.G.) (Plea Trng. - p. 54, 1-17-24; p. 56, 1-15-20; p. 59, 1-9-12; p. 59, 1-21-25; pgs. 60-62, 1-1-25). (See exhibits) (See exhibits)
 3. Failure to negotiate plea offers, esp. 1-18-05! (Trans. p. 97, 1-15-25; p. 98, 1-1-19)

(b) If you did not exhaust your state remedies on Ground Three, explain why: No Direct Appeal. Same - (Please see Ground One. (b))

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: Same - (Please see Ground One - Direct Appeal (a))
(See also; Ground One (b)).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Post-Conviction Relief

Name and location of the court where the motion or petition was filed: _____

Granville County Court of Common Pleas

Docket or case number (if you know): _____

2005-CP-23-7327

Date of the court's decision: March 26, 2007 (Filed April 11, 2007)

Result (attach a copy of the court's opinion or order, if available): (See exhibit)
Reversal and Remand for a new trial - Ineffective Assistance of
Counsel.

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Same - (Please see (7) - Ground One).

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

Same - (Please see Other Remedies - Ground One).

GROUND FOUR: Ineffective Assistance Of Counsel - Issues 3. and 5. (Please see PER Order X See also Memorandum Argument III)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. Failure to present mitigating evidence, i.e. - there was never a psycho-logical exam performed in this case, despite mandatory requirement and "had court order mandating." (Plea Trans. p. 85, l. 23-25; p. 86, l. 1-25; p. 87, l. 1-8). (See exhibits)

2. Failure to adequately advise the Applicant, i.e. - counsel advised guilty plea despite lack of evidence. (Trans. p. 38, l. 3-15).

(b) If you did not exhaust your state remedies on Ground Four, explain why: No Direct Appeal - Same - (Please see Ground One-(b)).

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: Same - (Please see Ground One - Direct Appeal (2)). (See also; Ground One (b)).

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Greenville County Court Of Common Pleas

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: March 26, 2007 / (Filed April 11, 2007)

Result (attach a copy of the court's opinion or order, if available): (See exhibit - Bailure and Remand For a new trial - Ineffective Assistance Of Counsel.)

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Same - (Please see (7) - Ground One).

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

Same - (Please see Other Remedies - Ground One).

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: No preliminary hearing - though requested!

(b) At arraignment and plea: Mr. Earnest Hamilton; 311 Mills Ave.; Greenville, S.C. 29605 - For Plea Hearing.

(c) At trial: No Trial

(d) At sentencing: Mr. Earnest Hamilton; 311 Mills Ave., Greenville, S.C. 29605

(e) On appeal: No Appeal

(f) In any post-conviction proceeding: Ms. Susannah C. Rags; 2495 East North Street, Suite #222; Greenville, S.C. 29615

(g) On appeal from any ruling against you in a post-conviction proceeding: Mr. Robert Pachak Appellate Defender on Certiorari to the S.C. Supreme Court. I was the Respondent!; P.O. Box 11589; Columbia, S.C. 29211.

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* _____

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -r

(continued...)

Therefore, petitioner asks that the Court grant the following relief: Vacating of sentence, or
reconsideration of remaining sentence time, (See Memorandum),

or any other relief to which petitioner may be entitled.

 Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
 and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on
 _____ (month, date, year).

Executed (signed) on 7-28-10 (date).

Mr. Terrence D. Terry
 Signature of Petitioner

* (...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

United States District Court
District of South Carolina

United States of America }

Plaintiff,

) Case No. 6:10-cv2006 JFA/KFM

vs.

Terrence D. Terry

Defendant.

} Memorandum In Support
OF § 2254 Motion OF
Terrence D. Terry

Comes now the defendant, Terrence D. Terry, pro se, pursuant to 28 U.S.C. § 2254, and files this Memorandum in support of his Motion to Vacate and Set Aside his Conviction and Sentence for violation of § 16-15-140 - Lewd Act upon a Minor (2 counts) and § 16-3-655(1) CSC w/ a Minor (1 count), and states as follows:

Background

The February 2005 term of the Greenville County Grand

Jury indicted the Defendant for two (2) counts of lewd act upon a child (2005-CP-23-1157, -1158) and First-degree criminal sexual conduct (CSC) with a minor (2005-BS-23-1274). Ernest Hamilton represented Defendant.

On March 8, 2005, the Defendant pled guilty. The Honorable Edward W. Miller sentenced the Defendant to concurrent terms of Fifteen (15) years for each count of lewd act upon a child and twenty (20) years for First-degree CSC with a minor. Defendant did not appeal.

Defendant filed an application for post-conviction relief (PCR) on November 11, 2005 (2005-CP-23-7327) and two amendments were filed with the PCR court. One dated February 5, 2007, submitted by the Defendant's counsel and one submitted March 1, 2007, entered by the Defendant himself, the day of the PCR hearing.

The evidentiary (PCR) hearing was held at the Greenville County Courthouse on March 1, 2007. The Defendant (then Applicant) was represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office represented the State. The Honorable Michael B. Nettles granted the Defendant a new trial on all three charges in an order dated March 26, 2007.

Both the Defendant and the State filed a Motion to Affirm or Amend the judgment pursuant to Rule 59(c). In the Defendant's case the 59(c) Motion was submitted "pro se" citing that his PCR counsel "terminated representation" be-

For, he (Defendant) could exercise his right to do so, within the ten(10) day time limit. The Defendant did receive a "clock-stamped" Filed copy of his 59cc Motion from the Greenville County Clerk of Court - dated 2007. Judge Nettles issued an order denying both motions on July 2, 2007. The Defendant also submitted a "pro se" Motion To Compel - citing same circumstances against P CR counsel.

Ground / Argument I

Did the solicitor commit misconduct by withholding SLED material evidence from discovery?

Prosecution's constitutional duty to disclose favorable evidence is governed by materiality standard and not limited to situations where defendant has requested the favorable evidence.
U.S. v. Aguilar, 427 U.S. 97, 107-11 (1976).

The Brady disclosure rule requires the prosecution to provide any evidence in the prosecution's possession that may be favorable to the accused and material to either guilt or punishment.
State v. Kernerly, 331 S. C. 442, 452 503 S.E. 2d 214, 220 (Ct. App. 1998).

It is a violation of the due process clause when a prosecu-

for knowingly suppresses evidence favorable to a defendant.
Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996)

On March 2, 2005, SLED special agent-Rhonda R. Fields, Forensic Analyst, forwarded to the Greenville County Sheriff's Office, (in care of, Investigator-Ty Bracken), the results of a sexual assault evidence kit concerning the alleged victim in the Defendant's case, Lab No: L05-2011. (See exhibit P-2).

In addition, a copy was also forwarded to the Greenville County Solicitor's office. (See page 2 of the Results, i.e. PC:). On July 19, 2005, the Defendant forwarded a letter to SLED requesting information concerning the DNA analysis and on August 9, 2005, SLED responded, in turn, stating that "All testing has not yet been completed concerning the above-referenced case." On September 8, 2005, the Defendant received the results.

As reiterated in Argument II, p. 12, trial counsel testified on PER that he had everything contained in the Solicitor's File, and that, p. 14, he went over with the Defendant the materials contained in that file.

Also contained within the solicitor's discovery was a supplemental report from the Sheriff's office stating that one etc. D. Ketheson did report to the emergency room to retrieve the rape kit to be placed in property and evidence at the Detention Center for forwarding to SLED, - dated July 8, 2004.

Also contained in the State's discovery was, in fact, a Property

1. The further testing would turn out to be a Toxicology Result completed November of 2007, eight (8) months after the Defendant's PER hearing.

and Evidence Report, cited on the Solicitor's "discovery sheet."
(See exhibit P-6, No. 3: 5 and 9.)

The Assistant Attorney General testified on PCR:

"I think it's a difficult issue, if it turns out that the State withheld, that was prosecutorial misconduct....." ²

App. p. 103, lines 6-8.

Obviously he cannot challenge what he does not have and does not know of.

App. p. 103, lines 9-10.

The Defendant contends, that clearly the Attorney General knew and defined the parameters of misconduct at the General Sessions level, as well as, for the PCR and Certiorari levels also.

The Defendant further contends that the aforementioned discovery documents make it "crystal clear" that although the Rape Kit results weren't completed and forwarded until March 2, 2005, their existence, as evidence, is "undisputable." (Note: On each report heading is a checked box marked "GS evidence"). (See exhibit(s)). The Plea Hearing was March 8, 2005.

The PCR defense counsel testified:

"Just briefly. I know the State said something about how, would Mr. Hamilton know a SLED report was out there, and that would simply be because it was a rape case, involving a rape kit, which consist of hair and DNA samples. That's what it is and

1. Although the itemized numbered articles identify property and evidence, reports do not specify, that were only two, one for clothing and one for the kit.
2. The solicitor was referring to the Family court transcript as a part of Brady, however, clearly the dynamics are the same. 3. Plea defense counsel.

there's going to be a SLED report out there any time there's an allegation of actual penetration and the victim (alleged) taken to the hospital and a rape kit done, as there was here.
App. p. 105, lines 8-15.

The Assistant Attorney General testified:

"And also, in regards to this SLED report that should have been on notice that there was a SLED report, Your Honor, it is not necessary to have the SLED report completed on a case such as that or even like a drug case, before a defendant decides to plead guilty. It happens all the time."

App. p. 106, lines 11-13.

"I think the fact that this happened before the SLED report came back is irrelevant."

App. p. 106, lines 20-21.

Rule 6 of the SERCrimp states:

"In a criminal prosecution, any report of chemical analysis and certified or sworn statement establishing physical custody or control of evidence [shall] be made available to the defendant or his attorney at the preliminary hearing, or if no hearing is held, no later than (11) days prior to the trial of the case..."

Rule 5 of the SERCrimp states:

"Upon request of a defendant or his counsel, the solicitor [shall] permit the defendant to inspect and copy any results or reports of scientific tests.... which are material to the preparation of the defense or are intended for use by the solicitor."

for as evidence in chief at trial...."

The Defendant requests, is there mandates that superseded these constitutional obligations in 2004? Or now?

There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed, even without a specific request.

U.S. v. August, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).

It is a violation of the due process clause when a prosecutor knowingly suppresses evidence favorable to a defendant.

Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996).

Due process was violated when the prosecution withheld exculpatory "serum sample" required during trial, even though defense never made a specific request or argued its existence in lower court.

Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992).

It was judicial error when the government lost "serum sample" taken from rape victim because the defendant was totally deprived of the opportunity to test sample and there was a strong possibility that the sample was exculpatory.

Miller v. Angliker, 848 F.2d 1312, 1321-22 (2nd Cir. 1998).

Under Appellate Court Rule 407. - Professional Conduct - 3.4:

A lawyer shall not:

a.) unlawfully obstruct another parties access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

c.) Knowingly disobey an obligation under the rules of a Tribunal.

A defendant is allowed to raise a Brady claim following a guilty plea because prosecutors may otherwise be tempted to withhold exculpatory information to elicit guilty pleas.

Sanchez v. U.S., 50 F.3d 1448-53 (4th Cir. 1995).

On PER the Defendant testified:

Q. Now if you had known that the SLED -- that there was no forensic evidence of any kind of sexual battery, would you have pled guilty?

A. "From what little I understand of legality, Susannah, I think that someone would plea when there's no evidence that vindicates. No I would not have pled guilty."

App. p. 53, lines 4-9.

Also:

Q. As far as -- you've also alleged prosecutorial misconduct, what's the basis of that?

A. "That is based on the DNA reports, Susannah, and a letter stating that 'a search of our database reveals that all testing has not yet been completed concerning the above-referenced case'."

App. p. 63, lines 10-16.

And finally:

A. "Susannah, I would like to say that with the results that you have, in fact, are returned and if you'll notice the date of the
1. The incomplete testing would turn out to be a Toxicology report submitted after the rape kit, completed in November of 2007, some
6.

top, it is dated March the 2nd, of 2005. My question is, Your Honor, had this analysis been completed, or had it not? My second request is why was it not a part of my discovery? How come this information came to me through researches of my own? And I'm at a loss to understand it. Because with the letter that's written they're saying the DNA was not completed. How could the State come at me the way that they did? Brady violation because prosecutor appeared to have deliberately suppressed evidence corroborating defense; court found that, even if one believed that nondisclosure unintentional, carelessness denied defendant most critical aspect of defense. with U.S. v. Agurs, 427, U.S. 97, 110 (1976).

Ground / Argument II

Did the prosecutor commit misconduct by using "alleged admission of guilt" from Family Court?

Noting the similarities between pleas of guilty and not guilty by reason of insanity, the court stated that the Brady doctrine would also apply to guilty pleas when the plea is affected by the government's nondisclosure of evidence. Brady v. Maryland, 373 U.S. 83 (1963).

Con'd - two years and eight months after the plea. And eight months after the PER hearing. Which I have still never seen. To this day.
1. The defendant received the DNA report in September of 2005. Six months after the plea. And in so doing, Filed For PER.

The government may not suggest that information not in evidence supports its case.

U.S. v. Badger, 983 F.2d 1443 (7th Cir. 1993).

The Supreme Court stated that the long applicable rule long ago was that a prosecutor may strike hard blows, [but] he is not at liberty to strike foul ones.

U.S. v. Easley, 994 F.2d 1241 (7th Cir. 1993).

On October 12, 2004, the Defendant attended a Family Court hearing in Greenville County, from the Greenville County Detention Center where he was being held, pending a General Sessions appearance. Upon his arrest on July 10, 2004, the Defendant was appointed defense counsel on his charges. Although this same counsel was retained at the time of the Family Court hearing, he was not in attendance to represent the Defendant.

At the conclusion of the hearing there was issued a court-ordered treatment plan prepared for the parties concerned.

Some form of documentation was forwarded to both the Defendant's defense counsel and the Solicitor for General Sessions Court that included-(or was actually)- the plan from the hearing.

On March 8, 2005, at the Defendant's plea hearing the solicitor recited:

1. There were actually "two plans." One dated August 26, 2004, and one updated and issued the day of the hearing.

Mr. Newkirk:

The Defendant admitted guilt in the DSS Family Court proceedings.

App. p. 12, lines 17-18.

In PCR the Defendant testified:

Q. All right. And the State, I guess, part of your prosecutorial misconduct is that the State presented this Family Court Order as evidence of your confession in Family Court?

A. That's close to correct, Susannah. Yes, my allegation is that the State brought a statement from the Family Court against me. And I, again, from the researches, I have come to learn that I'm not allowed to be -- I'm not to be held liable for my own incriminating words.

Q. And there was no confession presented to you in your discovery, was there?

A. No, there was not.

App. p. 67-68; lines 20-6.

Further,

Q. I don't think it's relevant to offer into evidence unless

1. absent counsel. U.S. v. Fellers, 124 3. Ct. 1019 (2004).

you want me to do that?

A. I would like to have them entered into the record. Thank you.

App. p. 68, lines 7-...

The Defendant submits however, the State:

Ms. Ratigan:

I'm going to object to relevance, Your Honor. I don't know that any treatment plan from Family Court has any bearing on this decision.

And:

The Court: It does not, I'll sustain your objection.

App. p. 68, lines 12-14.

The Defendant contends that the preceding PER excerpts denote the fact that, not only, did the Treatment Plan bear any relevance as a confession in PER - per the PER Judge's ruling, its denial as evidence, as a confession in the Court of General Sessions should prevail in the Defendant's favor in that:

"We hold that the criminal action must be dismissed when the government on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witness touching

10.

the subject matter of their testimony at trial.

Jencks v. U.S., 353 U.S. 657, 1 L. Ed. 1103, 77 S. Ct. 1007 (1957).

The Defendant suggests that the "alleged admission" constitutes a "relevant statement"; that, in accordance with the Solicitor's recitation of facts was duly bound by the Solicitor to produce as discoverable material.

The Defendant suggests that the "order to produce" is Rule 5, Brady, under the mandates of "due process" within the Fourth Amendment to the U.S. Constitution.

The Defendant contends that the Solicitor in question is clearly a "seasoned practitioner" in law-unlike himself, and as such, being practiced, did in fact present to the Defendant's attorney an itemized list couched as "detailing what documents he would use as evidence, of which, out of eighteen documents listed, there was one document listed as a 'victim / witness' statement." (See item no. 13 of PCR exhibit P-3).

The Defendant contends that also out of the eighteen documents there is not one that in any form or fashion represent what did - or did not transpire in the Family Court proceedings.

Counsel's Failure to object to improper comments that violated defendant's Fifth Amendment rights was found to constitute "substandard performance" in violation of defendant's Sixth Amendment rights.

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1999).

Exclusion of evidence describing "specific circumstances of teenage murder suspect's confession was prosecutorial error."

Crane v. Sowders, 889 F.2d 715 (6th Cir. 1989).

The Supreme Court held that compelled testimony is self-incriminating when reasonable cause exists to believe that a direct answer supports a conviction or provide a link in the chain of evidence leading to a conviction.

Hoffman v. U.S., 341 U.S. 479 (1951).

The Fifth Amendment right attaches only when a person's compelled testimony is self-incriminating.

Estelle v. Smith, 451 U.S. 454, 462 (1981).

Lastly, the Defendant contends that even if an alleged admission would have been properly presented in his case by the Solicitor, the Defendant (with competent defense counsel) would have adequately challenged the statement, i.e.:

Q. I'm going to show you what Bryna Spay provided to me of what was in her file regarding Family Court?

A. That's what I got. 2

Q. Okay. And basically that doesn't show a confession, but it does say in full agreement with treatment plan?

-
1. Q- The Defendant's PER counsel, at the PER.
 2. A- The Defendant's trial counsel, at the PER.

A. Treatment Plan and Finding.

Q. And the Finding. The Finding was sexual abuse, Treatment Plan and counseling?

A. That's correct.

App. p. 85, lines 1-9.

Q. And I'm showing you now the Treatment Plan. And in that Treatment Plan the findings were that there was a finding of sexual abuse, is that correct?¹

A. That's correct, Susannah.²

Q. Now there was no finding of sexual battery was there?

A. No, there was'nt.

Q. Or criminal sexual conduct with a minor, was there?

A. No there was'nt.

Q. And the Treatment Plan consisted of an order that you undergo counseling not incarceration or anything like that?

A. That's also correct, Susannah.

App. pgs. 66-67, lines 18-2.

Q. All right. Now supposedly you somehow confessed by agreeing to this treatment plan according to the state. And they brought that up.

App. p. 67, lines 10-12.

When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence

1. Q. The Defendant's PER counsel, at PER.
2. A. The Defendant himself, at PER.

affecting credibility of that witness justifies a new trial.
Biglio v. U.S., 405 U.S. 150, 31 L. Ed. 2d 104 92 S.Ct. 763 (1972).

The Defendant questions: Is it not a "constitutional oddity" in his case that he was the "witness" described in Biglio, intended for use by the solicitor, for the State, against his own self? Minus disclosurable proof of his own creditability?

The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecutor's possession that may be favorable to the accused and material to guilt or punishment.

State v. Kennerly, 331 S.C. 442, 432 S.E. 2d 214, 220 (Ct. App. 1998).

Due process bars a prosecutor from making knowing use of false evidence.

U.S. v. Boothe, 994 F.2d 63 (2nd Cir. 1993)

The essence of a violation of the "Confrontation Clause" is the presentation of an accusation against the defendant without presenting the accuser.

Ryan v. Miller, 303 F.3d 231 (2nd Cir. 2002).

The Defendant submits that in the instant case, the accusation was an alleged, "across-the-board, admission statement of inimization," not in discovery. And as such, nothing more than air. That cannot be an accuser.

Did trial counsel's failure to investigate cause the Applicant to be "mis-advised" into entering a guilty plea? Ground / Argument III

The Applicant's trial counsel testified at the PCR hearing that he (counsel) had time to review the discovery package, as well as, review it with the Applicant.

PCR Trans. p. 84, lines 14-16; p. 92, lines 22-1; p. 93, lines 4-10.

Therefore, counsel had to have come across the "Property and Evidence Reports" that introduced the Tape Kit and clothing as being in possession of both the Greenville County Sheriff's Department and the Solicitor's Office, for pending use in General Sessions Court. PCR Trans. pages 88-89, lines 23-4. ^{← counsel}

Yet the Applicant's - by his own admission - failed to make any inquiry into the whereabouts of, or results to any of this evidence. PCR Trans. p. 90, lines 4-16.

So in contradiction to defense counsel's above testimony, the Applicant could not have been informed of the fact that the SLED results (exhibit P-2 / PCR) showed "no incriminating evidence," taken from the alleged victim's body.

Further, the Applicant's counsel testified that he was not made aware of a Family Court hearing, though it

"Baylor v. Estelle, 94 F.3d 1321, 1323 (9th Cir.) - no follow up on exculpatory Report on semen by defense counsel."

the time, he was appointed counsel - he did also testify that he did receive and review the "Treatment Plans" in the State's discovery package from the Family Court hearings. PER-Trans. p. 85, lines 1-6.

Stipulated in the Treatment plans were a requirement for the Applicant to within 15 (Fifteen) days of this Order schedule a psychological evaluation."

The Petitioner respectfully submits that again by his trial counsel failing to investigate whether or not the evaluation took place - some (4) Four months prior to his appearance in General Sessions Court, and some (3) months after his arrest; when he (counsel) received notice; by the means of making an "Initial Contact" to ascertain any perspective(s) from the Applicant himself, it cannot be said that defense counsel was adequately knowledgeable of his client's circumstances to work towards or tender any guilty plea.

The rules of both Criminal Procedure and Lawyer Conduct Codes dictate that defense counsel at the earliest possible convenience "consult with a client to solicit / elicit information for use in preparation for trial."

The Petitioner contends that had his counsel made that initial contact, he (counsel) would have disclosed procedural / due process violation" where the Petitioner - then the defendant - was housed in the mental health wing
Williamson v. Ward, 110 F.3d 1508, 1516 (10th Cir. 1997); Lema v. U.S., 987 F.2d 48, 54-55 (1st Cir. 1993) - no competency testing.

of the Greenville County Detention Center, under "psychotropic medication, and up to the day of his General Sessions appearance and beyond - without a psychological evaluation. PCR Trans. pgs. 60-62, lines 2-25.

A due process stipulation that to this very day is a prerequisite to my being released and of which was / has yet to be fulfilled.

A due process violation that went unchallenged by defense counsel, and had to have been a "major factor" in determining whether to advise a guilty plea, and of what nature. Such as a possible insanity defense.

Lastly in this context, the final mitigating factors. While defense counsel testified that there was / were no state plea offer - that he recalled seeing "basically concurrent time"; PCR Trans. p. 95, lines 12. The record shows that on January 18, 2005, - along with the State's "Itemized discovery document list" - there was a second (or actually the first) plea offer forwarded to the Applicant's defense counsel, where the Solicitor offered to "discuss a cap on active time". PCR Trans. pgs. 97-98, lines 15-19.

A mitigating factor of "grossly negligent" counsel representation, resulting in the Applicant's NOT being able to benefit from any "probable, substantial" leniencies - even to this day. A mitigating factor - in

the Applicant's case at PCR - where the State felt it quite necessary to challenge the introduction of the plea offers into the record, and where the PCR Judge both cited that the plea offers constituted being "discovery material - overlooked by defense counsel" even though he stated under sworn testimony that he had the time to thoroughly study all discovery contents and review them with the Applicant - and against the State's objections made the offers "produced and preserved" as not the Applicant exhibits for the Record on Appeal, but rather, the Court's exhibit (C-1) preserved in the Applicant's behalf. PCR Trans. p. 98, lines 15-19.

A plea of guilty is constitutionally valid only to the extent it is "voluntary and intelligent." Brady v. United States, 397 U.S. 742, 748 (1970). With the advice of competent counsel. Tellet v. Henderson, 411 U.S. 258, 263 (1973).

The District Court in a thoughtful discussion held that a defendant counsel's failure to communicate a plea bar offer would deny the defendant of his sixth and fourteenth amendment rights.... Failure by defense counsel to communicate a plea offer to a defendant deprives of the opportunity to present a plea bargain for the consideration of the State Judge and on acceptance by the

judge, to enter a guilty in exchange for a lesser sentence.

A subsequent fair trial does not remedy this situation.

U.S. ex rel. Caruso v. Zelinski, 689 F.2d 435 (3rd Cir. 1982).

Ambiguity of language in plea agreement is construed in favor of defendant and against the government.

Margalli-Cluwa v. U.S., 43 F.3d 315 (8th Cir. 1994).

In the instant case, the defendant's trial counsel indisputably never gave his informed opinion on whether the State's plea offer of January 18, 2005, had merit or should be considered, much less accepted:

Q. Okay. And were there plea offers provided to you by the State?

A. There was no plea, concurrent time was basically the only thing I recall.

Q. All right. Did you ever discuss a cap with Ms. Sauf?

A. I don't recall discussing a cap.

Q. All right. Despite the fact, I guess, her initial January 18, 2005, plea offer does state that she was willing to discuss a cap?

1. The State Prosecutor.

A. Yeah, but I don't think we did.

App. p. 84.

By counsel's own admission, he did receive the State's discovery package, which included the plea offer to discuss a cap. The Defendant would respectfully question: What is the definition of a "basically concurrent" time? Counsel also stated:

A. We didn't think that, you know because of his record, that he would get a substantial amount of time, we didn't anticipate the amount of time but we thought that he was in a good position to get some leniency.

App. p. 91, lines 9-12.

The Defendant submits, while it might not be possible for the litigants to absolutely foresee actual sentencing time, he (Defendant) could have at least had the secure understanding of what time the State was going to pursue, if he had chosen to intelligently plead on all the charges, which, with the exception of the CSC charge, he might have been willing to do.

The Defendant's plea transcript denotes no plea colloquy whatsoever between any parties involved in this

case, and as such, the Defendant respectfully questions:

How is it possible - based upon his trial counsel's, contradictory testimony in the PCR transcript, of reviewing the discovery package with the Defendant, App. p. 93, lines 8-10 and talking about appearing in court to plead guilty App. p. 90, lines 16-17, yet, acknowledging no discussion or disclosure of any plea offers or arrangements, (exp or otherwise) App. p. 85, lines 10-21; that there was no construal of manifestly ineffective assistance of counsel, on this issue alone, warranting relief?

This Circuit has held that defendants in a criminal case have the constitutional right to be fully advised about all plea offers and discussions, and then to receive counsel's informed opinion as to what pleas should be entered.

Boria v. Keane, 99 F.3d 492 (2nd Cir. 1996).

Second, the duty to give an opinion to an offer is not a delicate tactical matter subject to being unfairly second-guessed, after a trial or plea situation is over. It is an unavoidable duty grounded in the sixth amendment's guarantee to effective counsel, the benefit of which inures to all criminal defendants whether or not they admit or deny their guilt when they walk in counsel's door.

Where counsel does not provide such information, advice and professional opinion to the defendant, counsel has performed ineffectively.

Boria, citing Strickland v. Washington, 466 U.S. 668 (1984).

The appeals court stated that the attorney breached his duty to advise defendant about the desirability of a plea by grossly underestimating sentencing.

U.S. v. Gordon, 156 F.3d. 376 (2nd Cir. 1998).

Unlike the case in Boria, where the court simply chose not to address the performance component of ineffectiveness of defense counsel for failure to disclose the plea, or for or properly advise plea options in violation of Strickland, supra, 466 U.S. at 697 (1984), the PER judge in the defendant's case, heard rather extensive testimony from the litigants, did in fact, consider, mitigate, and overrule in favor of the Defendant on admittance of the plea offers. And then ruled by general decree - with no explanation in his final order that counsel's ineffectiveness on this issue was "unmurderous," against the Defendant's allegations.

Clearly, defense counsel's failure to advise the Defendant of his right to a direct appeal was reversible error.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.

Davis v. State, 288 S.C. 290, 342 S.E. 2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

In the instant case, the Defendant testified at PER:

Q And you didn't file an appeal, why not?

A. I had no knowledge of -- I am -- prior to being under -- turning myself in I was an assistant manager at Wal-Mart. I had no idea of the legal sense or concept of what my rights were or anything else. Nor was I advised by my attorney that I should file for an appeal nor was I 100 percent sure even today what a direct appeal is.

Q. So after receiving a 20 year sentence your lawyer said nothing to you about you have a right to appeal, do you wish to do so?

A. That is absolutely correct.

App. pgs. 45-46, lines 24-11.

There was also colloquy between the court and the solicitor:

Solicitor: Regarding the guilty plea issue -- pardon me, the appeal issue, case of *Weather's* vs. State, that's a '95 case, says that trial counsel, it is not incumbent upon them to advise the rights of a guilty plea. That's long standing criminal courts allow. Terms of collateral consequence of

the plea, terms of conditional release ---

The Court: That law you said about appealing a guilty plea, doesn't that essentially say that there has to be some meritorious appeal or pr, you saying that's a blanket? A blanket rule that no one is ever required to tell a defendant that they have a right to appeal?

App. p. 102, lines 5-15.

Solicitor: *Weather's v State* says that although a defendant has the right to appeal a guilty plea, there's no constitutional requirement that he be advised of his right absent extraordinary circumstances.

App. p. 102, lines 16-19.

The Defendant contends and submits that in taking into consideration - through hindsight perspective - defense counsel's purported testimonial assertion that he (counsel) hadn't anticipated substantial time due to the Defendant's record (or lack thereof), App. p. 91, lines 9-12, - oneself such as the Defendant allegedly having counsel's full support by rendering a meaningful adversarial

testing of the prosecutor's case could have and should have met the criteria of extraordinary circumstances warranting the advice of a direct appeal. Even in, and under the circumstances of a plea.

A criminal defendant is entitled to counsel whose undivided loyalties lie with his client.

U.S. v. Jeffers, 520 F.2d 1256, 1263 (7th Cir. 1975).

Further, it was ruled ineffective assistance when counsel failed to file an appeal despite defendant's request and fact that defendant had pled guilty in prior proceeding.

Martin v. U.S., 81 F.3d 1083, 1084 (11th Cir. 1996); Heeper v. U.S., 112 F.3d 83, 87 (2d Cir. 1997).

In reiterated summation the Defendant submits that counsel's testimony of allegiance to the Defendant bears several incongruities: i.e.: PER Direct Exam.,

Q. Did you file a Brady Rule 5 in this case

A. I did not do a motion as the normal course. I'm a former prosecutor, I know Bryna and I called her and she said she would give it to me.

Q. Did the solicitor in this case have an open file policy?

1. The issue of a direct appeal was raised as the 'least' of the meritorious issues after five years, and three levels of appeal.

11.

A. She did.

Q. Did you make copies of everything that was in her file?

A. I did.

Q. Was there a SLED Report in that file?

A. There wasn't a SLED Report in there.

Q. Were you ever made aware that there was a SLED Report?

A. Never made aware of a SLED Report.

App. p. 80, lines 2-13

The Defendant contends that while there was no SLED Report, there was clear evidence of a rape kit involved and as such, results - either pending or completed. Further, by defense counsel's own admission of being also a "former prosecutor," surely there was the dual benefit of "investigatory prowess" that should have been at the Defendant's disposal, and yet....

on cross-examination by the Defendant's PCR counsel, his trial counsel testified:

Q. All right, so you never had any independent testing done or demanded the SLED results prior to having Mr. Terry plead guilty?

A. Never.

Q. Beg the Court's indulgence. And obviously, because you didn't have the SLED report, you never advised Mr. Terry prior to his plea that there was no semen or any kind of physical hairs or anything found in the rape kit?

A. Right.

Q. And, in fact, you never viewed the rape kit at all to see whether there was any doctor's evidence of any findings of tearing or anything like that?

A. No. We talked about him appearing in court to plead guilty and that he was guilty.

App. p. 90, lines 4-17.

The Defendant submits that the testimony of counsel on the preceding page(s) concerning discovery on "cross-examination" is clearly contradictory of his testimony on "direct examination" where when asked:

Q. Do you recall how many times you met with Mr. Terry before the plea?

and he responded....

A. I do not recall how many times I met with him. I do recall the time we did enter the plea, that I went over the materials that I had in my possession.

App. p. 79, lines 21-25.

The Defendant respectfully questions, How is it possible that defense counsel stated that he (counsel) copied the discovery under an "open file policy," yet the Defendant at the PCR hearing submitted as an exhibit a document showing that his counsel hadn't requested - after seven months of being appointed,

and less than sixty days prior to the General Sessions appearance - a discovery. And, in fact, an exhibit listed "itemized discovery documents" forwarded by the solicitor, along with the First plea offer and a mutual request for Brady materials, in return. (See exhibit P-6.)

The Defendant submits that the best explanation for all of counsel's "testimonial contradictions" can be determined where counsel was asked:

Q. And, again, the State referred in their case just during the plea, in their presentation of the facts, the State referred to Mr. Terry admitting guilt in Family Court and you never challenged that saying, "well no, he admitted sexual abuse, not that he had vaginal and anal intercourse with his daughter?"

and he responded....

A. Right. To me it's all the same.
Sexual conduct. Misconduct

Q. So you didn't make that distinction?

A. I didn't make that distinction

Q. Because sexual abuse was the same as sexual battery?

A. It's all the same, "messing with children".

Q. Is that the way you discussed it with Mr. Terry as well when you were going over it with him?

A. Well, when I told him what the allegations were and he was calm about it. And didn't just say okay. He understood! That's what he was charged with.

App. pgs. 86-87, lines 16-9.

Under sworn direct examination by PCR defense counsel, the Defendant testified:

Q. Did he ever review the discovery with you?

A. No Susanna, he did not.

Q. Now at this point have you had a chance to

* The "quotation" was deliberately extricated from the PCR Transcript prepared by the solicitor. See PCR Order pg. 6, lines 5-8.

review the discovery against you?

A. I have had an opportunity through yourself.

Q. All right.

A. Excuse me, to review what has been presented in the course of this last two and half years your Honor, I've been getting bits and pieces. And of course, I'll get as to where that inconsistency falls and why it falls, but I've been managing to get bits and pieces, so to say that I believe that I believe that I have had an opportunity to review the entire discovery, I would have to say no. But I believe I have reviewed enough of the credible evidence for my allegations.

Q. All right. But before you pled guilty had you reviewed your discovery?

A. Absolutely not.

App. pgs. 47-48, lines 19-8.

It would be discovered by the Defendant after the FOR hearing, the existence of a Toxicology Report, completed in 2007.

Further:

Q. Now at the time of that guilty plea, how many times had you met and discussed your case with Ernie Hamilton, your defense attorney?

A. That would come to a total of zero.

Q. So it's your testimony that you never met with him.

A. Until the day of my plea hearing for a 10 minute consultation. That's my answer.

Q. All right. And he had never provided or reviewed with you discovery or the evidence against you?

A. Absolutely not.

App. pgs. 50-51, lines 25-9.

And Finally:

Q. And at the time of your plea did he

our discuss the fact that the SLED report came back with no evidence of semen or anything like that?

A. My recollection of our brief consultation prior to my being called upstairs was him on one side of the partition, myself on the other. No paperwork exchanged. A brief consultation, unfortunately, which I cannot elaborate back to you word for word.

App. pg. 51, lines 10-17.

Q. Now, if you had known that the SLED -- that there was no forensic evidence of any kind of sexual battery, would you have pled guilty?

A. From what little I understand of legality, Susannah, I think that someone would plea only when there's no evidence that vindicates. No I would not have pled guilty.

App. pg. 53, lines 4-9.

The Defendant finally submits that, clearly taking into consideration the aforementioned discrepancies in counsels testimonies and admissions there can be no question that under the circumstances the Defendant has become both a party and a victim of substantial constitutional violations under the Fourteenth Amendment "due process" statutes under more than the ineffective counsel based upon failure to explain the definition of sexual battery.

Conclusion

Defendant-Terry-respectfully moves this Court to set aside his conviction and sentence for reconsideration on the Lewd Act charges and vacate his conviction and sentence on the charge of Criminal Sexual Conduct. And/or any other relief within the jurisdiction and discretion(s) of the honorable Court.

"Structural errors" call into question the very accuracy and reliability of the trial process, and thus are not amenable to harmless error analysis, but require automatic reversal.

Shaw v. Alaska, 229 F3d 1088 (9th Cir. 2000).

Respectfully,

Verification

I, Terrence D. Terry, hereby declare under penalty of perjury that the facts stated in the foregoing memorandum are true and correct.

s. Mr. Terrence D. Terry
Terrence D. Terry
Defendant

Sworn to and Before Me,
this 28 day of July, 2010.
Debra L. Young L.S.
Notary Public of South Carolina
My commission expires: 8-28-2011

United States District Court
District of South Carolina

United States of America }

Plaintiff

) Case No.

vs.

Terrence D. Terry

Defendant

} Certificate of Service

I, Mr. Terrence D. Terry, do hereby certify that a true and correct copy(ies) of my Petition for Habeas Corpus, and Memorandum in Support of Habeas Petition, is being forwarded by U.S. Mail, postage prepaid, addressed as follows to:

Sworn To and Before Me,
this 28 day of July 2011.
Joyce L. Young, J.
Notary Public of S.C.
My commission expires: 8/28/2011 (Signature on Back)

Hon. Larry W. Propps
U.S. District Clerk of Court
District of South Carolina
901 Richland Street
Columbia, S.C. 29201

9 Mr. Terrence D. Terry
Mr. Terrence D. Terry, #307935

Habes Exhibit -

STATE OF SOUTH CAROLINA
 COUNTY OF GREENVILLE
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. : 2005CP2307327

Terrence Dimingo Terry vs. South Carolina State Of**CHECK ONE:**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED. (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

☐ See attached order;☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this _____ day of _____,

Court-Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the 6 day of 7, 2007, and a copy mailed first class this 6 day of 7, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

Terrence Dimingo Terry McCormick Corr Instit 386 Redemption
 Way McCormick, SC 29899
 ✓ Susannah Conyers Ross Suite 222 2435 East North Street
 Greenville, SC 29615

Karen Ratigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4 (Rev. 6/02)

Paul B. Wickensimer - Clerk of Court

2007 JUL - 6 A 29
 LED-CLERK OF COURT
 GREENVILLE CO. S.C.

Habes Exhibit

pen

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

TERRENCE D. TERRY,)
S.C.D.C. No. 307935,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
2005-CP-23-7327

**ORDER DENYING RULE 59(e) MOTION
TO ALTER OR AMEND THE FINAL ORDER**

FILED
CLERK OF COURT
FLORENCE CO. S.C.
2007 JUL 9 29

The above-captioned case is a post-conviction relief matter arising from an application filed November 11, 2005. An evidentiary hearing was convened on March 1, 2007, and the final order of dismissal was signed by this Court on March 26, 2007.

This matter is back before the Court by way of the Respondent's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 24, 2007; and Applicant's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 25, 2007. The Respondent made its return to this motion on April 26, 2007.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Respondent and Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment¹. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. The previous order fully comports with the requirements of Rule 52(a) SCRCP.

Habias Exhibit**IT IS THEREFORE ORDERED:**

1. That the Respondent and Applicant's motion are denied and dismissed.

AND IT IS SO ORDERED this 2nd day of July, 2007.



Michael G. Nettles
Presiding Judge
12th Judicial Circuit

¹ In addition, the Applicant's motion to reconsider pursuant to Rule 59(e), SCRCP, is ineffective and void because Applicant is currently represented by counsel. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

Habeas Exhibit-

Exhibit-23



2Office of the Clerk of Court

Greenville, South Carolina

Paul B. Wickensimer

Clerk of Court-

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

Family Court Division
301 University Ridge
Post Office Box 757
Greenville, South Carolina 29602
(864) 467-5800 FAX (864) 467-5856

July 23, 2007

Terrence D. Terry 307935
McCormick Corr Insti
386 Redemption Way
McCormick SC 29899

Re: 2005 CP 23 7327

In reply to your request and return of my letter dated June 24, 2007. *Requesting "my" Memorandum of Law!*

I am enclosing the only amended item in the file that we have at this time. That is the amended application. Not finding a brief in the file I could not honor your request. Perhaps this application is what you needed.

I am sending your motion to comply to Judge Nettles.

2.

It was / is not! This is

Clerk of Court's Office

1. This was a two-page amendment submitted by PCR Counsel, as dated, (enclosed), not "my" (15) Fifteen-page amendment submitted on March 1, 2007, at the PCR hearing (marked exhibit P-8.) Which is what I am trying to obtain with your help. (Along with exhibits P-1 thru 9) and C-1!
2. This is also what I am trying to obtain.

Hobbs - Exhibit -

OF AGENCY I.D. Greenville County Sheriff's Office
SC0230000 SUPPLEMENTAL REPORT

CASE NUMBER

0,4,0,0,0,0,9,7,6,2,0,1

☐ ORIGINAL REPORT	☐ STATUS CHANGE	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	INCIDENT TYPE	Criminal Sexual Conduct
☒ SUPPLEMENTAL REPORT	☐ OTHER	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	PATROL DISTRICT	06
				PAGE	1 OF 1 PAGES

Victim: Corsha Johnson, dob 1-5-95, 1 Woodmont Ln., Greenville, SC 29605 area 06

I responded to the GMER to pick up a rape kit that the Children's ER Staff had performed on victim. I met with ER nurse Sarah Brem in the Children's ER. Ms. Brem handed me the rape kit and paperwork for the kit. I had Ms. Brem sign a P & E sheet acknowledging I took the rape kit directly from her. The rape kit was then taken directly to the LEC and placed into P & E.

c47/Wright took the original report of this incident.

***** SUPPLEMENT TO THE ORIGINAL REPORT *****

ADMIN	SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE ☐ ADMIN. CLOSED ☐		ARRESTED UNDER 18 ☐		EX-CLEARED UNDER 18 ☐	
	YES ☐ NO ☐		YES ☐ NO ☐		UNFOUNDED ☐		ARRESTED 18 AND OVER ☐		EX-CLEARED 18 AND OVER ☐	
	REASON FOR EXCEPTIONAL CLEARANCE: ☐ OFFENDER DEATH ☐ NO PROSECUTION ☐ VICTIM/DECLINES COOPERATION ☐ EXTRADITION DENIED ☐ JUVENILE NO ARREST									
	REPORTING OFFICER(S)		DATE		UNIT NO. / STARS		APPROVING OFFICER		DATE	
D. Kettelson *689		7-7-04		C43		[Signature]		7/12/04		

7/12/04 [Signature]

(PCR / Exhibit - P-2) - A Habeas Exhibit -
SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
 Governor



ROBERT M. STEWART
 Chief

INVESTIGATOR TY BRACKEN
 GREENVILLE COUNTY SHERIFF'S OFFICE
 4 MCGEE STREET
 GREENVILLE, SC 29601

**Department of Forensic
 Serology and DNA Analysis**
 March 2, 2005
 SLED Lab No.: L05-2011
 Your Case No.: 0400097620
 Incident Date: 7/4/04
 (V) Minor I
 (S) Terrence Terry

*** My Plea Hearing date was March 8, 2005!**

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
 South Carolina Law Enforcement Division

ITEM(S) SUBMITTED:

RESULTS OF EXAMINATIONS:

1. Sexual Assault Evidence
 Collection Kit from
 Minor I

**	1.1	Known head hairs	1.1	No analysis performed.
	1.4	Blood	1.4	No analysis performed.
	1.5	Smears (Vaginal, Rectal)	1.5	No spermatozoa identified.
	1.6	Vaginal swabs	1.6	No semen identified.
	1.7	Oral swabs	1.7	No semen identified.
	1.8	Rectal swabs	1.8	No semen identified.
	1.9	Miscellaneous Body Fluids	1.9	No semen identified.

**** What of the Toxicology test / results completed in November 2007?
 If no other analysis (cas) were performed?**

(PCR/Exhibit P-2) - B. Habeas Exhibit-

Page 2 of 2
SLED LAB NO.: L05-2011
March 2, 2005

ITEM(S) SUBMITTED:

1.10 Fingernail scrapings

RESULTS OF EXAMINATIONS:

1.10 Nothing of apparent serological evidentiary value found.

Any additional evidence retained by your agency that might contain serological or trace evidence can be submitted at this time.

(Like maybe the toxicology specimen?). Completed, March 2007.
These examinations were conducted by S/A Rhonda R. Fields, Forensic Analyst, South Carolina Law Enforcement Division.

Rhonda R. Fields

Rhonda R. Fields
Special Agent

3/2/05!

Date

No DNA testing Required.

St. du Joffe
9/6/05

jmj

cc: Greenville County Solicitor's Office

! THEY KNEW!

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.

How can this document be neither exculpatory, nor incriminating?

What if all the No's were Yes's?



Page 1 - Habias
Exhibit - 5

(PCR/Exhibit - P-6)
State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185

Solicitor
Robert M. Ariail

January 18, 2005

Ernie Hamilton, Esq.
311 Mills Ave.
Greenville, SC 29605

was appointed on the day that I turned
myself in, which was July 10, 2004!

19. No Rape Kit analysis results!
20. No Toxicology analysis results!

Re: State of South Carolina vs. Terrance Dimingo Terry
Warrant(s) 1466191, 1466187, 1466186

Dear Ernie: → AFTER (5) months of being detained at the Detention Center!

Although I do not have a discovery request from you at this time, I am providing the following documents:

1. Above-referenced ticket (or warrant);
2. GCSO Incident Report by Officer RF Wright, dated 7-7-2004, 1 page;
3. GCSO Supplemental Report by Officer RF Wright, dated 7-4-2004, 1 page;
4. GCSO Supplemental Report by Officer D Kettelson, dated 7-7-2004, 1 page;
- * 5. Property and Evidence Report, 1 page; - Rape Kit (Two different copies!)
6. GCSO Supplemental Report by Inv. TD Bracken, dated 7-7-2004, 1 page;
7. GCSO Supplemental Report by PG Clark, dated 7-10-2004, 1 page; (enclosed)
8. GCSO Supplemental Report by Inv. TD Bracken, dated 7-8-2004, 2 pages;
- * 9. Property and Evidence Report, 1 page; Clothing (Two different copies!)
10. GCSO Incident Report by Officer Jim Austin, dated 7-8-2004, 1 page;
11. GCSO Supplemental Report by Officer Jim Austin, dated 7-8-2004, 1 page;
12. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
13. GCSO Victim/Witness Statement by Minor 2, dated 7-8-2004, 1 page;
14. GCSO Incident Report by Inv. Cheryl Cromartie, dated 7-8-2004, 1 page;
15. GCSO Supplemental Report by Inv. Cheryl Cromartie, dated 7-8-2004, 2 pages;
16. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
17. GCSO Supplemental Report by Officer PG Clark, dated 7-10-2004, 1 page;
18. NCIC Criminal History.

* Property and Evidence reports documented - 5. and 9. Infer 2 reports
(See Exhibits)

Page 2 Habeas
Exhibit -

(PCR / Exhibit - P-6)

Ernie Hamilton, Esq.
January 18, 2005
Page 2

****** Please contact our office regarding a mutually convenient time for you to view evidence which may be contained in the Property and Evidence Room at the Law Enforcement Center here in Greenville County. Pursuant to discovery rules, we will allow you to inspect the evidence which may be utilized at trial. Which, Trial counsel Failed to do - by admission at the PCR hearing!

***** Also, please find enclosed the State's Request for Reciprocal Discovery and the State's Request for Notice of Alibi and/or Insanity Defense, pursuant to Rule 5, South Carolina Rules of Criminal Procedure.

If you have any questions regarding this defendant's case(s), please do not hesitate to call me. I look forward to working with you.

Sincerely,

Bryna Seay

Bryna S. Seay
Assistant Solicitor
Thirteenth Circuit Solicitor's Office

BSS/lmb

Re: Terrence Dimingo Terry

*** Please acknowledge receipt of discovery by signing here and returning a copy of this to me within 10 days. If I do not hear from you or receive a copy of this acknowledgement within the allotted time, I will assume you received the enclosed documents and have no objections.

Attorney for Defendant

? What of the Forensic evidence!
(See exhibit P-2)

2

Hobas Exhibit-

**Greenville County Department of Community Services
Criminal Justice Support - Property Report**

SC1 - Greenville SO
 □ 2 - Greenville PD
 □ DCS - Detention
 □ Other

1. Status - Check one only: ☒ P&E Evidence ☐ MIA Evidence ☐ Found ☐ Recovered ☐ Safekeeping ☐ Other		2. Case No. 1-04-97620	
3. Date and Time Impounded 7-7-04 1403		4. Case Type CSC w/a Minor	
5. Found or Recovered From ☐ Location ☐ Suspect ☒ Complainant ☐ Victim ☐ Person reporting ☐ AEA ☐ Other		6. Where property was impounded (Give exact location - address) Greenville, SC 29605	
7. Owner's Name Zelma Zelphine Terry		9. Owner's Phone # None	
10. Item #		11. Quantity	
12. Description (Include make, model and serial numbers)			
13. NCIC Hit Yes No			
A 1 Pair of White Juvenile Shorts			
B 1 Pair of Pink Juvenile Panties			
C 1 Blue Magic Hair & Goggles			
End of List			
14. I hereby acknowledge that the above facts represent all property taken from my possession and that I have received a copy of this report.		15. Impounding Officer (print full name) Kendall F Wright	
16. Signer's Initials ERT		17. Unit No. 853	
18. Signature Zelma Z. Terry		19. Investigating Officer [Signature]	
20. Received By (print name) Eddie Hucks		21. Signature Eddie Hucks	
22. Reason Storage		23. Date and Time Received 7-7-04 1720	
24. Reason disposal		25. Date and Time Received 1/25/06	
AUTHORIZATION FOR DEPOSITION TYPE OF DEPOSITION: ☐ Cleared for destruction/custody ☐ Retained from file AUTHORIZED BY: Name (print) _____ Signature _____ Date _____ It is the authorizing officer's responsibility to notify owners to claim property.			

ORIGINAL

Hobias Exhibit -

Greenville County Department of Public Safety
Criminal Justice Support - Property Report

- ☒ 1 - Greenville SO
☐ 2 - Greenville PD
☐ DCS - Detention
☐ Other

1. Status - Check one only: ☒ ACS Evidence ☐ MME Evidence ☐ Found ☐ Recovered ☐ Safekeeping ☐ Other		2. Case No. 07-097620	
3. Date and Time Impounded 7-7-04 / 1820		4. Case Type Sexual Assault	
5. Found or Recovered From ☐ Location ☐ Suspect ☐ Complainant ☐ Victim ☐ Person reporting ☐ AKA ☒ Other ER Staff		6. Where property was impounded (Give exact location - address) 701 Grove Rd. (Children's ER) Greenville SC 29605	
7. Owner's Name Name: Sarah Brem (Nurse GMPR) Minor 1		9. Owner's Phone # Unknown	
10. Item # A		11. Quantity 1	
12. Description (include make, model, serial numbers and drug weights) Child's Rape Kit for Minor 1 (dob [redacted]) and paperwork. Encl		13. NCIC Hit Yes No	
Drug weight/grams 14. I hereby acknowledge that the above lists represent all property taken from my possession and that I have received a copy of this report. Signature: [Signature]		P & E Use only Gross weight 15. Impounding Officer (print full name) D. Belleson 16. Star No. 684 17. Unit No. C13 18. Signature D. Belleson 19. Investigating Officer	
20. Received by (print name) Leahon Callahan R. Pruitt J. McDonald Eddie Hicks Eddie Hicks		21. Signature Leahon Callahan R. Pruitt J. McDonald Eddie Hicks Eddie Hicks	
22. Reason Temp Storage E. Storage SLED SLED SLED SLED		23. Date and Time Received 7-7-04 7:15PM 7/08/04 0745 2/23/05 0715 2-23-05 1658 8-9-05 1520	
RECORDS COPY [Signature]			
AUTHORIZATION FOR DISPOSITION			
TYPE OF DISPOSITION: ☐ Cleared for destruction/return ☐ Release item #s		AUTHORIZED BY: Name (print) Signature Date	
Name Address ID#			

It is the authorizing officer's responsibility to notify owners to claim property.

ORIGINAL !!!

Habias Exhibit -

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2005-CP-23-7327
COUNTY OF GREENVILLE	)	REF. 2005-GS-23-1157 & 8, -1274
	)	
TERRENCE DIMINGO TERRY,	)	
APPLICANT,	)	
	)	ORDER
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

This matter comes before me by way of application of post-conviction relief filed November 11, 2005, alleging prosecutorial misconduct, ineffective assistance of counsel, and lack of subject matter jurisdiction. An amended application was filed February 5, * 2007, incorporating the issues presented in the initial application and adding the additional ground that the plea was not knowingly and voluntarily made in violation of the due process guarantees of the South Carolina and U.S. Constitutions. The Respondent filed its Return on June 6, 2006. A continuance was granted April 19, 2006, and an evidentiary hearing was held on March 1, 2007, at the Greenville County Courthouse. The applicant was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Assistant South Carolina Attorney General represented the Respondent. The applicant testified on his behalf and Ernest Hamilton, Esq. testified for the State.

PROCEDURAL HISTORY

The applicant is presently confined at McCormick Correctional Institution of the South Carolina Department of Corrections. Mr. Terry was indicted by the Greenville County Grand Jury at the February 2005 term of General Sessions for two counts of lewd

* As well as March 1, 2007, at the hearing where I was allowed to submit my Memorandum of Law!

Habeas Exhibit -

act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274). On March 8, 2005, the applicant pled guilty before the Honorable Edward W. Miller to all three indictments receiving fifteen years concurrent on the lewd act upon a child indictments, and a twenty year concurrent sentence for the one count of criminal sexual conduct with a minor, first degree. Ernest Hamilton, Esq. represented the applicant. No appeal was filed.

ALLEGATIONS

The applicant requested post-conviction relief for the following reasons:

- I. Prosecutorial misconduct
 - a. Violation of Brady and Rule 5 SCRCrimP
 - b. Failure to test and destruction of evidence
 - c. Use of uncounseled "admission" not in discovery
- II. Ineffective assistance of counsel
 - a. Failure to address mental health issues
 - b. Failure to investigate
 - c. Failure to present mitigating evidence
 - d. Failure to effectively negotiate with the solicitor
 - e. Failure to adequately advise the applicant
- III. Lack of subject matter jurisdiction
 - a. Invalid arrest warrants and indictments
 - b. No preliminary hearing

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. Pursuant to S.C. Code Ann. § 17-27-80 (2003), following are the relevant finding of facts and conclusions of law.

Prosecutorial Misconduct

The applicant alleged that the solicitor engaged in prosecutorial misconduct by not providing the SLED lab report for the rape kit analysis pursuant to Brady and Rule 5 of the South Carolina Rules of Criminal Procedure, failing to submit a pair of underpants

and shorts in evidence for forensic testing, and stating during the guilty plea that Mr. Terry admitted guilt in Family Court when the alleged admission was only as to the finding sexual abuse not sexual battery and was not provided in discovery. I find that the allegations of prosecutorial misconduct are without merit.

The applicant submitted as an exhibit the SLED lab report for the rape kit analysis which was dated March 2, 2005. It showed no sperm or semen found and was neither exculpatory nor incriminating. The applicant pled guilty March 8, 2005. No evidence was presented as to whether the solicitor had received the report prior to the guilty plea. However, the report was present in the solicitor's file over one year later when the file was subpoenaed by the applicant. The applicant and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. While a Brady violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by the applicant failed to adequately support a Brady claim because he failed to demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999).

The applicant alleged that the solicitor failed to submit a pair of underpants and shorts collected as evidence to SLED for forensic testing and presented a property and evidence report showing that the potentially exculpatory evidence was destroyed in 2005. Because the applicant failed to prove the evidence was exculpatory or that the solicitor acted in bad faith, the solicitor's actions did not amount to prosecutorial misconduct. The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d

Habeas Exhibit--

281 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, supra; State v. Jackson, supra.

The transcript of the applicant's guilty plea states in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17). According to the applicant's testimony, he was not represented by counsel at the DSS proceedings and any admission was only the general admission of and agreement with the family court's finding of sexual abuse, not an admission of guilt of sexual battery which Mr. Terry expressly denied. The applicant submitted a family court order contained in the file subpoenaed from the solicitor which said that Mr. Terry was in agreement with the finding of sexual abuse of his three step-daughters to support the assertion that the solicitor was aware that any admission was of sexual abuse only. I find that this did not entail prosecutorial misconduct, a "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Ineffective Assistance of Counsel

The applicant alleged counsel's performance was deficient because of the following:

Habeas Exhibit -

- (1) failure to request an evaluation or discover mental health issues apparent due to the applicant's housing in the mental health sector of the law enforcement center and the fact the applicant was on prescription mental health medications for the nine months he was incarcerated prior to his guilty plea and at the time of his plea;
- (2) failure to investigate by meeting with the applicant to discuss the case only once, the day of the guilty plea, not filing discovery, failing to review the evidence in property and evidence or request independent testing of that evidence, and failing to attend the family court hearing on the matter of alleged sexual abuse when the applicant appeared without counsel;
- (3) failure to present mitigating evidence at Mr. Terry's guilty plea by not mentioning the applicant's twelve year military background, depression and mental health background, or the failure of the victims to attend the plea or recommend incarceration;
- (4) failing to effectively negotiate with the solicitor pleading "straight up" despite lack of any physical or forensic evidence of sexual battery and the victim's statement that the sexual battery happened with her clothes on; and
- (5) failing to adequately advise the applicant providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery.

I find that these allegations are without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. The applicant stated that at the time of his guilty plea he had not been advised that sexual battery does not mean any battery of a sexual nature, but, rather, is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some

Habeas Exhibit.

sort. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (S.C. 2001) *rev'd on other grounds*.

The applicant stated that he did not commit a sexual battery on his step-daughter and would not have pled guilty to criminal sexual conduct with a minor if he had known that it involved sexual penetration. Plea counsel testified that he met with the applicant one time, the day of his guilty plea, during the nine months he represented him. Counsel admitted that he did not review the meaning of sexual battery with the applicant saying that lewd act and criminal sexual conduct with a minor are basically the same thing, "messing with children." Plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented the applicant. Based upon the testimony of trial counsel and the applicant, I find that the plea attorney did not advise the applicant of the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree. Considering the entire record including the guilty plea transcript, I find that the error was not cured by the colloquy during the guilty plea.

To receive post-conviction relief for ineffective assistance of counsel a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Reasonable and prevailing professional norms would require that a lawyer advise a criminal defendant of the elements of the crime and that he ensure that the defendant understands the nature of the offense to which he is charged. The applicant's plea counsel did not do this. Where there has been a guilty plea, as here, the applicant must prove prejudice by showing that the result of the proceeding would

Habeas Exhibit-

have been different and, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991). Upon hearing the testimony and reviewing the transcript of the plea, I find that the applicant has shown prejudice. Had the Applicant known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial.

Subject Matter Jurisdiction

The Applicant argues that the State lacked subject matter jurisdiction because of invalid arrest warrants and indictments as well as the fact that his case did not receive a preliminary hearing. I disagree and find that the indictments contain the necessary elements of the intended charge to confer subject matter jurisdiction regardless of any alleged errors in the warrants and the failure to have a preliminary hearing. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The applicant presents no evidence that a preliminary hearing was properly requested pursuant to Rule 2(b) SCrimP and even if it was properly requested, subject matter jurisdiction exists upon the proper indictment of the case even if a preliminary hearing is not held. State v. Ballington, 551 S.E.2d 280, 346 S.C. 262 (2001).

All Other Allegations

This Court finds that the applicant failed to prove any other allegations that were raised in the application or at the hearing in this case and not specifically addresses herein. Therefore, all such allegations are without merit and denied.

CONCLUSION

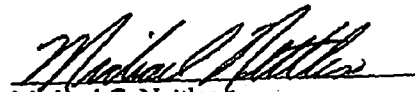
Habias Exhibit -

This Court grants Mr. Terry's motion for post-conviction relief based on ineffective assistance of counsel. The cases are reversed and remanded for a new trial and Mr. Terry is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

IT IS HEREBY ORDERED:

1. That the applicant's motion for post-conviction relief is granted;
2. That applicant's convictions of two counts of lewd act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274) are reversed and remanded; and
3. That the applicant is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

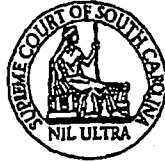
AND IT SO ORDERED this 26 day of March, 2007



Michael G. Nettles
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

Habeas
Exhibit



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1880

FAX (803) 734-1495

June 2, 2008

Terrence D. Terry, #307935
McCormick Correctional
Institution
386 Redemption Way
McCormick, SC 29899

Re: Terry, Terrence D. v. The State

Dear Counsel:

The following Order has been endorsed on your Pro Se Motion to Remove Counsel for Self-Representation in the above entitled case on appeal.

*

"Motion to proceed pro se is denied. !"

s/ Jean H. Toal C.J.
For the Court

Justice John H. Waller, Jr., not participating ?

June 02, 2008. *

Why ? was ? I ? Denied ?

Habias
Exhibit -

Very truly yours,

Daniel E. Shearouse

CLERK

BS

DES/klb

cc: Assistant Attorney General Karen C. Ratigan
Appellate Defender Robert Pachak

Habeas Exhibit-

Habeas - Exhibit-

Di
4.

State of South Carolina)

County of Greenville)

Terrence D. Terry)

Applicant)

v.)

State of South Carolina)

Respondent)

ENTERED COMPUTER

In The Court of Common Pleas

Thirteenth Judicial Circuit

C.A. No. 2005-CP-23-7327

59(e) Motion to Alter or Amend

PROCEDURAL HISTORY

This matter comes before the court by way of Application for Post Conviction Relief, filed on November 11, 2005. The State made its return on June 6, 2006. A hearing on the Motion was held on March 1, 2007. The Applicant was present at this proceeding and represented by Susannah Ross, Esquire, of the Greenville County Bar. Karen C. Rattigan, Assistant Attorney General represented the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Applicant is incarcerated in the South Carolina Department of Corrections pursuant to an order for commitment from the Greenville County Clerk of Court.

5/2/07
 July 2, 2007
 Informal S. Ross. Inf. at 11:00 AM. 5/2/07

Habea Corpus
Exhibit

Exhibit-11 20

The Greenville Grand Jury indicted the Applicant at the february 2005 of General Session for lewd act on a child (2005-CP-23-1157) and first degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Earnest Hamilton, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen (15) years for lewd act on a minor and twenty (20) years for first degree (CSC) with a minor. The Applicant did not appeal his convictions or sentences.

II

In this current application, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Prosecutorial Misconduct.
2. Ineffective Assistance of Counsel.
3. Subject Matter Jurisdiction.

III

The Applicant presented several issues and exhibits at his post-conviction relief hearing, and indicated that he did not wish to waive any of these issues for further appellate review.

Hobbs
ExhibitProsecutorial Misconduct

Exhibit-12

The Applicant testified that his guilty plea was uninformatively and unintelligently entered, as well as, involuntarily.

The Applicant testified that the prosecutor committed misconduct by using invalid arrest warrants that the Magistrate would not "backdate" in accordance with the (24)twenty-four hour statute of the Const. of the United States.

The Applicant also testified that he was denied (upon request) his right to a preliminary hearing before, the issuing Magistrate according to Gerstein v. Pugh; County of riverside v. McLaughlin, as well as, in violation of his 1st, 4th, 5th, 8th and 14th Amendments rights, which the records (or lack there of) will substantiate, and of which the prosecutor was aware.

The Applicant also submitted that his indictments were not valid, in that, the prosecution failed to file them with the clerk of court-before and after-presentment to the grand jury in violation of rules 3(b) and (3c), of the SCRCrimP; also S.C. Code Ann. §14-17-530. Citing State v. Quattlebaum 338 S.C. 441, 527 S.E. 2d 105 (S.C. 200); Burger v. U.S. 295 U.S. 78, 55 Ct. 629 (1935), and State v. King, 71 S.E. 2d 293 (S.C. 1952).

The Applicant testified, and entered into the record the sled rape analysis report as a speaking exhibit, (dated March 2, 2005), to show both "reasonable doubt", and prove that the prosecutor was made aware of its existence (See second page of report).
Citing: Ince v. Winship, 397, U.S. 358 (1970); State v. Quattlebaum, 527 S.E. 2d 105 (S.C. 2000).

Exhibit-13

Ineffective Assistance of Counsel

The Applicant testified that his assigned counsel-Mr. Earnest Hamilton-failed to investigate into(Applicant's)case in that:

A.Mr.Hamilton failed to file a Motion for Discovery in the Applicant's behalf.

B.Mr.Hamilton failed to present any portion of the discovery to the Applicant for review.

C.Mr.Hamilton failed to inform the Applicant of his rights to an arraignment hearing or provide representation therein.

The Applicant testified that these action clearly rendered the Applicant informatively incompetent to enter a guilty plea. Boykin v. Alabama, 395 U.S.238(1969)Pittman v. State, 337 S.C.597, 524 S.E.2d 628(1999);and White v. State, 263 S.C.110, 208 S.E.2d 60(1975).

The Applicant further testified that his counsel's failure to acknowledge the defects of his warrants and indictments-being unfiled-and failure to file a "Motion for Suppression" of the evidence;provide(1)one 10-15 minute collquy between the Applicant's(8)eight month detainment;and the plea hearing(on the day of the hearing)and failure to protect Applicant's(6th) sixth and(14th)forteenth Amendment rights of "due process" showed absolute prejudice.Strickland v. Washington;see also Johnson v. State, 325 S.C.182, 480 S.E.2d 733(1977);Hill v. Lockhart , 474 U.S.52, 106 S.Ct.366, 88 L.Ed.2d.203(1985).

Exhibit-14

The Applicant testified that Mr. Hamilton's failure to "secure" the DNA Analysis results prior to advising a guilty plea, as well as, an appropriate "chain of custody" report (which would have revealed destroyed evidence) and not being able to present these facts to the court, and the Applicant, as grounds for "reasonable doubt" in defense, satisfies the "two pronged" requirements in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and that he Mr. Hamilton would have "competently" not advised a guilty plea, and opted for a trial. Cherry v. State, 300 S.C. at 117 386 S.E.2d at 625.

The Applicant testified that his counsel had no knowledge of the court orders requiring the Applicant to have a "psychological evaluation" to determine his mental stability nor made any effort to fulfill the established prerequisite in the Applicant's behalf, to again protect the Applicant from "due process" violation.

The Applicant testified that his counsel advised a guilty plea and allowed the hearing to proceed through to its entirety, when at the onset, the Applicant stated that he had taken mental health medication less than (24) twenty-four hours prior to attempting to plea. State v. Maryott, 492 P.2d 239 (Wa. 1971); see also Jackson v. Denno; and the (14th) fourteenth Amendment right of "equal protection"

The Applicant asserted that his counsel should have requested a recess to assess the Applicant's "true" state of mind or requested that the guilty plea hearing be discontinued.

Lastly, the Applicant testified that his counsel never advised him of his right to a Direct Appeal, and allowed possible self incriminating testimony into court without objection. Davis v. State, 342 S.E.2d 60 (S.C. 1987); State v. Rich, 239 S.E.2d 731 (S.C. 1977).

Exhibit-15

Subject Matter Jurisdiction

The Applicant testified that the court lacked jurisdiction due to inconsistencies pertaining to his warrants, being.

A. The warrants was never served, nor was mandatorially given (read) "Miranda Rights" implemented (officer's signature appears, rather than the Applicant's).

B. The Magistrate Judge would not "backdate" the warrants to the date of the offense, (alleged), in accordance with 22-5-510 of the S.C. Code of Laws, and Art. 1§ 15 of the S.C. Constitution.

C. Falsified document-(warrant no.-1-466191)-judges signature.

Further, The Applicant testified that his indictments was never filed with the Clerk of Court for authoritative / authenticity purpose, in accordance with rules 3(b), and (c) SCRCrimP, and State and Federal Laws.

Lastly, the applicant testified that due to the influence of "tranquilizers" that rendered him incompetent to knowingly, intelligently, and voluntarily enter a plea, or stand trial and by presenting several due process violations (on record), the jurisdiction of the court was/should have been nullified. State v. Maryott, 492 p.2d 239 (wa. 1971).

Conclusion

For the forementioned reasons, the Applicant prays of the court the relief of reverse and remand for a new trial, or vacating of the case with prejudice.

S/ _____
Presiding Judge,
Thirteenth Judicial Circuit

This _____ day of _____, 2007.

Exhibit-16

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

April 12, 2007

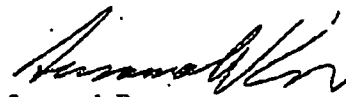
← 1 day after the
Filing of the
Final Order!

Mr. Terrence Terry #307935
McCormick Correctional Inst.
386 Redemption Way
McCormick, SC 29899

Dear Mr. Terry:

Congratulations. Enclosed is a copy of the Order granting relief in your PCR case. You should be released to Greenville County as specified in the Order. I will be closing my file on your case, but it is likely that the State will appeal the judge's ruling. The office of Appellate Defense will represent your interest in the appeal.

Sincerely,



Susannah Ross
Attorney at Law

* Termination of representation -
prior to post-trial motion options ?? (59c)?

enclosure

2435 E. NORTH ST. #222 • GREENVILLE/SC • 29615-1442
PHONE: (864) 242-0029 • E-MAIL: SUSANNAH.ROSS@SCBAR.ORG

Ross & Enderlin, PA
2435 E. North St., #222
Greenville, SC 29615

Mr. Terrence Terry #3079335
McCormick Correctional Inst.
385 Redemption Way
McCormick, SC 29899

1/2/04



APR 17 2007

MAIL ROOM

Day I received
the final order!

Exhibit-17

Exhibit-18

In The Court of Common Pleas

Case No. 2005-CP-23-7327.

Certificate of Service by U.S. Mail

The Applicant, Terrence D. Terry, #307935 hereby certifies that a true and correct copy of his 59(e) Motion to Alter or Amend Judgment is being forwarded to the Honorable Judge Michael Nettles; The Honorable Clerk of Court, Paul B. Wickensimer; the Honorable Clerk of the S.C. Supreme Court, Daniel E. Shearouse; and counsel for the Respondent, Karen C. Ratigan, by U.S. Mail, postage pre-paid and addressed as follows:

Hon. Judge Michael Nettles
c/o Paul B. Wickensimer
305 East North Street
Greenville, SC 29601

Hon. Paul B. Wickensimer
Greenville County Clerk of Court
305 East High Street
Greenville, SC 29601

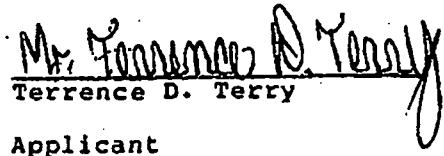
Hon. Daniel E. Shearouse
Clerk of S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

SWORN TO and subscribed before me
This 25 day of April, 2007.



Notary Public for South Carolina
My Commission Expires: 3-30-2009


Terrence D. Terry
Applicant

* - 1st Order For a psychological evaluation !

TREATMENT PLAN

August 26, 2004

Department of Social Services -vs.- Zelma Terry, Terrance Terry and Frederick Lamont Meredith

Re: Minor 3

DOB: [REDACTED]

Minor 2

, DOB: [REDACTED]

Minor 1

, DOB: [REDACTED]

Number: 2004-DR-23-

- A. **FINDING:** That there be a finding of sexual abuse, against Terrance Terry to the minor children Minor 3 Minor 2 and Minor 1 . That this finding be put on the South Carolina Department of Social Services central registry.
That there be a finding of physical neglect, against Zelma Terry to the minor children Minor 3 Minor 2 and Minor 1 . That this finding be put on the South Carolina Department of Social Services central registry.

- B. **PLACEMENT OF CHILD:** That the minor children Minor 3 Minor 2 and Minor 1 remain in the custody of Zelma Terry .

C. **TREATMENT GOALS FOR DEFENDANTS:**

1. That Zelma Terry shall attend and participate in the therapy sessions with the minor children Minor 3 Minor 2 and Minor 1 as recommended by their therapist until the therapist deems it no longer needed by them.
2. That Zelma Terry shall call the Greenville Children's Advocacy Center, 2905 White Horse Road Greenville, SC 29611; Telephone (864) 233-2882, within 15 days from the date of this Order and set an appointment to be assessed for the Non-Offending Parenting Classes.
3. That Zelma Terry, Terrance Terry and Frederick Lamont Meredith shall cooperate with Department of Social Services and the treatment plan.
4. That all Defendants will cooperate with the Department of Social Services and referrals made by the Department of Social Services.
5. That the Defendants shall keep the Plaintiff informed of any changes in their circumstances, to include but not limited to, any changes in address, household composition, employment, or telephone number, and that such changes shall be reported to the Greenville County Department of Social Services within 3 working days of such changes occurring.
6. That Terrance Terry shall contact Dr. Karl Bodtorf, 302 West Main Street, Taylors, SC 29687, telephone (864) 244-0007, within 15 days from the date of this Order or upon release from the detention center, which ever occurs first and schedule a psychological evaluation appointment with Dr. Bodtorf; That Terrance Terry shall follow all recommendations resulting from said evaluation, including all counseling sessions. If Terrance Terry fails to attend the appointment scheduled without notification, Defendant shall be personally responsible for any "no-show" fee assessed against the Plaintiff.

Objective will be complete when evaluation is completed and Defendant has attended all counseling sessions recommended until released by his counselor.

- D. **REQUIREMENTS/SERVICES FOR CHILD:** That Minor 3, Minor 2 and Minor 1 shall attend and participate in all recommended therapy sessions until successfully released.
- E. **VISITATION / CONTACT ISSUES:**
1. That Terrance Terry shall not have any contact, direct or indirect with the minor children Minor 3, Minor 2 and Minor 1
 2. That Zelma Terry shall not allow any contact, direct or indirect between Terrance Terry and the minor children Minor 3, Minor 2 and Minor 1
- F. **REVIEW:** The case shall be reviewed as required by statute or upon motion of any party.
- G. **REASONABLE EFFORTS BY DSS:** Not applicable
- H. **ACCESS TO INFORMATION/AUTHORIZATION:**
1. That the Department of Social Services be allowed access to all medical, school, criminal, or professional records that may be necessary to implement this treatment plan.
 2. That the Guardian ad Litem shall continue to monitor this case and have access to information necessary to monitor.
 3. In accordance with 42 U.S.C. 290dd-3(b)(2)(c) and 42 CFR Ch.1 Section 45C.F.R.164.512 (HIPAA[®]) and applicable State Law, there is good cause to authorize the disclosure of the information sought, there are no other means for Plaintiff to obtain the information, and the public interest and the need for disclosure out-weighs the potential injury to the Defendant(s), the patient-physician relationship, and the treatment service. In authorizing the disclosure, no party to this action shall disclose any of the records or information released in any manner whatsoever other than in the course of these proceedings. Therefore, the following service providers shall be, and hereby are, authorized to disclose any and all records and information in their possession and/or custody relating to the diagnoses and treatment of the Defendant(s) and/or minor children to the Department of Social Services and Guardian ad Litem: Greenville County Commission on Alcohol and Drug Abuse, Department of Mental Health, Compass of Carolina, Affiliated Counseling, Dr. Todd Morton, Dr. Karl Bodtorf, Serenity Place, Greenville County Detox Center, Marshall I. Pickens, William S. Hall Institute, Patrick B. Harris Hospital, Greenville Sexual Trauma Center, Greenville Hospital System, St. Francis Hospital, Department of Probation and Parole, Greenville Children's Advocacy Center, SHARE Program, Prevent Child Abuse Carolina, Red Cross, The Journey Center (located on Woodruff Road), Piedmont Mental Health, Behavioral Health Services, Laurel Bay Therapy, Department of Disabilities and Special Needs, Morris Village, Meyer Center for Special Children, Pendleton Place Children's Shelter, Palmetto Boys Shelter, MRW Corporate Choice, Morgan Manor, Dr. Paul Gunter, Cindy Stichnoth, LPC, The Family Therapy and Trauma Center, Greenville County School District, A Child's

* 2nd Order for a psychological evaluation - the day of the hearing,
that to this day has Amended Treatment Plan October 12, 2004 not transpired!

Department of Social Services-vs-Zelma Johnson Terry, Terrance Terry, Frederick Lamont Meredith

Court File Number: 2004-DR-23-3940

Children: Minor 3

DOB: [REDACTED]

Minor 2

DOB: [REDACTED]

Minor 1

DOB: [REDACTED]

A. FINDING: That there be a finding of sexual abuse of the minor children, Minor 3, Minor 2 and Minor 1, by Terrance Terry, and that such finding be entered into the South Carolina Department of Social Services Central Registry.

That there be a finding of physical neglect of the minor children, Minor 3, Minor 2 and Minor 1, by Zelma Johnson Terry, and that such finding be entered into the South Carolina Department of Social Services Central Registry.

B. PLACEMENT OF CHILDREN: That the minor children, Minor 3, Minor 2 and Minor 1, shall remain in the custody of Zelma Johnson Terry.

C. TREATMENT GOALS FOR DEFENDANTS:

1. That Zelma Terry shall attend and participate in therapy sessions with the minor children, Minor 3, Minor 2 and Minor 1 as recommended by their therapist until successfully released.
2. That Zelma Johnson Terry shall contact the Greenville Children's Advocacy Center, 2905 White Horse Rd., Greenville, S.C. 29611, telephone number 331-0560, within fifteen (15) days from the date of this order and schedule an appointment to be assessed for the Non-Offending Parenting Classes. If Ms. Terry does not qualify for these classes, she shall cooperate with all referrals for the appropriate classes.
3. That Zelma Johnson Terry shall undergo a hair strand test and if the test is positive, shall enroll in Alcohol and Drug Abuse counseling and complete all required counseling recommendations.
4. That Terrance Terry shall contact Dr. Karl Bodtort, 302 West Main St., Taylors, S.C. 29687, telephone number 244-1007, within fifteen (15) days from the date of this order, or upon his release from the detention center, whichever occurs first, and schedule a psychological evaluation. That Terrance Terry shall follow all recommendations resulting from said evaluation, including all counseling sessions. If Terrance Terry fails to attend any scheduled appointments without notification, he shall be personally responsible for any "no-show" fees.
5. That Zelma Johnson Terry, Terrance Terry and Frederick Meredith shall cooperate with the Department of Social Services and all referrals made by the Department of Social Services.
6. That the Defendants shall keep the Plaintiff informed of any changes in their circumstances, to include, but not limited to, any changes in address, household composition, employment or telephone number, and that such changes shall be reported to the Greenville County Department of Social Services within three (3) working days of such changes occurring.

D. REQUIREMENTS/SERVICES FOR CHILDREN: That the minor children, Minor 3, Minor 2 and Minor 1 shall attend and participate in all recommended therapy sessions until successfully released.

E. VISITATION/CONTACT ISSUES:

1. That Terrance Terry shall not have any contact, direct or indirect, with the minor children, Minor 3
Minor 2 and Minor 1, until further order of the court.
2. That Zelma Johnson Terry shall not allow any contact, direct or indirect, between the minor children,
Minor 3, Minor 2 or Minor 1, until further order of the court.

F. **REVIEW:** That this case shall be reviewed as required by statute or upon motion of any party to this action.

G. ACCESS TO INFORMATION/AUTHORIZATION:

1. That the Department of Social Services be allowed access to all medical, school, criminal or professional records that may be necessary to implement this placement plan.
2. That the Guardian ad Litem shall continue to monitor this case and have access to information necessary to monitor.
3. In accordance with 42 U.S.C. 290dd-3(b)(2)(c) and 42 CFR Ch.1 Section 45 C.F.R. 164.512 ("HIPAA") and applicable State Law, there is good cause to authorize the disclosure of information sought, there are no other means for Plaintiff to obtain the information, and the public interest and the need for disclosure out-weighs the potential injury to the Defendant(s), the patient-physician relationship, and the treatment service. In authorizing the disclosure, no party to this action shall disclose any of the records or information released in any manner whatsoever other than in the course of these proceedings. Therefore, the following service providers shall be and hereby are, authorized to disclose any and all records and information in their possession and/or custody relating to the diagnoses and treatment of the Defendant(s) and/or minor children to the Department of Social Services and Guardian ad Litem: Greenville County Commission on Alcohol and Drug Abuse, Department of Mental Health, Compass of Carolina, Affiliated Counseling, Dr. Todd Morton, Dr. Karl Bodtorf, Serenity Place, Greenville County Detox Center Marshall I. Pickens, William S. Hall Institute, Patrick B. Harris Hospital, Greenville Sexual Trauma Center, Greenville Hospital System, St. Francis Hospital, Department of Probation and Parole, Greenville Children's Advocacy Center, SHARE Program, Prevent Child Abuse Carolina, Red Cross, The Journey Center (located on Woodruff Rd.), Piedmont Mental Health, Behavioral Health Services, Bay Laurel Therapy, Department of Disabilities and Special Needs, Morris Village, Meyer Center for Special Children, Pendleton Place Children's Shelter, Palmetto Boys Shelter, MRW Corporate Choice, Morgan Manor, Greenville County EMS, Dr. Paul Gunter, Cindy Stichnoth, LPC, The Family Therapy and Trauma Center, Greenville County School District, A Child's Haven, Helping Hands, and New Horizon Family Health Services.

H. **ADDITIONAL PROVISIONS:** Not applicable.

I. **TYPE OF HEARING:** That this hearing shall serve as an intervention hearing.

Respectfully Submitted,

Deborah Hines

Deborah Hines
HSSII/CF'S

(PCR/Exhibit-C-1)
 State of South Carolina
 Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8847
 Telefax: 864-467-8510



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

Solicitor
 Robert M. Ariail

1/18/2005

ERNEST HAMILTON
 311 MILLS AVENUE
 GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466191	Sex / Lewd Act, committing or attempting
1466187	Sex / Lewd Act, committing or attempting
1466186	CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE

The State will make the following sentence recommendations/negotiation:

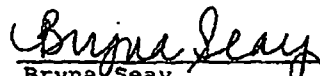
I WILL RECOMMEND THAT ALL SENTENCES RUN CONCURRENT. I AM WILLING TO DISCUSS A CAP ON ACTIVE TIME IF YOU WISH.

Other conditions/comments:

DEFENDANT HAS BEEN IN LEC SINCE 7-10-04. HE ADMITTED COMMITTING CSC 1ST W/A MINOR. SENTENCE SHEETS ENCLOSED. PLEASE ADVISE. THANKS, BRYNA

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,


 Bryna Seay
 Assistant Solicitor

(PCR / Exhibit - C-1)
 State of South Carolina
 Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8847
 Telefax: 864-467-8810



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

Solicitor
 Robert M. Ariail

2/23/2005

JAIL

ERNEST HAMILTON
 311 MILLS AVENUE
 GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466186	CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE
1466187	LEWD ACT ON A CHILD
1466191	LEWD ACT ON A CHILD

The State will make the following sentence recommendations/negotiation:

CONCURRENT ON ALL.

Other conditions/comments:

DEFENDANT HAS BEEN IN THE LEC SINCE 7-10-04. MADE COMPLETE ADMISSION OF GUILT IN FAMILY COURT.
 SENTENCE SHEETS ENCLOSED FOR YOUR CONVENIENCE. ?

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Bryna Seay
 Bryna Seay
 Assistant Solicitor

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District
Name (under which you were convicted): <u>Terrence Dimingo Terry</u>		Docket or Case No.:
Place of Confinement: <u>McComick Correctional Institution</u>		Prisoner No.: <u>307935</u>
Petitioner (include the name under which you were convicted) <u>Terrence D. Terry</u>		Respondent (authorized person having custody of petitioner) <u>Mr. Leroy Cartledge</u>
The Attorney General of the State of <u>South Carolina</u>		RECEIVED USDC CLERK, COLUMBIA, SC 2009 JUL 29 PM 2:09

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: South Carolina Supreme Court
- (b) Criminal docket or case number (if you know): 2005-CP-23-7327
- (a) Date of the judgment of conviction (if you know): Submitted-5-28-09
- (b) Date of sentencing: Filed-7-13-09
- Length of sentence: Twenty (20) years
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case:
Criminal Sexual Conduct w/ Minor - 1 - Count
Lewd Act - 2 Counts
- (a) What was your plea? (Check one)

(1) Not guilty ☐	(3) Nolo contendere (no contest) ☐
(2) Guilty ☐	(4) Insanity plea ☐

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

1. To my understanding the S.C. Supreme Court is the highest state court.
2. Upon reviewing the Supreme Court's decision I did make an "urgent appeal" to appellate counsel to petition for Rehearing. (See exhibit 2.)

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. During the course of the PCR hearing I entered (9) nine exhibits into the Court records. The PCR judge - in turn - entered two documents (the plea offers) as well. (See exhibit) (See also, PCR Transcript - pgs. 97-98, 115-19).
2. I received PCR relief (Reverse and Remand), and as a result, the state became the "Petitioner" for Certiorari with the responsibility of preparing an Appendix. (See exhibit) (See Memorandum in Support)
3. The "Attorney General" retained All exhibits with the G.S. Clerk. (See exhibit)

(b) If you did not exhaust your state remedies on Ground One, explain why: Appellate counsel refused to pursue the violation when notified by myself and the Court. Petitioned Court For removal of counsel for pro se status to raise this violation and other "meritorious issues". Denied with No explanation. (See exhibit)

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: I am not aware of a "Direct Appeal status" on Certiorari. Had I been granted "pro se" status, I would have petitioned for "Rehearing", which, appellate counsel also refused to do.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d) (1) is "Yes," state:

Type of motion or petition: Petition For Habeas Corpus

Name and location of the court where the motion or petition was filed: U.S. District Court District of South Carolina

Page 7

Docket or case number (if you know): (Pending)

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: I have contacted the S.C. Court Administration to intervene and assist in acquiring the omitted documents for an appropriate submission to this Court.

GROUND TWO: Ineffective Appellate Counsel (See Memorandum.) - Failure to provide more than a less than perfunctory representation/investigation.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): From our very first communicate it was established that we had "opposing views" concerning presenting the Misconduct (PER) issue as "highly contentious" in Caribou, ME- PER, H&M- against. This view was established further, counsel refused to pursue stipulation-3 in the PER Final

Order; p. 8, (enclosed). Counsel then refused to challenge the absence of all the exhibits from the Appendix. In both the Respondents' "Return For Writ and Brief For Certiorari" my counsel adopted the State's inaccurate "Case Statement".

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: (Same as Ground One)

No Direct Appeal From the S.C. Supreme Court

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Habeas Corpus

Name and location of the court where the motion or petition was filed: U.S. District Court District of South Carolina

Docket or case number (if you know): (Pending)

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Page 9

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

- (e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: Due to default issues beyond my control, my only other measures of recourse were, to my understanding, solicit the assistance of the Court Administration to obtain "Filed" copies of my exhibits and Petition this Court, "Pro Se" - where - at last the "WHOLE TRUTH" will be brought forth.

GROUND THREE: Misinterpretation of the Record on Appeal (Appendix) resulting in "Reversal" of the PCR Order Granting Relief (See Memorandum).

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Discrepancies are on page no. 9 of the Opinion. (See also: Memorandum)

1. The Petitioner responded "yes" to taking medication within 24 hours and did elaborate on his treatment.

3. There was an additional "Amended Application" From the Petitioner, Filed but deliberately withheld From the record on appeal.

* This would be (PCR exhibit P-8)!

- (b) If you did not exhaust your state remedies on Ground Three, explain why: _____
- _____
- _____

- (c) Direct Appeal of Ground Three:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why: (Same as Ground One)

No Direct Appeal From the S.C. Supreme Court
Court of Appeals (Exhibit P-9/PCR)

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Habeas Corpus

Name and location of the court where the motion or petition was filed: U.S. District Court
District of South Carolina

Docket or case number (if you know): (Pending)

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative

remedies, etc.) that you have used to exhaust your state remedies on Ground Three: I am currently seeking Habeas Corpus relief. Requested appellate counsel to petition for rehearing to the S.C. Supreme Court. Rehearing: Never submitted.
(See exhibit)

GROUND FOUR: Due Process violation - Denial of right to present case under "Pro Se" Status by the Chief Justice of the S.C. Supreme Court.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. Contacted Appellate counsel - immediately after appointment - to discuss pursuance of Grounds One thru Three, in this application
2. Counsel ignored my concerns, and as a result, "unceremoniously" told me that "if I was not satisfied with his appointment, I know what I could do."
3. Petitioned the Court for "Pro Se" status by serving all concerned parties. (See exhibit) (See also Memorandum)
4. No Se representation denied by Chief Justice. (See exhibit)

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Habeas Corpus

Name and location of the court where the motion or petition was filed: U.S. District Court District of South Carolina

Docket or case number (if you know): (Pending)

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: This is - to my understanding - my next available opportunity to do so.

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

Page 13

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: No preliminary hearing - though requested.

(b) At arraignment and plea: Mr. Ernest Hamilton; 311 Mills Ave.; Greenville S.C. 29605 - For the plea hearing.

(c) At trial: No Trial

(d) At sentencing: Mr. Ernest Hamilton; 311 Mills Ave.; Greenville, S.C. 29605

(e) On appeal: No Appeal

(f) In any post-conviction proceeding: Ms. Susannah C. Ross; 2435 East North Street, Suite #222; Greenville, S.C. 29615

(g) On appeal from any ruling against you in a post-conviction proceeding: Mr. Robert M. Pachak P.O. Box 11589; Columbia, S.C. - on Certiorari to the S.C. Supreme Court - where I was the "Respondent"

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

Therefore, petitioner asks that the Court grant the following relief: Vacating of sentence, or re-consideration of remaining sentence time, (See Memorandum), with concurrence to the "un-negotiated" plea offer of January 18, 2003,
 or any other relief to which petitioner may be entitled.

 Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

 Signature of Petitioner

 * (...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

United States District Court
District of

United States of America }

Plaintiff,

) Case No.

vs.

Terrence D. Terry

Defendant.

} Memorandum In Support
OF § 2254 Motion OF
Terrence D. Terry

Comes now the defendant, Terrence D. Terry, pro se, pursuant to 28 U.S.C. § 2254, and files this Memorandum in support of his Motion to Vacate and Set Aside his Conviction and Sentence for violation of § 16-15-140 - Lewd Act upon a Minor (2 counts) and § 16-3-655(1) CSC w/ a Minor (1 count), and states as follows:

Background

The February 2005 term of the Greenville County Grand

Jury indicted the Defendant for two (2) counts of lewd act upon a child (2005-CP-23-1157, -1158) and First-degree criminal sexual conduct (CSC) with a minor (2005-BS-23-1274). Earnest Hamilton represented Defendant.

On March 8, 2005, the Defendant pled guilty. The Honorable Edward W. Miller sentenced the Defendant to concurrent terms of Fifteen (15) years for each count of lewd act upon a child and twenty (20) years for First-degree CSC with a minor. Defendant did not appeal.

Defendant filed an application for post-conviction relief (PCR) on November 14, 2005 (2005-CP-23-7327) and two amendments were filed with the PCR court. One dated February 5, 2007, submitted by the Defendant's counsel and one submitted March 1, 2007, entered by the Defendant himself, the day of the PCR hearing.

The evidentiary (PCR) hearing was held at the Greenville County Courthouse on March 1, 2007. The Defendant (then Applicant) was represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented the State. The Honorable Michael B. Nettles granted the Defendant a new trial on all three charges in an order dated March 26, 2007.

Both the Defendant and the State filed a Motion to Alter or Amend the judgment pursuant to Rule 59(c). In the Defendant's case the 59(c) Motion was submitted "pro se" citing that his PCR counsel "terminated representation" be-

Fore, he (Defendant) could exercise his right to do so, within the ten (10) day time limit. The Defendant did receive a "clock-stamped" filed copy of his 59th Motion from the Greenville County Clerk of Court - dated 2007. Judge Nettles issued an order denying both motions on July 2, 2007. The Defendant also submitted a "pro se" Motion To Compel - citing same circumstances against P CR counsel. Both Motions were denied on July 6, 2007.

Ground / Argument - I

Did the assistant attorney general commit misconduct at Certiorari Level - S.C. Supreme Court - as the Petitioner?

On March 26, 2007, as a result of being granted relief of ineffective assistance of counsel the Hon. Judge - Michael B. Nettles issued a "Final Order" for post-conviction. Also, as a result of the order the Applicant became the "Respondent" when the S.C. Supreme Court granted the State's petition for writ of Certiorari.

During the course of the Applicant's PCR hearing there were nine (9) exhibits entered into the record as a result of direct examination of the Applicant by his PCR defense counsel.

1. Each exhibit submitted by the Applicant met with "no opposition" from the State.

In addition, after all PER counsel examinations had been conducted, the Defendant's PER counsel on closing defunction of the Applicant's allegations sought to enter two additional exhibits, i.e. - the Defendant's plea offers from the Solicitor's office prior to the Defendant's General Sessions appearance:

Upon which time, the PER Attorney General raised the following objection:

The Court: Were these offered into evidence?

Ms. Ross: I don't think I did.

The Court: I think there was testimony in that regard, but I don't think they were offered into evidence.

Ms. Ross: I don't think they were. I'll be happy to do that at this time if you'd like me to.

The Court: You might want to.

Ms. Ratigan: I object that her case is closed. I mean, if you want

The Assistant Attorney General

to make that a Court's exhibit that's one thing, but she had ample opportunity to, and, in fact, had a lot of evidence, and her case has been closed, Your Honor.

The Court: I believe I will make that as a Court's Exhibit.

(Whereupon, Court's exhibit No. 1 was admitted into evidence).

App. pg. 98, lines 4-16.

And as Further substantiation:

The Court: I was looking at the letter, I think we're looking at two different letters, talk about a cap.

Ms. Ross: Oh, I'm sorry. There were two different plea offers. I believe I put in the one from January 18th in. I'll give you the two I have.

The Court: This is actually discovery!

App. pg. 97, lines 20-25.

The Defendant submits that, with the Judges exhibits and the Applicant's, there were a total of eleven exhibits presented in the Defendant's behalf. (See "index page" from the Defendant's record on appeal).

The Defendant submits that as the "Respondent in Certiorari", it was the attorney general's responsibility to prepare and submit the record on appeal.

The Defendant submits that, by the State's omission of these exhibits he was subjected to not only 14th amendment violation of due process, but malicious prosecutorial misconduct as well.

The S.C. Supreme Court held that "a prosecutor has special responsibilities to do justice and is held to the highest standard of professional ethics... and that deliberate prosecutorial misconduct which threatens rights... fundamental to liberty and justice will not be tolerated."

State v. Quattlebaum, 527 S.E.2d 105 (S.C. 2000).

Upon review of the "index page" it is stated that "All exhibits were retained by the Clerk of Court for Granville County."

Under Appellate Court Rule 210 - Record on Appeal - it is stated:

(f.) Photographs, plats, diagrams, and other paper exhibits "shall" be inserted in the Record on Appeal when they can

be reasonably reduced or drawn to a size which permits them to be printed and inserted in the Record on Appeal without folding more than one time.

The Defendant submits that accommodating this stipulation should not have been problematic, in that, each of the eleven exhibits were already of the appropriate dimensions for transmittance.

While prosecutors may strike hard blows, they are not at liberty to strike foul ones.

Burger v. U.S., 78, 55 S. Ct. (1935).

What is problematic is the fact that the solicitor in this instance not only chose to ignore the Defendant's right to due process and in so doing -

Rule 210-(H.) - Review Limited to Record on Appeal: Except as provided by rule 212 and rule 208 (b)(1)(c) and (2), the Appellate Court will not consider any fact which does not appear in the Record on Appeal - ~~prejudiced~~ Defendant by preventing review of the Defendant's exhibits by the S.C. Supreme Court. But blatantly chose to manipulate a specific State mandate, of which, they (solicitors) are sworn to uphold. Are not "Certiorari Material" a Form of Brady also?

The Defendant respectfully proposes and questions: How is it possible for the Hon.: S.C. Supreme Court, to review documentation "retained" by the Clerk of Court, for General Sessions, rather than appropriately transferred.

1. Is not an "exhibit" to be considered a "verbal/pictorial" Fact?

In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), the Court held that the solicitor's suppression of evidence favorable to the accused violated due process where evidence is material to either guilt or punishment. See also, Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984).

The Defendant further submits and questions: Particularly with the Defendant entering Certiorari to the S.C. Supreme Court as the "Respondent" having gained PER relief - was/is he not entitled to the continued "Fair bite" of the apple? Moreover, should/does not the constitutional - State and Federal - mandates of proper prosecutorial conduct remain enforced at all levels of appeal? Under, again, Brady?

The Defendant submits that there are several markedly "detrimental setbacks" that withholding the exhibits from the Record on Appeal by the attorney general have caused - Namely, the Defendant's:

Exhibit P-8 - Memorandum of Law In Support of the PER Application:

Ms. Ross: Your Honor, I apologize, at the beginning of the hearing Mr. Terry stated that he had this that he wanted to put into evidence.

The Court: Okay. And I'll allow you to do that.

Ms. Ross: Thank you, Your Honor.

The Court: Are they in the form of a brief or?

Ms. Ross: This is his law in support of his application.

App. pgs. 93-94, lines 25-6.

The Defendant testified:

The Court: Very good. I'll be glad to hear from you.

Mr. Terry: I'm most thankful, Your Honor. I would like to respectfully ask for a continuance. I prepared a brief in accordance with the PCR application, which stated to state concisely the reasons and allegations why you feel you are submitting this application. Also this is in response to the State's return, which, I received three days after filing my application. And they also say that they expressly deny any allegations that I raised or otherwise unexplained. This is what I have comprised for you. And I would like to ask your permission, Your Honor, to have these requests entered into the record, to have it where every-

1. This testimony is altered only to the extent of compensating for the court reporter's discrepancies in transposition of the entire transcript.

body can have an opportunity to understand exactly where I'm coming from.

The Court: Mr. Terry, that's fair enough, and I will agree to make that part of the record. We'll hear all the issues that you have here today. However, your Motion for a continuance is denied.

App. pgs. 34-35, lines 7-1.

The Defendant humbly reminds the Hon. Court that the preparation and submission of a "Memorandum" is substantial to the cause and purpose of a Defendant, in the specific interest of "shoring up" any discrepancies in court litigations, as well as, backing up those litigations with pertinent "case law" citations, in pursuit of the various court "reliefs". In the instant case - as it was in *Certiorari* - as in *Habeas Corpus*, i.e. this Memorandum, it is my sole sworn testimonial defense representation, in my absence, as a pro se litigant, or otherwise.

The Defendant concedes that he was not pro se on/in *Certiorari* - though he did petition - nor was he allowed to attend the S.C. Supreme Court proceedings, but what cannot be conceded is the fact that in the absence of his PER Memorandum, the attorney general took away a "significant por-

tion of his constitutional right to be "fully heard." While the Memorandum was submitted at the PCR during the last portion of the proceeding, it was the most, and still remains the major exhibit in this evidential submission, both now and then, or better stated, on equal footing with....

Exhibit P-2 - SLED Lab Results; Exhibit P-5 - SLED letter (dated August 9, 2005).

Ms. Ross: All right. I would just go ahead, since we did bring this up. Here is the South Carolina Law Enforcement Forensics report showing the results of the rape kit. No evidence found. That Mr. Terry - - -

Mr. Terry: You need to see this.

Ms. Ross: I don't think we need to put this in, frankly.

Mr. Terry: You need to see this one. I don't think you've seen that second letter. I appreciate it.

App. pg. 49, lines 17-24.

1. This is exhibit P-5 - SLED letter stating that "all testing has not yet been completed concerning the above referenced case", dated August 9, 2005. (Please see also "Footnote", pg. 13, #2.), which will turn out to be Toxicology results, completed in 2007.

Further....

Ms. Ross: This is a SLED report which I'd like to offer into evidence

The Court: Very good.

Ms. Ross: These are requests to SLED that Mr. Terry made for these reports and they say that beyond this nothing else has been done.¹

The Court: This SLED report is into evidence as Plaintiff's exhibit 2 without objection. Is that correct Ms. Ratigan?

(Solicitor) - Ms. Ratigan: That's correct, Your Honor.
App. pg. 50, lines 6-15.

And Further still....²

Mr. Terry: Susanna, (Ms. Ross), I would like to say that with the results that you have, in fact, are returned and if you'll notice the date at the top, it is dated March the 2nd of 2005. So my question is, Your Honor, had this analysis been completed or had it not? My second request is why was it not a part of my discovery? How come this information came to me through researches of my

1. Please see following page for Footnotes. 2. Following page, also.

own. And I'm at a loss. I'm lost to understand it. Because with the letter that's written they're saying the DNA was not completed. How could the State come at me the way they did? And I believe because of the emotional upset and the way that I was, I wasn't able to be prepared for it, being withheld.

App. pg. 64, lines 3-14.

(From page 12.)
1. See page 1, of the 2-page results - Exhibit P-2. Please note, also that on page 1, under the category of "Blood," the results show, "No analysis performed," as of March 2, 2005. This date is six (6) days prior to the Defendant's appearance in General Sessions Court where he had the plea hearing.

2. I would come to discover that the answer to my "testimonial question" concerning the SLED results letter of August 9, 2005, (see footnote - pg. 11) would be that: At some point after March 2, 2005, a second analysis request for "Toxicological results" would be forwarded to SLED, from the Greenville County Sheriff's Department. That information - once received - would have become "Brady" evidence requiring transmittal to the Solicitor. A circumstance that, in fact, did take place.

Refusal of a conviction is required if the undisclosed evidence is material and the omission deprived the defendant of a fair trial.

United States v. Aguas, 427 U.S. 97, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1976); Miller v. Anglikur, 848 F.2d 1312, 1321-22 (2nd Cir. 1988).

The Defendant testified under Direct-examination in PER:

Ms. Ross: Now if you had known that SLED -- that there was no forensic evidence of any kind of sexual battery, would you have pled guilty?

Mr. Terry: From what little I understand of legality, Susannah, I think someone would plea when there's no evidence that vindicates. No, I would not have pled guilty.

App. pg. 53, lines 4-9.

The solicitor (attorney general) at the PER - under closing arguments - justified ignoring Rule 5 Brady by stating that:

Cont'd. - There was forwarded to the Greenville Co. Sheriff's Dept. From the South Carolina Law Enforcement Division, results from a toxicological examination - completed in November 2007, yet never made available to the Defendant. I.E. (NEW.)

Ms. Ratigan: And also, in regards to this SLED report, Your Honor, it is not necessary to have the SLED report completed on a case such as that, or even like a drug case, before a defendant decides to plead guilty. It happens all the time. Somebody will be arrested with a white, powdery substance, they decide they want to plead guilty before the SLED report even comes back. So I think the fact that Mr. Terry said he wanted to plead guilty several times, wanted to go through with it, I think the fact that this happened before the SLED report came back is irrelevant.

App. pg. 106, lines 11-21.

The Defendant respectfully submits and questions: what of Rules 5 and 6 of the South Carolina Rules of Criminal Procedure which state:

"Upon request of a defendant or his counsel, the solicitor shall permit the defendant to inspect and copy any results

or reports of scientific tests"... which are material to the preparation of the defense, or are intended for use by the Solicitor as evidence in chief at trial. Rule 5 - SCRcrimP.

And, "in criminal prosecution, any report(s) of chemical analysis and certified or sworn statement establishing physical custody or control of evidence shall be made available to the defendant or his attorney at the preliminary hearing, or if no hearing is held, no later than eleven (11) days prior to the trial of the case. Rule 6 - SCRcrimP.

The Defendant submits that it was revelation of the SLED results required by the Defendant, after the plea hearing, as the initial sole basis for petitioning for PCR under the ground of prosecutorial misconduct, based upon the fact that although he (Defendant) got the results on September 8, 2005 - exactly five (5) months after his plea; the date of the results completion was March 2, 2005.

The Defendant questions, how is it that, after extensive efforts to both submit and preserve this particular exhibit, and the issues surrounding it, that the attorney general need only "motion" to extract it from the record, and then convince both the Clerk of Court and Court Reporter to

1. A copy of the results was also forwarded to the Solicitor's office on March 2, 2005. (See exhibit E2, page 2 / cc:). Six days before hearing. The Defendant raised this fact in both his Memorandum of Law and his 59a's Motions. The Defendant's plea hearing was March 8, 2005.

act "in confusion" with it, against both State and Federal Constitutional Mandates. See also; Fourteenth Amendment. So in reiteration:

A.-The Solicitor in General Sessions Failed to disclose the SLED results provided from the examiner on March 2, 2005.

B.-The Defendant then disclosed the results through testimony, Memorandum, exhibit and post-trial Motions, citing Solicitor misconduct, without any objection in PER by the attorney general, with the exception of stating that violation of Brady is exorable in the Defendant's case, "because in deciding to disclose a SLED Rape Kit analysis, like a drug analysis; i.e. DNA as compared to a "white powder" substance; it not important to have results of examinations as a defendant who chooses to plead guilty. (Although, also in the Defendant's case, the results were available before anyone knew whether or not a plea was forthcoming).

C.-The attorney general (Solicitor) on Certiorari as the "petitioner" proceeds to commit the "same misconduct" concerning the "same evidence" being withheld from the Court records in the two aforementioned levels.

The most devastating consequence of withholding the results was to have 4 Supreme Court Justices conclude that

1. The Solicitor in Certiorari has in addition to ignoring Rule 5 Brady and Rules 5 and 6 of the SCRCMP, now added disregarded Rule 210 - sections (F) and (H). of the S.C. Appellate Court Procedure.

the withheld results showed (revealed) no evidence found on the "clothing" of the victim, rather than the victim herself. (See Supreme Court Opinion - pg. 4, lines 30-34.). Despite the fact that in closing colloquy PER defense counsel stated:

Ms. Ross: Just briefly, I know the State said that -- how would -- something about how would Mr. Hamilton know a SLED report was out there, and that would simply be because it was a rape case involving a rape kit which consists of hair samples and other samples. That's what it is, and there's going to be a SLED report out there any time there's an allegation of actual penetration, and the victim, taken to the hospital and a rape kit done, as there was here. And also, should know and know from the discovery, that there were shorts out there, and underwear that would also be tested for evidence of sexual battery or rape.

And then my hearing too, was that Mr. Hamilton did say that basically they were the same thing sexual battery and touching. And that is the crux of this case. From the beginning and from my discussions with Mr. Terry. He had stated that now that he understands what sexual battery means, that is not what he did. He stated that inappropriate touching is what happened. And that's why he felt guilty.

1. "and the victim," added for clarity in the transcript's transposing.
2. there were two chain of custody / Property Control Sheets for the rape kit and the clothing. 3. and missing with children (See PER Order.)

App. pg. 105, lines 8-25.

Exhibit P-7 - Property and Evidence Reports:

Submitted to show "defense counsel's" failure to investigate.
By Ms. Ross on cross-examination of Defendant's trial counsel:

Ms. Ross: And these clothes were actually taken into property and evidence.

Mr. Hamilton: Okay.

Ms. Ross: Are you aware of that? And I'll just show you all of the property and evidence sheets. One is a rape kit for the "alleged victim" along with paperwork.

Mr. Hamilton: Okay.

Ms. Ross: And this shows who signed it out. You never went down to see that evidence did you?

Mr. Hamilton: At SLED?

Ms. Ross: Yeah, it was at the law enforcement center, property and evidence. I went to SLED for testing and that came back negative, you said you didn't get that report.

Mr. Hamilton: Let me see the -- yeah discovery.

Ms. Ross: Okay. And yeah this was in discovery, except it didn't have as many signatures because a new version after it had been signed out. And then there was a pair of white shorts, pair of pink juvenile panties and blue hair grease that was also in discovery that you never went to see. And, in fact, this is showing that that evidence is now destroyed. Okay? 2.

Ms. Ross: I'd offer this as Plaintiff's Exhibit 6?

Court Reporter: 7

Ms. Ross: 7. And this is the property and evidence report showing that Mr. Hamilton didn't go down and re-view that property and evidence.

The Court: Plaintiff's Exhibit 7 into evidence without objection.

App. pg. 88-89, lines 23-25.

Exhibit P-6 - The State's Cover Sheet.

Ms. Ross: I'm showing the Attorney General a

1. The Copies marked "ORIGINAL" show transference to and from SIED. While the "RECORDS" copy forwarded to the defendant did not.
2. Property Reports show destruction date of January 25, 2006, while the Property Disposition Sheet date is June 20, 2005?

copy of what was provided in your discovery.

Mr. Terry: Understood.

Ms. Ross: The cover sheet.

App. pg. 64, lines 15-18.

Ms. Ross: I'd offer this into evidence at this time. This is a cover sheet of what the State provided as discoverable material to Mr. Hamilton on January 18th 2004. And the SLED report is not in there.

App. pg. 64-65, lines 24-2.

P-4 - Drug Record - Submitted to show that not only was the Defendant on medication during the plea, but in Family Court as well, where he appeared without appointed counsel.

Ms. Ross: That -- I want the records from the law enforcement center of the medications you were on. Not your type-written description

1. What was in discovery and listed on the itemized numerical cover sheet were two Property and Evidence Reports for the Rape Kit and the clothing - Nos. 5 and 9. And the 1st Plea Offer, to discuss a cap.

21.

of what they are.

Mr. Terry: Well actually they are excerpts from the book, but I understand you Susanna, this would be from October.

App. p. 59, lines 8-12.

Mr. Terry: Thank you Susannah, And I have February and also March.

Ms. Ross: I believe this is the same one in March.

Mr. Terry: That's correct.

Ms. Ross: 9 milligrams of Risperdal, 500 milligrams of Depakote and 75 mg. perphenazine---

Ms. Ross: Go ahead.

Mr. Terry: Perphenazine, Amitriptyline, tranquilizers.

App. pg. 59-60, lines 21-3.

Ms. Ross: All right. And we would look for that after the hearing. But according to my recollection and notes that's the same prescription you were on in March. And the hearing was on March -- I mean, the plea hearing was on March 8th.

App. pg. 60, lines 4-7.

Ms. Ross: All right. Did Ernie Hamilton ever discuss the drugs that you were taking with you?

Mr. Terry: Mr. Hamilton could not have discussed the drugs, because Mr. Hamilton could not have known that I was on them, because Mr. Hamilton never made any contact with me.¹ Had he made any attempt to reach me at the detention center, he would have realized that he would have had to go through the medical wing, the "isolation medical" wing, to even reach me.²

App. pgs. 61-62, lines 21-3.

Ms. Ross: Just leading up we've been talking about the medications you were on when you pled guilty, the actual transcript of the guilty plea showing admissions, discussions between you and the judge, did you understand fully what you were doing?

Mr. Terry: Absolutely not Susannah. My body was in a portion -- I would be adverse to sit here and say that I was

1. No contact was attempted even after Mr. Hamilton reviewed the documentation from Family Court, in October of 2004.
2. Miles v. Stainey, 108 F.3d 1109 (9th Cir. 1997).

absolutely 100 percent incompetent as I was in that courtroom. What I am saying is that I was not at a competently adequate level to realize what I was doing.

Ms. Ross: And that was because you were on these medications?

Mr. Terry: That is absolutely correct.

App. pg. 62, lines 5-16.

The Defendant submits Further:

Ms. Ross: All right. And the State -- yet the State, I guess, part of your prosecutorial misconduct is that the State presented this Family Court Order as evidence of your confession in Family Court?

Mr. Terry: That's close to correct, Susannah. Yes, my allegation is that the State brought a statement from the Family Court against me? And I, again, from researches I have come to learn that I'm not allowed to be -- I'm not to

1. "that courtroom" is in reference to the Family Court hearing of October 12, 2007 where I appeared without appointed counsel and have no recollection of the proceedings. (See App. pgs. 66-67, lines 9-19.).

be held liable for my own inerm-
inating words. . ."

Ms. Ross: And there was no confession present-
ed to you in your discovery, was there?

Mr. Terry: No, there was not.

Ms. Ross: Okay. Now Mr. Terry, I don't think--
you've testified to what's in these,
I don't think it's relevant to offer
these into evidence unless you
want me to do that.

Mr. Terry: I would like to have them entered
into the record. Thank you.

Ms. Rahigan: I'm going to object to relevance
Your Honor. I don't know that any
treatment plan from Family Court
has any bearing on this decision.

The Court: It does not, I'll sustain your objection.

App. pgs. 67-68, lines 20-15.

The Defendant submits that in addition to the aforemention-
ed testimonies, the relevance of the "Treatment Plan/Court Order"
was/is to establish that a "psychological evaluation" was
"mandated" prior to the Defendant's plea hearing. A mandate
"aptly attached" to the Defendant's alleged charges. A man-

1. . . . absent counsel. U.S. v. Fellers, 124 S.Ct. 1019 (2004). See
also, U.S. v. Badger, 983 F.2d 1443 (7th Cir. 1993). . . . The Government
may not suggest that information not in evidence supports its case.

date that-to date - has yet to be enacted or even considered in the Defendant's case at bar, under the Fourteenth Amendment Statutes of Due process. In the Defendant's case of conviction and release conditions it has been established as prerequisite, that the Defendant complete certain mental health criteria, consummate with discharge status from incarceration.

Exhibit P-9- Letter dated 2-8-07; No Direct Appeal.

The Defendant submits that while the attorney general argued on PER that:

Ms. Ratigan: Weather's v. State, says that "although a defendant has the right to appeal a guilty plea, there's no constitutional requirement that he be advised of his right, absent extraordinary circumstances."

A court's Failure to advise a defendant who pled guilty of his right to appeal does not entitle him to Habeas relief, if he knew of his rights and suffered no prejudice from the omission. (Which, in my case, I did not). Know!
Peguerro v. United States, 536 U.S. 23, 143 L.Ed. 2d 18 (1999)

To waive a direct appeal a defendant must make a knowing and intelligent decision not to pursue the appeal.

On PER the Defendant testified:

Ms. Ross: All right. And you didn't file an appeal, why not?

Mr. Terry: I had no knowledge of -- 'I am -- prior to being under -- turning myself in, I was an assistant manager at Wal-Mart, I had no legal sense or concept of what my rights were, or anything else. Nor was I advised by my attorney that I should file for a direct appeal, nor am I 100 percent sure. Even today, what a direct appeal is. Even though I was trying to ascertain it in these two and a half years¹.

Ms. Ross: So after receiving a 20 year sentence your lawyer said nothing to you about you have a right to appeal or do you wish to do so?

Mr. Terry: That is absolutely correct.

App. pgs. 45-46, lines 24-11.

1. a direct appeal. 2. no lawyer. 3. arrest after, (deletions above --, are "verbatim" throughout the entire transposing of the transcripts in the Appendix), and as such, the most "logical inference words" are mine. 4. of jail.

The Defendant would respectfully submit that in view of the fact that had the Defendant been notified by his counsel of the plea offer and negotiation options, there is a "great likelihood" that the "necessity" of a direct appeal would have become non-existent. As well as, a PCR.

The District Court in a thoughtful discussion, held that failure to communicate a plea bargain offer would deny a defendant [Caruso] his sixth and fourteenth amendment rights.... Failure by defense counsel to communicate a plea-offer to a defendant deprives defendant of the opportunity to present a plea bargain for the consideration of the State Judge, and on acceptance by the Judge, to enter a guilty plea in exchange for a lesser sentence. "A subsequent fair trial does not remedy this deprivation."

U.S. ex rel Caruso v. Zelinski, 689 F.2d 435 (3rd Cir. 1982).

Lastly, with all aforementioned on this issue:

It is a violation of the due process clause when a prosecutor knowingly suppresses evidence favorable to a defendant.
Banks v. U.S., 920 F. Supp. 688 (E.D. Va. 1996).

The Defendant questions: Are the aforementioned withheld documents on *Certiorari* exempt from this mandate?

As a general matter, we will reverse a conviction on the basis of governmental misconduct only if the misconduct may have prejudiced substantial rights of the accused.
U.S. v. Cross, 928 F.2d 1030 (11th Cir. 1991).

The PER Solicitor testified:

Ms. Ratigan: Let's see, Family court transcript, can't be ineffective assistance of counsel if the trial attorney didn't have it, and the State didn't have it. I think it's a different issue if it turns out that the State withheld, that was prosecutorial misconduct, that's not an ineffective assistance of Mr. Hamilton. Obviously he cannot challenge what he does not have and does not know of.

App. p. 103, lines 4-10.

The Defendant submits that Ms. Ratigan had, (or at least, had access to), my exhibits from PER, that were "required" in the Record on Appeal. That Ms. Ratigan did withhold those exhibits, and by so doing, did commit misconduct, and "greatly prejudiced and poisoned the Defendant's apple." Namely:

The Defendant's Fifth Amendment-against self-incrimination by using an "uncounseled alleged statement," not provided discovery, given under the influence of "psychotropic medications."

The Defendant's Sixth Amendment- to have the "compulsory process" of obtaining (and presenting?) witnesses (or exhibits?) in his favor, in his absence? And the right to file legal documents and writings with the Courts without threat of retaliation.

The Defendant's Eighth Amendment- against cruel and unusual punishment as the Respondent, where if it had been the State that had this right of privilege, there would have been every effort and assurance to insure that every affiliated document in their case would have been present for presentation to the S.C. Supreme Court on Certiorari.

And the Defendant's Fourteenth Amendment- "equal right of assurance" that no prosecutor, at any level, will resort to less-than-savory-constitutional adversarial processes or procedures."

Ground / Argument II

Was Appellate Defense Counsel "Ineffective" in representation of the Defendant on Certiorari?

In Evitts v. Lucy; Supra, the Supreme Court held that the Strickland standard of Ineffective of Counsel also applies to appellate counsel.

The Strickland standards apply to appeals as of right only, and not to discretionary appeal.

Weinwright v. Torma, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 71 L. Ed. 2d 475 (1982).

The first controversy of effective appellate counsel lies in the time periods between the issuance of the "Final Order" in PCR, the Defendant's and the State's submissions of the "suitable post-trial motions", and the "actual appointing" of appellate counsel to the Defendant's case.

Accompanying the Final Order was a letter from the Defendant's PCR counsel stating that the file was "closed on his case", and that the case would be taken up by the S.C. Office of Appellate Defense. (See exhibit)

No one at the PCR level anticipated that the Defendant (then the Applicant) would have intentions of exercising his right to submit any post-trial motion; nor that he knew what a post-trial motion was; seeing as how he was "granted relief" on/in the Order based upon ineffective assistance of trial counsel, i.e., that the Defendant was not advised as to the meaning of sexual battery." (See exhibit)

1. Both the Defendant's 59c and Comply Motions were Forwarded-in copy-pro se to all concerned "lower court parties", who-in return-Forwarded their responses to defense counsel who had terminated representation." (See exhibits)

It was, in fact, the "prosecutorial misconduct" issues of the "withheld DNA and uncounseled statements" allegedly made by the Defendant, and the "ineffective assistance of counsel" issues of failure to investigate, failure to notify and advise the Defendant of the Solicitor's plea offer, and failure to request discovery concerning the SLED results that the Defendant was seeking relief upon in the PCR courts, and as a result, the reasoning behind the Defendant's post-trial 59(a) Motion, as well as, the Motion To Comply.

The Defendant's Pro Se 59(a) Motion was submitted to the PCR Court on April 25, 2007, - 8 days after receiving the Order. (See exhibit). It would be July 24, 2007, when the Defendant would be notified concerning "eligibility for representation" with Appellate Defense and it would be August 3, 2007, when the Defendant would receive the "first correspondence from appellate counsel himself. (See exhibits)

Immediately after counsel's notification, the Defendant made contact by phone with appellate counsel to make known his (Defendant's) two "imminent concerns, those being the recognition of the post-trial motions".... and the "third shoulatel" mandate in the final order, i.e., "That the Applicant is to be released to the custody of the Greenville County Detention Center where his "Original" bond" will be reinstated." 2.

1. In anticipation of the upcoming Supreme Court proceedings, the Defendant began notifying the "Clerk of the S.C. Supreme Court" concerning his lower-court filings and discrepancies. Starting with the 59(a).
2. See PCR Final Order, P. 3.

By the end of the "semi-heated" initial phone interview between the Defendant and his appellate counsel it was determined that:

A.-Regardless of the "Order" granting the Defendant his "Original Bond", appellate counsel would not even consider petitioning the Court for an "Appeal Bond" in the Defendant's behalf.

B.-Regardless of the Defendant's efforts to submit and secure for appellate review, the post-trial motions, appellate counsel saw no need to provide any "undersigned support".

C.-According to appellate counsel: "Due to your persistence in wanting to pursue these matters, you present to me the impression that 'you think you know the law.' If you are not satisfied with my appointment to represent you, then you know what you can do."

* This phone conversation would be the "First and the Last vocal conversation" between ourselves because counsel would fail to provide the appropriate acknowledgement document to submit in the Defendant's behalf.

The Defendant submits that he did, in fact, know what to do concerning the arising "conflict of interest", and did, in fact, petition the S.C. Supreme Court to

1. The issue of the Defendant Filing the Post-trial Motions (pro se) was submitted for review to the Office of the Disciplinary Counsel by the Defendant citing abandonment of PER defense counsel at a "critical stage", i.e., before the filing of post-trial motions. to no avail.

"Remove Counsel For Self-Representation" on May 8, 2008, (See exhibit) and was denied - "without explanation" on June 2, 2008. (See exhibit).

The Defendant submits that during the waiting period between the initial call and May 8, 2008, he forwarded to all concerned parties at both the PER and Certiorari levels individual letters concerning intervention and acquisition of the numerous Motions and Transitional Petitions from the PER to S.C. Supreme Courts, in copy. Dated April 2, 2008.

Appellate counsel was also notified by the Clerk of the S. C. Supreme Court of the Defendant's dilemma on April 8, 2008, by forwarding copies of the letters and informing counsel that no action would be taken without his initiating support.

The Defendant submits that, again, his appellate counsel saw no necessity to intervene in his behalf. This was especially problematic to the Defendant back then because his PER counsel was emphatically convinced that any PER post-trial actions on the Defendant's behalf were the responsibility of his appellate counsel. And as a result, the Defendant's case was presented in Certiorari through an "Appendix" prepared by the Attorney General, minus the proof, that the Defendant exercised all avenues for relief at the PER level, as well as, minus his first exhibit on PER and Certiorari, and exhibits P-1 thru P-1.

1. i.e., The State's 59a, Proposed Order of Dismissal, and Petition For writ. The Defendant's PER Memorandum of Law, Motion To Compel. In a second request for endorsement, appellate counsel was forwarded copies of all letters by the Defendant. 2. The Defendant's Memorandum In Support of his APER.

Restrictions on Federal Habeas Corpus review of Fourth Amendment claims announced in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed. 2d 1067, do not extend to Sixth Amendment Ineffective Assistance claims which are founded primarily on "incompetent" representation, with respect to a Fourth Amendment issue. Federal Courts may grant Habeas Corpus in appropriate cases regardless of the nature of the underlying attorney error.

Kimmelman v. Morrison, 477 U.S. 365, 91 L. Ed. 2d 305, 106 S.Ct. 2574 (1986).

A criminal defendant is entitled to counsel whose undivided loyalties lie with his client.

U.S. v. Jeffers, 520 F.2d 1256, 1263 (7th Cir. 1975).

The Defendant submits that this is problematic "now" because at the Habeas Corpus level, he has "yet to acquaint" the post-trial Motions in the Record on Appeal, and worse still, none of the "eleven exhibits" that were, or rather, become "evidence for Federal review" by their PCR submission.

Upon receiving the State's prepared Appendix the Defendant - upon recognition of the missing exhibits - contacted both the Clerks of Court for Certiorari and PCR. The Clerk of the S.C. Supreme Court - in turn - contacted the Defendant's appel-

1. The significance of each relevant exhibit has been briefed in Argument I, and the Defendant respectfully directs the Hon. Court there in for support of this argument.

late counsel to notify counsel of the Defendant's wishes to address this issue. Once again, to no avail. The Defendant's appellate counsel saw no need to make contact in order to possibly ascertain any "significant validity" behind his (Defendant's) actions. (See exhibit) Dated April 7, 2008.

At this point, the Defendant is now not only faced with the predicament of losing "credible face" in demonstrating to the Supreme Court proper lower court-exhaustive remedy actions, but is now being forced to accept misconduct actions of the Solicitor (Assistant Attorney General) by omission of the Defendant's PCR exhibits in the Record on Appeal, without one iota of objection, from his appellate counsel.

The Defendant submits that his appellate counsel could not even be relied upon to present an appropriate "Statement of the Case" in the Defendant's Reply Briefs, concerning the Motions To Alter or Amend submitted by the Defendant. Counsel merely chose to adopt (piggy back) on the Attorney General. (See exhibits). An equivalent of failure to investigate.

Appellate counsel need not advance every argument regardless of merit urged by the Appellant, but the issues chosen must not fall below an objective standard of reasonableness.

Gray v. Green, Supra, note 125, 778 F.2d at 353.

If appellate counsel failed to raise a "significant and obvious"

1. The Defendant submits that counsel in his desire to expedite his "responsibility termination", did not even so much as scrutinize the Appellants defective statements of fact, in their petition briefs where it is repeatedly undisclosed, the Defendant's Amended Brief (also presented on PCR).

issue (Failure can be viewed as deficient performance).

If counsel's ineffectiveness was so persuasive, an applicant may be exempted from proving actual prejudice.

Fitch v. State, 298 S.O. 34, 378 S.E. 2d 249 (1988).

Clearly, after all the aforementioned has been said and done, there can be no doubt that after the Defendant (and before) chose to proceed pro se, his appellate counsel had already determined to be of a "perfunctory assistance" at best. And in so choosing, actually did worse!

It would have certainly been better that counsel endorsed the Defendant's pro se petition, (since he chose not to endorse anything else: not the post-trial motions, not the PER exhibits being withheld, not the plea offers, and definitely not the DNA or toxicology results being withheld by both Solicitors at the PER and Cauterari levels of appeal, or the "undiscoverable" alleged confession from Family Court).

If counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing then there has been a denial of the Defendant's Sixth Amendment rights that makes the the adversary process itself presumptively unreliable.

U.S. v. Cronig, 466 U.S. 648 104 S.Ct. 2039 80 L.Ed 2d 657 (1984).

Appellate counsel could not even be persuaded by the Defendant to enter a Petition for Rehearing, "as a last resort to

1. With the exception of the issue that the PER Judge raised the Defendant's case upon. But this was done with what adds up to be a 1 1/2 page rebuttal against the State's 2 issue, 7 page Petition. 2. Against the 13 page Opinion.

address any issues, utilize "full exhaustion" of the highest State Court remedies, and lastly, "set to rights" the "clear misinterpretations" of the Supreme Court 13-page Opinion, due in great proportion to the missing exhibits in the Record on Appeal, prejudicially withheld by the attorney general.¹
(See exhibit).

Ground / Argument III

Was there a "gross misinterpretation" of the Record on Appeal resulting in the Defendant's "Reversal" of PCR relief?

The Defendant would respectfully submit that on the basis of the aforementioned in arguments I and II lay more than enough "substantial support" for this allegation, and the Defendant would humbly request of the Court to please (when and where directed) reflect and/or refer to these stations.

This is particularly profound where the Defendant, in the instant case, would point out concerning the Supreme Court² Opinion, per page:

Page (1), paragraph (3) - "Subsequently, a Family Court proceeding brought by the Dept. of Social Services was conducted."

1. Assistant Attorney General - Karen E. Rotigan as the Petitioner in Court-
ari. 2. Pages of the Opinion numbered by the Defendant. Same for paragraph numberings.

ed wherein Respondent admitted to the allegations. As a result, a treatment plan was put into effect to address Respondent's conduct.

(Please see Argument I, pages 24 thru 26).

Here, the Supreme court reflects to "unsubstantiated testimony" shown not within the State's "discovery package", given without defense representation of appointed counsel. The Court also reflects to the "treatment plans" that were never made a part of the PER record or the Record on Appeal, although requested to be made, so by the Defendant as a reference to the lack of a psychological evaluation. Treatment Plan Court Orders address no Battery.

Paragraph (5) - "Respondent indicated taking hypertension medication, but felt fine and had not taken any drugs or alcohol within the 24 hrs. before the proceeding."

(Please see Argument I, pages 21 thru 24), (See also; Plea Hearing Transcript, pages 5 thru 6, lines 24-1. See also; page 6, lines 16 thru 19) - It was, in fact, one Mr. Austin (a separate Defendant) who testified to taking no drugs within 24 hrs. .

* Respondent acknowledged that he had previously been treated for drugs and psychiatric. He did not, however, elaborate on this treatment.

(Please see Plea Trans., pages 6 thru 7, lines 20 thru 7). i.e.

The Court: who treated you and when?

Mr. Terry: Oh, Forgive me. I was -- The Salvation Army. They had a thirty, sixty -- they have a nine-

ty day rehabilitation program which you live in, which I graduated from last year.

The Defendant did, in fact, elaborate, and in that elaboration, bring out a mental drug and psychiatric circumstance. Miles v. Stainer, 108 F.3d 1109, (9th Cir. 1997).

Page(5), paragraph (2) - "Despite the State's assertion that Respondent admitted to committing a sexual battery during the family court proceeding, ...

The Defendant submits that here again, (as on page 3), the Court reflects to an "assertion" absent any constitutional foundation, presented by the State.

Page(5), paragraph (4) - Plea counsel explained away his failure to file for discovery by stating that the Solicitor had an "open file" policy and he copied the Solicitor's file. Yet.... Page (6) paragraph (2) states: "In turn of the contents of his file, plea counsel testified that he had (not copied) the discovery package provided by the Solicitor's Office."

(See exhibit), which shows no request to copy anything. (Please See Also, Argument I, pages 20 thru 21, and pages 4 thru 5).

1. This package contained two significant documented pieces in the Defendant's case. I. E., The State's first plea offer to discuss a cap - dated January 18, 2005. Also an itemized numerical document sheet which listed two Property and Evidence sheets for the Rape kit and the clothing. Both of which became exhibits, and were not even a mention in the opinion.

Page (6), paragraph (1) - Defendant's trial counsel testified:
 "The only thing that I would say that he - he wanted to admit without admitting that he did this act. You know. He danced around it but I'm going to plead guilty. You know I'm going to plead guilty. But, you know, when you get into specifics as to what he did, he would kind of be evasive but something happened. And that's what he told me. I said, 'Well you're going to plead guilty to it?' And he said, yes."

In the instant case, this statement reflects - on one hand - the plea for all three charges. And yet... the statement appears to also reflect pleading to the "a" single act, omitting any discourse / discussion concerning the 2 lesser charges. In either event, the Defendant submits:

[In order to avoid procedural default, the 'substance' of [the] claim must have been fairly presented in state court. That requires "the ground relied upon [to] be presented 'face-up and square.' Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick." (quoting Townes v. Murray, 68 F.3d 840, 846 (4th Cir. 1995) (quoting Mallery v. Smith, 27 F.3d 991, 995 (4th Cir. 1994)).

The Defendant questions: Is this presentation in the opinion face-up and square, or oblique? And as such, should it be brought forward to this court for review as "factual discourse"?

Further,

"We hold that where, as in this case, the defendant pleads guilty but refuses to admit 'to conduct that demonstrates a factual basis for the plea,' if the government undertakes to establish the factual basis by reciting what facts it would have proven at trial, the prosecutor must also identify the evidence it has to prove the facts.... if the government fails to recite specific evidence upon which it would have relied, then we see no way for a district to satisfy itself that sufficient evidence..... justifies..... reaching the conclusion that the defendant's guilty plea is accurate."

U.S. v. Turning, 69 F.3d 107 (6th Cir. 1995)

Plea counsel testified Respondent was evasive and remorseful but never said he was not guilty.

Opinion, Page 6.

Plea counsel also testified:

A. "Well, you know, my discussion with him was basically what was alleged that happened. We talked about what he was accused of doing and he wanted to plead guilty."

Q. Yet he never said that he had anal sex with his daughter, did he? To you. He never said that to you.

A. No, he never said that.

PER Transcript, page 92, lines 16-21.

1. If, in fact, this statement were worthy of true consideration the Defendant would respectfully in regards to a "verbatim" except direct the court to the case of North Carolina v. Alford, 400 U.S. 25, 9 S.Ct. 160, 27 L.Ed. 2d 162 (1970).

42.

The Defendant testified:

Q. I've asked all my questions, is there anything else that you want the Judge to hear about your post-conviction relief action?

A. Yes, Susannah, as a matter of fact there is. Your Honor, again, I would like to say that the reasons for my being here and the things that I was charged with are not one and the same. I did not, I would not have attacked my daughter. That child worshiped the ground I walked on. I felt it an honor and a privilege to be able to take care of those children. Your Honor, also, embarrassingly so, at the age 6, what I was charged with was done to me. So I know, in fact, what type of pain that would inflict. I know, in fact, what type of animal it would take to do something like that, Your Honor. And I cannot, as God as my witness, sit here before you and declare myself that sort of an animal. I simply wouldn't.

Further,

A. And your Honor, further, as far as having defense in my behalf, I simply had none. I was in the detention center for nine months. Which I believe more than ample opportunity to have someone get in touch with me to let me know what I was coming up against and what I was charged with.¹ (Rather than the day of court).²

App. pages 68-69, lines 22-16.

¹ Excerpt submitted under penalty of perjury, both then and now, as a truth despite numerous adversarial repetitive testimonies to the contrary. ² Last statement added for emphasis (mine).

Page (4), paragraph (3) - "Because he did not review any discovery materials, Respondent claimed he was unaware of the SLED report stating that no physical evidence was found on the clothing of the victim."

(Please see Argument I, pages 12 thru 18).

(Note: Here the Defendant states that he never viewed his discovery, in contradiction to "four different instances" where it is alluded that he had.)

Yet on Page (7), paragraph (1) - Plea counsel admitted that he did not discuss the SLED report, the rape kit, or the victim's statement. Counsel maintained that Respondent wanted to plead guilty.....

The Defendant, in Summation, questions:

- A. Despite never viewing the Rape Kit or Toxicology SLED reports that counsel could have acquired?¹
- B. Despite never having the privilege of negotiating the cap² presented to defense counsel along with the discovery package provided by the State, ² as the first plea offer?
(Note: Again, an issue "not even mentioned" in the Opinion).
- C. Despite the fact that the State produced no admission document from Family Court, in their discovery?
- D. Despite the fact that the PER judge stated that counsel "demonstrated a lack of knowledge of the nature of the crimes for which

1. At least the rape kit results since that "in evidence" through the chain of custody reports, and completed six days before the plea, i.e. March 2, 2005. 2. Not copied from an open file.

he represented the Respondent? (paragraph (2)).

E. Despite the fact that the Defendant never had any intentions of pleading guilty to a "violent" CSC charge?

F. Despite the fact that each assertion raised in PCR-if honored-presented enough "constitutional clout" to-at least-warrant a reconsideration of the remaining time that the Defendant currently faces? As well as, under what status?

The Defendant humbly responds, No. Three times, the Opinion alludes to the Defendant admitting guilt in Family Court, "without substantiation." Four times, the Opinion alludes to the Defendant's plea counsel reviewing the discovery with his client, yet "nine documented" exhibits say something entirely contradictory, in culmination with the Applicant's testimony.

Three different times during the PCR hearing the judge engaged the Solicitor in "meaningful colloquy" concerning controverted actions attempted by his plea counsel, before and during the plea hearing, and the PCR solicitor herself, i.e. the Plea Offer and SLED results. Making the Plea Offer Court's exhibits in favor of the Defendant, then ruling the exhibits "unmeritorious" warranting relief.

The Defendant submits that while these allegations of misinterpretation pertain mostly to the "Factual/Procedural History"

1. Yet, the only relief granted the Defendant was that counsel failed to advise the Defendant of the elements of the alleged crimes. So if that, upon return for a new trial, all previous assertions of unconstitutional prosecutor misconduct and ineffective counsel disappear.

segment of the Opinion. And although the "Discussion" segment deals specifically with the issue of refusing PER relief based upon the trial judges colloquy as a "cure-all" for any other discrepancies surrounding the plea hearing. And the PER judge's ruling of the Defendant being competent to enter a plea as a "cure-all" for all the other constitutional violations, prior to and during, the plea raised by the Defendant at PER. Due "observatory" light must be shed on the fact that the "Factual / Procedural" History segment of the Opinion has been prepared, reviewed, and sanctioned by the South Carolina Supreme Court as "authentically binding" for the purposes of any past or future appeal reference circumstances, is "critically Flawed".

This document clearly implicates the fact. The Supreme Court panel accepted - at face value - erroneous information(s) provided by an - at best - "detrimentally soiled" Record on Appeal, prepared by the Assistant Attorney General, (as a sworn officer of the court), to benefit the State's position. Regardless of the obligation to produce, (both morally and constitutionally), a record bearing every aspect of the true process validity, of truth.

A prisoner need not prove that he would have been acquitted in order to demonstrate materiality, for the purpose of a Brady claim. Burton v. Demire, 295 F3d 839 (8th Cir. 2002); Denial of due process occurs where the State allows false evidence to go uncorrected. Hall v. Director of Corrections, 343 F3d 976 (9th Cir. 2003).

Ground / Argument IV

Was the Petitioner subjected to a Fourteenth Amendment due process violation where he was denied on his petition for pro se status on Certiorari to the S.C. Supreme Court by the Chief Justice?

An individual has a constitutional right to represent himself.

Faretta v. State of California, 422 US 806, 43 LEd2d 562, 95 S Ct. 2525 (1975).

Defendant has a right to submit briefs pro se on appeal.

Vega v. Johnson, 149 F3d (9th Cir. 1998)

A defendant need not be "technically" competent in the law to act in his or her own defense, but must be competent to make the choice to proceed pro se.

Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989).

The Petitioner submits and maintains that for the reasons presented and argued in Grounds One thru Three, of this application, the only suitable alternate recourse remaining was to exercise his Sixth and Fourteenth Amendment right for self-representation. By the means

of a Petition served on "all concerned parties," to include the Clerk of the S.C. Supreme Court who acknowledged receipt of the petition on May 8, 2008. And, in addition, forwarded "stipulated instructions" to both the Petitioner and counsels affiliated with this case. (See exhibit).

With "no acknowledgement" from the Petitioner's counsel, and a mere one paragraph "letter in lieu of a formal return" from the Assistant Attorney General, (See exhibit), continued adherence to formal appeared to have deviated, to the extent that no briefs were submitted and the Petition was forwarded to the Justice(s) for a decision.

Of which, was rendered less than thirty (30) days afterwards, on June 2, 2008, signed by the Chief Justice only, and with, "no explanation," for the denial (See exhibit).

Denial of a defendant's right to represent himself, if established, requires reversal without need for harmless error analysis.

U.S. v. Majors, 329 F3d 791 (5th Cir. 2003).

Pro se litigant's pleadings are to be construed liberally and held to less stringent standards than the formal pleadings drafted by lawyers.

Bray v. MacDougall, 454 US 364, 70 LEd2d 531, 102
9 Ct 700 (1982).

Haines v. Kerner, 404 US 519, 30 LEd2d 652 42 9 Ct
(1972).

The Petitioner submits that, prior to the forwarding of the Petition to the Court, in an effort to address the "withheld PER exhibits," several letters were forwarded to the various individuals involved - (to include the Chief Justice) - with the Petitioner's case. And although there was only one response from the Supreme Court Clerk (See exhibit), it might, may, be construed that a "prelude of cause" for self-representation did at least proceed towards the appropriate venues on the part of the Petitioner himself, in the interest of both preserving the issues and exhausting all avenues of State remedies. As well as demonstrating some degree of competence in deciding to proceed under Pro Se Status.

Lastly, it is established

A.) Courts interpret pro se petitions for "PER" liberally
Hohn v. US, 262 F3d 811 (8th Cir. 2001).

B. Federal Court should construe a Habeas petition Filed by a pro se litigant more liberally than one Filed by an attorney.

Urbina v. Thomas, 270 F3d 292 (6th Cir. 2001).

C. The Sixth and the Fourteenth Amendments to the Constitution guarantees the right to self-representation, when a defendant voluntarily elects to proceed without counsel.

Faretta v. California, 422 US 806, 45 L. Ed. 2d 362, 95 S Ct. 2525 (1975).

Clearly, the right to self-representation is available at every level, to include, certiorari. It was at that time "crucial" to the Petitioner, to be able to present pertinent information, i.e., his FBI exhibits, to the Court after "all the other concerned parties" deemed this action irrelevant. (To include as argued, his own Appellate counsel).

The Petitioner respectfully submits that, in hindsight, perhaps these issues might have gone unchallenged. And then ruled "defaulted", at this, the Habeas level.

However, having then, the foresight of now, the Petitioner may enjoy the right of a "proper presentation" for relief, without the penalty of regression back to the lower Courts?

United States District Court
District of South Carolina

United States of America }

Plaintiff

Case No.

vs.

Terrence D. Terry

Defendant

Certificate of Service

I, Mr. Terrence D. Terry, do hereby certify that a true and correct copy(ies) of my Petition For Habeas Corpus, and Memorandum In Support of Habeas Petition, is being forwarded by U.S. Mail, postage prepaid, addressed as follows to:

Hon. Larry W. Proles
U.S. District Clerk of Court
District of South Carolina
901 Richland Street
Columbia, S.C. 29201

Sworn To and Before Me,
this 28 day of July, 2010.

Joseph T. Young, Jr.
Notary Public of S.C.

My commission expires: 8/28/2011 (Signature on Back)

3 Mr. Terrence A. Terry
Mr. Terrence D. Terry, #307935

Conclusion

Defendant-Terry-respectfully moves this Court to set aside his conviction and sentence for reconsideration on the Lewd Act charges and vacate his conviction and sentence on the charge of Criminal Sexual Conduct. And/or any other relief within the jurisdiction and discretion(s) of the honorable Court.

"Structural Errors" call into question the very accuracy and reliability of the trial process, and thus, are amenable to harmless error analysis, but require automatic reversal. Shawfelt v. Alaska, 228 F.3d 1088 (9th Cir. 2000).

Verification

Respectfully,

I, Terrence D. Terry, hereby declare under penalty of perjury that the facts stated in the foregoing memorandum are true and correct.

s. Mr. Terrence D. Terry
Terrence D. Terry
Defendant

Sworn To and Before Me,
this 28 day of July, 2010.
Joyce L. Young, S.
Notary Public of South Carolina
My commission expires: 8-28-2011

Habeas Exhibit

(PCR/Exhibit-C-1)

State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185

Solicitor
Robert M. Ariail

1/18/2005

ERNEST HAMILTON
311 MILLS AVENUE
GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466191 Sex / Lewd Act, committing or attempting

1466187 Sex / Lewd Act, committing or attempting

1466186 CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE

The State will make the following sentence recommendations/negotiation:

I WILL RECOMMEND THAT ALL SENTENCES RUN CONCURRENT. I AM WILLING TO DISCUSS A CAP ON ACTIVE TIME IF YOU WISH.

Other conditions/comments:

DEFENDANT HAS BEEN IN LEC SINCE 7-10-04. HE ADMITTED COMMITTING CSC 1ST W/A MINOR. SENTENCE SHEETS ENCLOSED. PLEASE ADVISE. THANKS, BRYNA

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Bryna Seay
Bryna Seay
Assistant Solicitor

Habens
Exhibit -

(PCR / Exhibit - C-1)
State of South Carolina
Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
Telefax: 864-467-8610



Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, SC 29601-2185

Solicitor
Robert M. Ariail

2/23/2005

JAIL

ERNEST HAMILTON
311 MILLS AVENUE
GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton:

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466186	CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE
1466187	LEWD ACT ON A CHILD
1466191	LEWD ACT ON A CHILD

The State will make the following sentence recommendations/negotiation:

CONCURRENT ON ALL.

Other conditions/comments:

DEFENDANT HAS BEEN IN THE LEC SINCE 7-10-04. MADE COMPLETE ADMISSION OF GUILT IN FAMILY COURT. SENTENCE SHEETS ENCLOSED FOR YOUR CONVENIENCE. ?

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Bryna Seay
Bryna Seay
Assistant Solicitor

Habeas Exhibit -



State of South Carolina

The Circuit Court of the Twelfth Judicial Circuit

MICHAEL G. NETTLES
JUDGECITY COUNTY COMPLEX, MSC-0
180 NORTH IRBY STREET
FLORENCE, SOUTH CAROLINA 29501-3456
TELEPHONE: (843) 292-7433
FAX: (843) 292-7436
E-MAIL: mnstiles@sccourts.org

MEMORANDUM

March 1, 2007

TO: Susannah C. Ross

RE: Post Conviction Relief Hearings
Thirteenth Judicial Circuit
March 1, 2007

K RATERIAN @ AC STATE
JCUS

The following is a report of the disposition and/or status of the cases reflected on the roster for the above PCR hearings.

Terrence Terry (05-CP-23-7327) – The applicant's motion for post-conviction relief is granted and the case is reversed and remanded for a new trial. Ms. Ross shall prepare the Order.

I. Ineffective Assistance of Counsel

- a. There are numerous allegations of ineffective assistance of counsel. Each of these allegations are without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. Based upon the testimony of trial counsel and the applicant, I find that—
 - i. Defendant was not informed as to the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree.
 - ii. Reasonable and prevailing professional norms would require that a lawyer advise a criminal defendant of the elements of the crime and that he ensure that the defendant understands the nature of the offense to which he is charged.
 - iii. Had the applicant known the definition of sexual battery, he would not have pled guilty.

Attorneys preparing proposed final Orders are reminded of their need to include all of the issues raised by the PCR applications in accordance with the ruling handed down in the Hyman v. State case reported at 278 S.C. 501, 299 S.E.2d 330 (1983).

Attorneys representing the applicants who received unfavorable decisions are requested to advise their clients of the right to appeal the decision of the PCR Judge. The notice requirements

Habes Exhibit-

mandated by the appellate process will be triggered by receipt of the Orders anticipated by this letter.

Sincerely Yours,

Michael G. Nettles

cc. Ernest Hamilton

* In accordance with the Final stipulation / statement (above), the State was required to submit a "Proposed Order OF Dismissal." *

Habeas Exhibit

Table of Contents page for the "Record On Appeal"!

INDEX - Appendix!

(AW) - Denotes Applicant's Witness
 (RW) - Denotes Respondent's Witness
 (IC) - Denotes In Camera

(AW) TERRENCE TERRY:

Examination by the Court.....3
 Direct Examination by Ms. Ross.....15
 Cross-Examination by Ms. Ratigan.....41
 43

(RW) ERNIE HAMILTON:

Direct Examination by Ms. Ratigan.....49
 Cross-Examination by Ms. Ross.....54

Certificate of Reporter.....78

EXHIBITS

NO.	DESCRIPTION	ID.	EVD.
	(Applicant's Exhibits)		
P-1	Booking Report. <i>Identifying attorney at time of arrest</i>		17
P-2	SLED Lab Report. <i>Dated March 2, 2005 Rape Kit</i>		20
P-3	Medical Request Form. <i>Handwriting Sample</i>		25
P-4	Drug Record. <i>Medications</i>		30
P-5	Letter Dated 8-9-05. <i>All testing has not been</i>	34	34
P-6	Letter Dated 1-18-05. <i>State Chief Sheet</i>	34	36
P-7	Property and Evidence Report. <i>Rape Kit: Clothing destroyed</i>		60
P-8	Memorandum. <i>But submitted at beginning of PCR hearing</i>		64
P-9	Letter Dated 2-8-07. <i>No Direct Appeal</i>		64

(Respondent's Exhibits)

There were no Respondent's Exhibits.

(Court's Exhibit's)

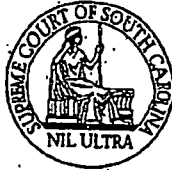
C-1 Two Letters Dated 2-23-05 and 1-18-05. *Plea Offer (2)* 68

* All Exhibits were retained by the Clerk of Court for Greenville County. *Why?*

But not retained in the appendix for presentation to the Supreme Court, (Citing Rules 210), by Assistant Attorney General - Karen E. Ratigan! The "Petitioner" in the S.C. Supreme Court!

Discovery

Habeas Exhibit



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1060

FAX (803) 734-1459

June 2, 2008

Terrence D. Terry, #307935
McCormick Correctional
Institution
386 Redemption Way
McCormick, SC 29899

Re: Terry, Terrence D. v. The State

Dear Counsel:

The following Order has been endorsed on your Pro Se Motion to Remove Counsel for Self-Representation in the above entitled case on appeal.

*

"Motion to proceed pro se is denied. !"

s/ Jean H. Toal C.J.
For the Court

Justice John H. Waller, Jr., not participating ?

June 02, 2008.

*

Why ? was ? I ? Denied ?

Hobas Exhibit

Very truly yours,

Daniel E. Shearouse

CLERK

BS

DES/klb

cc: Assistant Attorney General Karen C. Ratigan
Appellate Defender Robert Pachak

③
Habeas Exhibit -

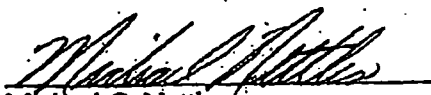
Exhibit - 9

This Court grants Mr. Terry's motion for post-conviction relief based on ineffective assistance of counsel. The cases are reversed and remanded for a new trial and Mr. Terry is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

IT IS HEREBY ORDERED:

1. That the applicant's motion for post-conviction relief is granted;
2. That applicant's convictions of two counts of lewd act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274) are reversed and remanded; and
3. That the applicant is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

AND IT SO ORDERED this 26 day of March, 2007


Michael G. Nettles
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

③

Habeas Exhibit -



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1690
FAX: (803) 734-1839
www.sccourts.org

February 8, 2007

Mr. Terrence D. Terry, #307935
McCormick Correctional Inst
F2-A-256
386 Redemption Way
McCormick, Sc 29899

Re: Letter received by this office

Dear Mr. Terry:

We are in receipt of your letter, dated February 5, 2007 concerning an appeal filed on your behalf.

According to our records there is no indication that an appeal has been filed in your behalf. If you were represented at trial by a Public Defender, appointed counsel or by retained counsel, you should immediately contact that individual and advise them of your desire to appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

CLERK

KAR/ab

cc: Ernest Hamilton, Esquire

③

Habeas Exhibit -



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

July 27, 2009

Terrence D. Terry, #307935
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

Re: Your case

Dear Mr. Terry:

I have reviewed the South Carolina Supreme Court's 13 page decision on your case and see no basis in filing a petition for rehearing that would result in a different decision by the Court. The decision to grant or deny relief on petition for writ of certiorari is discretionary with the Court.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/fkb

Habeas Exhibit-



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 8, 2008

Terrence D. Terry, #307935
McCormick Correctional
Institution
386 Redemption Way
McCormick, SC 29899

Re: Terry, Terrence D. v. The State

Dear Mr. Terry:

This will acknowledge receipt of your Pro Se Motion to Remove Counsel For Self-Representation in the above entitled matter.

By copy of this letter, all counsel are requested to file an original and six (6) copies of a return to this motion no later than May 19, 2008, pursuant to Rule 224(e). Upon receipt of the return, the matter will be taken under consideration and you will be notified as soon as action has been taken.

The time limits for perfecting the appeal will be held in abeyance pending the Court's decision.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/klb

cc: Assistant Attorney General Karen C. Ratigan
Appellate Defender Robert M. Pachak

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District	South Carolina
Name (under which you were convicted):	Mr. Terrence Dimingo Terry	Docket or Case No.:
Place of Confinement:	McCormick Correctional Inst.	Prisoner No.: 307935
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)	RECEIVED USDC CLERK, COLUMBIA, SC 2007 JUL 29 PM 2:08
Mr. Terrence Dimingo Terry	v. Mr. Leroy Cartledge	
The Attorney General of the State of	South Carolina	

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: Greenville County Court of Common Pleas (PCR)
Greenville, South Carolina

(b) Criminal docket or case number (if you know): 2005-CR-23-7327
- (a) Date of the judgment of conviction (if you know): March 26, 2007

(b) Date of sentencing: _____
- Length of sentence: _____
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: Criminal Sexual Conduct w/ Minor - 1 Count
Lewd Act - 2 Counts
- (a) What was your plea? (Check one)

(1) Not guilty ☐ (3) Nolo contendere (no contest) ☐

(2) Guilty ☒ (4) Insanity plea ☐

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pre-trial hearing, trial, or a post-trial hearing?

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: South Carolina Supreme Court

(b) Docket or case number (if you know): 2005-CP-23-7327

(c) Result: Reversed

(d) Date of result (if you know): Filed July 13, 2009

(e) Citation to the case (if you know): Opinion No. 26683 (Attached)

(f) Grounds raised: Brief Of Respondent - (Myself) - prepared by counsel
Statement Of Issues On Appeal -

"Whether there was any evidence to support the PCR judges findings that plea counsel was ineffective in failing to explain to respondent the meaning of sexual battery?"

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): _____

Page 4

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

- (b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

I wrote to my appellate defense lawyer requesting a "Petition For Re-
hearing on the S.C. Supreme Court reversing the one issue that he
did raise, that had received PER relief for S.A.C. He refused to do so.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: 14th Amendment due process Violation of Brady, "No Relief" at PCR. Failure to disclose DNA (SLID results) or toxicology report. (See Memorandum)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
1: Greenville Co. Sheriff's Investigator prepared 2 "Property Control and Custody Reports" for the Rape Kit Forwarded and returned from SLID. 2: Copy of results also forwarded (cc:) - to Solicitor (dated March 2, 2005). 3: "Chemized" discovery list dated 1-18-05 shows Rand E. Reports sent to defense counsel, but NO RESULTS. 4: Plea hearing was March 8, 2005. Results still withheld. No disclosure of "toxicology" evidence whatsoever. All potential evidence withheld 3 months after plea. (except toxicology results) Facts 1-3 argued at PCR. Judge ruled issue of DNA results "unamenable" for relief.

(b) If you did not exhaust your state remedies on Ground One, explain why: After appointment of Appellate counsel, counsel chose not to pursue Ground 1 to the Supreme Court of S.C., or bring forth exhibits from PCR hearing. (See exhibits 1-9- (PCR) enclosed) ("Ineffective Assistance of Appellate Counsel" Xerox denied)

(c) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

Case from PCR, proceeded to Certiorari in the S.C. Supreme Court.

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Greenville County Court of Common Pleas

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: March 26, 2007 / Filed April 11, 2007

Result (attach a copy of the court's opinion or order, if available): (Enclosed) (Exhibit 2)
Reverse: Remand for a new trial - ineffective assistance of counsel
Release to Greenville County Sheriff's Dept. / Misconduct denied.

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

South Carolina Supreme Court (Certiorari Appeal)

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: Filed July 13, 2009

Result (attach a copy of the court's opinion or order, if available):

Opinion No. 26683 (Attached) (Exhibit 3)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Due to PER relief, the State appealed as the "Petitioner." I expressed the "extreme desire" to appeal this issue with appointed appellate counsel - which he declined to do. I then petitioned the S.C. Supreme Court for "Pro Se" status to raise this issue. Denied "Pro Se" status without explanation. (See exhibit 4)

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

Petitioned the General Sessions (PER) Judge through a 59(c) Motion to Reconsider and a Motion to Compel - both "Pro Se" submissions. No counsel at "critical stage". Also Filed grievance with The Office of Disciplinary Counsel. (Exhibit 5)

GROUND TWO: Misconduct/abuse of discretion/Use of alleged admission from Family Court by the Applicant without counsel. (See Memorandum) not in discovery.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1-Applicant attended a Family Court hearing on October 12, 2004, without appointed counsel. (See PER Transcript - p. 87, lines 12-25; p. 88, lines 1-3).
2-A Court Order was issued on both August 26, and October 12, 2004. (PER Trans. p. 85, lines 1-9). The Orders, though argued as exhibits, never became a part of the records.

3: There was "No Statement of Admission" provided For G.S. Court.

4: Yet, the solicitor stated at the plea hearing that "The defendant" admitted guilt in Family Court. 5-Per Judge ruled issue "Unamittious".

(b) If you did not exhaust your state remedies on Ground Two, explain why: After being forced to retain appellate counsel - through denial of "Pro Se" Status petition on Certiorari - the issue was not presented by counsel for review in the S.C. Supreme Court. ("Ineffective Assistance of Appellate Counsel")

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Case from PER, proceeded to Certiorari in the S.C. Supreme Court.
(Please see Habeas Corpus Petition for the S.C. Supreme Court)

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Greenville County Court of Common Pleas

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: March 26, 2007 - Filed April 11, 2007.

Result (attach a copy of the court's opinion or order, if available): (See exhibit 2)

Reverse and Remand for a new trial - "ineffective assistance of counsel"
Release to Greenville County Sheriff's Dept. / Misconduct denied.

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

South Carolina Supreme Court (Certiorari Appeal)

Docket or case number (if you know): 8005 - CP - 23 - 7327

Date of the court's decision: Filed July 13, 2009

Result (attach a copy of the court's opinion or order, if available):

Opinion No. 26683 (Attached)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Please see Ground 1 - (7). (See exhibit 4)

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

Please see Ground 1 - (e). (See exhibit 5)

GROUND THREE: The PER Judge erred in granting relief based upon "one issue" of J.A.C., (See Memorandum), Abuse of discretion.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

At the PER hearing the Petitioner submitted that his counsel failed to investigate and as a result:
A.) Defendant pled under the influence of "psychotropic drugs"
B.) Failed to request "mandatory psychological evaluation. (Court ordered?)
C.) Failed to present SIED results to the Petitioner before advising a guilty plea.
D.) Failed to negotiate the State's plea offer for a cap on active time.

* The PER Judge Found no ineffective counsel or Prosecutorial Misconduct

(b) If you did not exhaust your state remedies on Ground Three, explain why: After appointment of Appellate counsel, counsel chose not to pursue Ground 3 to the Supreme Court of S.C. (See exhibit)

("Ineffective Assistance of Appellate Counsel") (Pro Se Denied)

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

Case from PER, proceeded to Certiorari in the S.C. Supreme Court.
(Please see Habeas Petition For the S.C. Supreme Court)

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition for Post-Conviction Relief

Name and location of the court where the motion or petition was filed:

Greenville County Court of Common Pleas

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: March 26, 2007 / Filed April 11, 2007

Result (attach a copy of the court's opinion or order, if available): (Attached)

Reverse and Remand for a new trial - "ineffective assistance of counsel"
Release to Greenville County Sheriff's Dept. / Misconduct denied.

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

South Carolina Supreme Court (Certiorari Appeal)

Docket or case number (if you know): 2005-CP-23-7327

Date of the court's decision: Filed July 13, 2009

Result (attach a copy of the court's opinion or order, if available):

Opinion No. 26683 (Attached)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: Please see Ground 1 - (7). (See exhibit 4)

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

Please see Ground 1 - (e).

(See exhibit 5)

GROUND FOUR: N/A(a) Supporting facts. (Do not argue or cite law. Just state the specific facts that support your claim.):

_____(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. _____

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: No Preliminary Hearing - though requested!

(b) At arraignment and plea: Mr. Ernest Hamilton; 311 Mills Ave., Greenville, S.C. 29605 - For Plea Hearing.

(c) At trial: No Trial

(d) At sentencing: Same as For plea hearing.

(e) On appeal: No Direct Appeal

(f) In any post-conviction proceeding: Ms. Susannah C. Ross; 2435 East North Street, Suite #222; Greenville, S.C. 29615

(g) On appeal from any ruling against you in a post-conviction proceeding: Mr. Robert Pachak Appellate Counsel; P.O. Box 11589; Columbia, S.C. 29211. I was the Respondent!

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

Page 14

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition. * N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(continued...)

Therefore, petitioner asks that the Court grant the following relief: N/A

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on 7-28-10 (date).

Mr. Terrence A. Terry
Signature of Petitioner

*(...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. N/A

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

United States District Court
District of

United States of America

Plaintiff,

vs.

Terrence D. Terry

Defendant.

Case No.

Memorandum In Support
OF § 2254 Motion OF
Terrence D. Terry

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Comes now the defendant, Terrence D. Terry, pro se, pursuant to 28 U.S.C. § 2254, and files this Memorandum in support of his Motion to Vacate and Set Aside his Conviction and Sentence for violation of § 16-15-140 - Lewd Act upon a Minor (2 counts) and § 16-3-655(1) CSC w/ a Minor (1 count), and states as follows:

Background

The February 2005 term of the Greenville County Grand

Jury indicted the Defendant for two (2) counts of lewd act upon a child (2005-CP-23-1157, -1158) and First-degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Ernest Hamilton represented Defendant.

On March 8, 2005, the Defendant pled guilty. The Honorable Edward W. Miller sentenced the Defendant to concurrent terms of Fifteen (15) years for each count of lewd act upon a child and twenty (20) years for First-degree CSC with a minor. Defendant did not appeal.

Defendant filed an application for post-conviction relief (PCR) on November 11, 2005 (2005-CP-23-7327) and two amendments were filed with the PCR court. One dated February 5, 2007, submitted by the Defendant's counsel and one submitted March 1, 2007, entered by the Defendant himself, the day of the PCR hearing.

The evidentiary (PCR) hearing was held at the Greenville County Courthouse on March 1, 2007. The Defendant (then Applicant) was represented by Susannah E. Ross, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office represented the State. The Honorable Michael B. Nettles granted the Defendant a new trial on all three charges in an order dated March 26, 2007.

Both the Defendant and the State filed a Motion to Alter or Amend the judgment pursuant to Rule 59(c). In the Defendant's case the 59(c) Motion was submitted "pro se" citing that his PCR counsel "terminated representation" be-

Fore, he (Defendant) could exercise his right to do so, within the ten (10) day time limit. The Defendant did receive a "clock-stamped" filed copy of his 59cc Motion from the Greenville County Clerk of Court - dated 2007. Judge Nettles issued an order denying both motions on July 2, 2007. The Defendant also submitted a "pro se" Motion To Compel - citing same circumstances against P CR counsel.

Ground / Argument I

Was it due process violation where the PER Judge granted "NO RELIEF" towards the Defendant's allegation of prosecutorial misconduct, where the DNA results were withheld from the discovery package? - Abuse of discretion?

There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.

US v. August, 427 U.S. 97, 49 LEd2d 342, 96 Sct 2392 (1976)

It is a violation of the due process clause when a prosecutor knowingly suppresses evidence favorable to a defendant.
Banks v. US, 920 F. Supp. 688 (E.D. Va. 1996).

As a general matter, we will reverse a conviction on the basis of governmental misconduct only if the misconduct may have prejudiced substantial rights of the accused.
US v. Cross, 928 F.2d 1030 (11th Cir. 1991).

At the Defendant's PCR hearing his trial counsel - under cross examination - testified:

Q. And those clothes were actually taken and put into property and evidence?

A. Okay.

Q. Are you aware of that? And I'll just show you. I'm just going to show you all of the property and evidence sheets. One is a rape kit for the alleged victim, along with paper work.

A. Okay.

Q. And this shows who signed it out. You never went down to see that evidence did you?

A. At SLED?

Q. Yeah, it was down at the law enforcement center, property and evidence. It went to SLED for testing and came back negative, you said you didn't get that report?

A. Let me see the - yeah, discovery

Q. Okay And yeah, this was in discovery ex-

2.

cept it didn't have as many signatures because
a new version after it had been signed out.

App. pgs. 88-89, lines 23-15.

And, in fact, this is showing that that evidence
is now destroyed. OKAY.

App. pg. 89, lines 17-18.

The Defendant submits that the 'Original' version of the
property report reveals that the rape kit went to SLED on
February 23, 2005. (See exhibit)

Nevertheless, even when the prosecutor does not herself
possess Brady material, she has a duty to learn of any favorable
evidence known to other government agencies, including the police.

Kyles, 115 Sct at 1567.

Also during the PCR hearing - under direct examination -
by his counsel - the Defendant's SLED results were entered
into the record, without objection from the State.

The Court: This SLED report is into evidence, as
Plaintiff's Exhibit 2 without object.

ion. Is that correct, Ms. Ratigan?
 Ms. Ratigan: That's correct, Your Honor.

App. pg. 50, lines 12-15.

Also, under direct examination the Defendant testified:

Q. As far as -- you've also alleged prosecutorial misconduct, what's the basis of that?

A. That is based on the DNA report, Susannah, and a letter that I received dated August the 9th of 2005, which states that "A search of our database reveals that all testing has not yet been completed concerning the above referenced case. Which I would like to offer to you."

Q. All right. Move to -- mark this as Plaintiff's Exhibit 5.

App. pg. 63, lines 10-20, and:

A. Susannah, I would like to say that with the results that you have, in fact, are returned and if you'll notice the date at the top it is dated March the 2nd, 2005. My question is, Your Honor, had

1. The Defendant's Plea was March 8, 2005, Six (6) days later.

this analysis been completed or had it not? My second request is why was it not a part of my discovery? How come this information came to me through researches of my own. Because with the letter that's written they're (SLED)- saying the DNA was not completed. How could the State come at me the way they did?

App. pg. 64, lines 3-12.

The Defendant's PCR counsel testified:

Q. I'm showing the Assistant Attorney General a copy of what was provided in your discovery.

Lines 15-16, and:

Q. I'd offer this into evidence at this time. This is a cover sheet of what the State provided as discoverable material to Mr. Hamilton in January 2004. And the SLED report is not in there.

App. pgs. 64-65, lines 24-2, also:

Q. And in the factual presentation during your guilty plea they (State) certainly didn't say

anything about there was a sexual battery except the SLED report shows there was no evidence of this. I mean, they don't bring that to the Judges' attention.

App. pg. 65, lines 10-14, and Finally:

Q. Just briefly, I know the State said that-- how would-- something about how would Mr. Hamilton know a SLED report was out there, and that would simply be because it was a rape case involving a rape kit which consist of hair samples and DNA samples. That's what it is and there's going to be a SLED report out there any time there's an allegation of actual penetration and the alleged victim is taken to the hospital and a rape kit done, as there was here.

App. pg. 105, lines 8-15.

In rebuttal, the Assistant Attorney General - on behalf of the General Sessions Solicitor - testified:

And also, in regards to this SLED report
6.

that should have been on notice that there was a SLED report. Your Honor, it is not necessary to have the SLED report completed on a case such as that or even like a drug case before a defendant decides to plead guilty. It happens all the time.

App. pg. 106, lines 11-15, and,

I think the fact that this happened before the SLED report came back is irrelevant.

lines 19-21.

The Defendant submits that March 8, 2005 was the, "first opportunity," that both his own defense counsel and the prosecution had to make an acquaintance with him. The day of the plea hearing. As well as, the first and ultimately, the only point at which the guilty plea was rendered. Or, in to any way, minutely discussed.

The Defendant submits that "both pages" of the results "unquivocally denote" the fact that the results "were completed on March 2, 2005. Six, days before the hearing!" The Defendant submits that, page two, of the results

also clearly denote the fact that the State Solicitor was provided with a copy. And, within ample time to update the "discovery package" provided to the Defendant's trial counsel on January 18, 2005. (See exhibit)

Suppression of evidence material to either guilt or punishment violates defendant's fundamental due process rights. Dowthitt v. Johnson, 230 F3d 733 (5th Cir. 2000).

A State may not arbitrarily prevent defendant from presenting evidence that is material, trustworthy, and important to his defense.

Gray v. Klouser, 282 F3d 633 (9th Cir. 2002).

During the closing "deliberations" at the PER hearing there was the following colloquy between the PER Judge and the Defendant's PER counsel:

The Court: I'm curious about why the SLED report was not -- is there any indication that the SLED report was in the Solicitor's File and it was withheld or is there any way to tell that?

Ms. Ross: All I can say is it was in the State's File back in, you know, April of 2006.

1. -- in the discovery package?

8.

when I requested a copy of their file.

The Court: But it's clear that Mr. Hamilton never saw it, and it's clear the defendant never saw it.

Ms. Ross: And the date on it is March 2, 2005. Which was approximately six days before the guilty plea.

The Court: And the letter was dated six days before the plea?

Ms. Ross: Yeah, the date on the SLED report, which I believe I put in itself is signed by the Special Agent, Rhonda Fields dated 3/2/05 which was less than a week before the actual guilty plea.

App. pgs. 96-97, lines 16-8.

The Defendant submits that it is indicative of this colloquy that the SLED results were not a part of discovery as of March 8, 2005.

The Defendant submits that the only other elements of the report not mentioned in the preceding colloquy was the cc: Greenville County Solicitor's Office - notation at the bottom of page 2 of the report, and the "actual results of NO DNA found belonging to the Defendant, on the alleged victim.

The Assistant Attorney General clearly defined misconduct for the PCR Court:

Ms. Rotigan: let's see, Family court transcript, can't be ineffective assistance of counsel if the trial attorney didn't have it and the State didn't have it. I think it's a different issue if it turns out that the State withheld, that was prosecutorial misconduct, ...

App. p. 103, lines 4-8.

The Defendant respectfully questions: How much differentiation in the aforementioned exists, where the SLED report is concerned under discoverable evidence is concerned?

It was prosecutorial error when the government lost sperm sample taken from rape victim because defendant totally deprived of opportunity to test sample and strong possibility that sample exculpatory.

Miller v. Angliker, 848 F.2d 1312, 1321-22 (2nd Cir. 1988).

As to the detrimental constitutional violation inflicted by the State's withholding and the PCR Judge's failure to rel-

10.

low the Defendant misconduct relief:

Absence of evidence in criminal case is a valid basis for reasonable doubt.

US v. Bautista, 252 F3d 141 (2nd Cir. 2002).

Under BRADY, an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.

Strickler v. Green, 527 US 263, 144 LEd2d 286, 119 Sct 1936 (1999).

The Brady rule requires the government to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.

Cone v. Bell, 243 F3d 961 (6th Cir. 2001).

And in conclusion the Defendant submits:

Q. Now if you had known that the SLED -- that there was no forensic evidence of any kind of sexual battery, would you have pled guilty?

A. From what little I understand of legality, Susan -- nah, I think only someone would plea when there's no evidence that indicates. No I would not have.

App. pg 53, lines 4-9, and as such, Prosecutorial Misconduct,

11.

51.

and abuse of discretion.

A prisoner need not prove he would have been acquitted in order to demonstrate materiality, for the purpose of a Brady claim.

Burton v. Dormine, 295 F3d 839 (8th Cir. 2002).

Ground / Argument II

Was it due process violation where the PER Judge granted "No Relief" towards the Defendant's allegation of prosecutorial misconduct, where the use of an "alleged admission" statement by the Defendant was not provided in discovery by the Solicitor? - Abuse of discretion? Defendant appeared without representation.

A prosecutor may not assume prejudicial facts not in evidence, nor may he insinuate possession of personal knowledge of facts not in evidence.

People of Territory of Guam v. Tott, 68 F3d 1177 (9th Cir. 1995).

It was error to exclude evidence pertaining to the reliability of a confession critical to the defendant's claim of innocence.

Crane v. Kentucky, 476 US 683 (1986).

Fifth Amendment prohibits a prosecutor from using "compelled testimony."

US v. Haynes, 301 F3d 669 (6th Cir. 2002).

Under direct-examination at the PCR hearing the De
art testified:

Q. Now, supposedly you somehow
by agreeing to this treatment plan according
to the State. And they brought that up.
Well let me put it this way. Did you make
any other admission in Family Court admit-
ting to sexual battery?

A. I made no admissions in Family Court, Sus-
annah. I was there as a body, but I was not
there competently as myself.

Q. And you weren't represented by counsel
there were you?

A. I was not.

App. pg. 67, lines 10-19, Further:

Q. And the State -- yet the State, I guess, part
of your prosecutorial misconduct is that the
State presented this Family Court Order as
evidence of your confession in Family Court?

A. That's close to correct, Susannah. Yes my
allegation is the State brought a statement
from the Family Court against me. And I, a-
gain from researches, I have come to learn

13.

that I'm not to be held liable for
my own incriminating words
Q. And there was no confession present-
ed to you in your discovery, was there?
A. No, there was not.

App. pgs. 67-68, lines 20-6.

The government may not suggest that information not in
evidence supports its case.

US v. Badger, 983 F.2d 1443 (7th Cir. 1993).

The Defendant submits that no where in the entire rec-
ord on Appeal can there be found any documentation of a con-
fession, or in fact, any Family Court evidence whatsoever.

When the reliability of a given witness may well be deter-
minative of guilt or innocence, non disclosure of evidence
affecting credibility of that witness justifies a new trial.

Biglio v. US, 405 U.S. 150, 31 LEd 2d 101 92 304 763 (1972).

The Defendant respectfully questions: How much more
would the relevancy of disclosure increase when the State-
in the instant case-sought to make him a witness against
himself? And in fact, succeeded?

The Defendant also questions: In the instant case, minus the validation of the States' assertion, was there not a Fifth-amendment violation of his being protected against self-incrimination by his own compelled testimonial communication in the Family Court?

Fisher v. U.S., 425 US 391 409 (1976).

In Crane v. Sowders, 889 F.2d 715 (6th Cir. 1989), the court determined that the exclusion of evidence describing "specific circumstances" of teenage murder suspect's confession was error.

The Defendant submits that he was appointed counsel on July 10, 2004.

App. pgs. 46-47, lines 19-18.

The Defendant submits that the Family Court hearing was on October 12, 2004, and his appointed counsel did not appear with him.

App. pg. 80, lines 14-17.

On cross-examination at the PCR by the Assistant Attorney General the Defendant testified:

Q. And you're stating today, Mr. Terry, that you never admitted your guilt to DSS?

A. I'm stating today that I was not competent to enter a guilty plea or admit anything else, or even be in the courtroom. And that my attorney, had he gotten in touch and done a little bit of research, he would not have had me in that courtroom.

App. pg. 77, lines 12-19, and

Q. What I asked you was you're saying today that you never went to Family Court and admitted your guilt, is that correct?

A. What I'm saying today is that I have no recollection of what took place in Family Court.

App. pg. 77, lines 21-25.

Evidence is "unfairly prejudicial" if it will induce the jury to decide the case on an improper basis, rather than on the evidence presented.

US v. Miles, 207 F3d 988 (7th Cir. 2000).

The Defendant's questions: Would it not be even more so when entering a plea and the evidence is clearly no part of the record? As discovery? Not even with the support of a testimonial transcript?

At the Defendant's plea hearing the Solicitor Stated:

The Court: All right. Listen carefully while the State recites the Facts they'd prove at trial.

App. pg. 11, lines 24 and 25.

Mr. Newkirk: The Defendant admitted guilt in the DSS Family Court proceedings.

App. pg. 12, lines 17 and 18.

The Defendant respectfully submits that the "Appendix" will show that even though he introduced the Treatment Plans at the PER hearing as an exhibit, they were never registered, as such. Thus, omitting the only "Family Court documents" that would have been authoritatively and appropriately submitted, at any level in the course of this entire appeal process.....

App. pg. 67-68, lines 20-11.

..... and even then, the PER Judge denied the request.

App. pg. 68, lines 12-15.

And in so doing, eliminated any right to inference, re-
17.

erence, or reflection to the subject matter of Family Court criteria by the prosecution. Not only at the PER level, but the General Sessions level as well. And the Supreme Court.

As to the detrimentality of "alleged admission" not in evidence . . . , even if true . . .

The Fifth Amendment right attaches only when a person's compelled testimony is self-incriminating.

Estate v. Smith, 451 U.S. 454, 462 (1981).

The Supreme Court held that "compelled testimony" is self-incriminating when reasonable cause exists to believe that a direct answer supports a conviction or provides a link in the chain of evidence leading to a conviction.

Hoffman v. US, 341 U.S. 479 (1951); Marchetti v. US, 390 U.S. 39, 53 (1968).

And yet, both the PER "Final Order" and the S.C. Supreme Court "Opinion" render the admission "substantiated Fact." Not to mention the Assistant Attorney General's "post-and-pre-trial PER motions, and Appellate (Certiorari) petitions and briefs."

In the PER Final Order the Judge addressed (much) the issue of the admission by reflecting to the "recitation is."

of the Facts" from the Defendant's Plea hearing. Compiled with an assessment of his PCR testimony concerning the definition of the admission in Family Court, and the Court Order.

And, again in so doing, ruled on the context of the admission as no misconduct, citing:

"A prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." . . .

Biglio v. US, 405 U.S. 150, 153, 92 S. Ct. 763 31 L.Ed.2d 104 (1972).

Rather than ruling on the Defendant's "actual misconduct" issue of the admissibility of any statement as evidence by the Solicitor in General Sessions, not presented through the proper due process channels, as discovery.

"Structural errors" calls into question the very accuracy and reliability of the trial process, and thus, are not amenable to harmless error analysis, but require automatic reversal.

Quintero v. Bell, 256 F3d 409 (6th Cir. 2001); Shewfelt v. Alaska, 228 F3d 1088 (9th Cir. 2000).

Harmless plain error does not exist, all plain errors are harmful.

US v. Innamorti, 996 F2d 456 (1st Cir. 1993).

Did the PER Judge err in granting relief based upon just one allegation of ineffective trial counsel?

Ground / Argument III

The Applicant's trial counsel testified at the PER hearing that he (counsel) had time to review the discovery package, as well as, review it with the Applicant.

PER Trans. p. 84, lines 14-16; p. 92, lines 22-1; p. 93, lines 4-10.

Therefore, counsel had to have come across the "Property and Evidence Reports" that introduced the "Tape Kit and clothing" as being in possession of both the Greenville County Sheriff's Department and the Solicitor's Office for pending use in General Sessions Court. PER Trans. pages 88-89, lines 23-4. ^{← counsel}

Yet the Applicant's - by his own admission - Failed to make any inquiry into the "whereabouts of, or results to" any of this evidence. PER Trans. p. 90, lines 4-16.[†]

So in contradiction to defense counsel's above testimony, the Applicant could not have been informed of the fact that the SLED results (exhibit P-2 / PER) showed "no incriminating evidence," taken from the alleged victim's body.

Further, the Applicant's counsel **testified** that he was not made aware of a Family Court hearing, though at

[†] *Becker v. Estelle*, 74 F.3d 1321, 1323 (9th Cir.) - no follow up on exculpatory Report on semen by defense counsel.

the time, he was appointed counsel - he did also testify that he did receive and review the "Treatment Plans" in the State's discovery package from the Family Court hearings. PCR Trans. p. 85, lines 1-6. (See exhibit)

Stipulated in the treatment plans were a requirement for the Applicant to within 15 (Fifteen) days of this Order schedule a psychological evaluation.

The Petitioner respectfully submits that again by his trial counsel failing to investigate whether or not the evaluation took place - some (4) Four months prior to his appearance in General Sessions Court, and some (3) months after his arrest, when he (counsel) received notice - by the means of making an "Initial Contact" to ascertain any perspective(s) from the Applicant himself, it cannot be said that defense counsel was adequately knowledgeable of his client's circumstances to work towards or render any guilty plea.

The rules of both Criminal Procedure and Lawyer Conduct Codes dictate that defense counsel at the earliest possible convenience "consult with a client" to solicit / elicit information for use in preparation for trial.

The Petitioner contends that had his counsel made that initial contact, he (counsel) would have discovered procedural / due process violation where the Petitioner - then the defendant - was housed in the mental health wing. *Williamson v. Ward*, 110 F.3d 1508, 1516 (10th Cir. 1997); *Lema v. U.S.* 387 F.2d 48, 54-55 (1st Cir. 1993) - no competency testing.

of the Greenville County Detention Center, under "psychotropic medication," and up to the day of his General Sessions appearance and beyond - without a psychological evaluation. PCR Trans. pgs. 60-62, lines 2-25.

A due process stipulation that to this very day is a prerequisite to my being released and of which was / has yet to be fulfilled.

A due process violation that went unchallenged by defense counsel, and had to have been a "major factor" in determining whether to advise a guilty plea, and of what nature. Such as a possible insanity defense.

Lastly in this context, the final mitigating factors. While defense counsel testified that there was / were no state plea offer - that he recalled seeing "basically / concurrent time"; PCR Trans. p. 85, lines 12, "The record shows that on January 18, 2005, - along with the State's 'Itemized discovery' document list" - there was, a second (or actually the first) plea offer forwarded to the Applicant's defense counsel, where the Solicitor offered to "discuss a cap on active time". PCR Trans. pgs. 97-98, lines 15-19.

A mitigating factor of "grossly / negligent" counsel representation, resulting in the Applicant's NOT being able to benefit from any "probable, substantial" "iniciencies" - even to this day. A mitigating factor - in

the Applicant's case at PCR - where the State felt it quite necessary to challenge the introduction of the plea offers into the record, and where the PCR Judge both cited that the plea offers constituted being "discovery material" overlooked by defense counsel even though he stated under sworn testimony that he had the time to thoroughly study all discovery contents and review them with the Applicant - and against the State's objections made the offers protected and preserved as not the Applicant exhibits for the Record on Appeal, but rather, the Court's exhibit (C-1) preserved in the Applicant's behalf. PCR Trans. p. 98, lines 15-19.

A plea of guilty is constitutionally valid only to the extent it is "voluntary and intelligent." Brady v. United States, 397 U.S. 742, 748 (1970). With the advice of competent counsel. Tollett v. Henderson, 411 U.S. 258, 263 (1973).

The District Court in a thoughtful discussion held that a defendant counsel's failure to communicate a plea bargain offer would deny the defendant of his sixth and fourteenth amendment rights.... Failure by defense counsel to communicate a plea offer to a defendant deprives of the opportunity to present a plea bargain for the consideration of the State Judge and on acceptance by the

judge, to enter a guilty in exchange for a lesser sentence.

"A subsequent fair trial does not remedy this situation."
U.S. ex rel. Caruso v. Zelinski, 689 F.2d 435 (3rd Cir. 1982).

Ambiguity of language in plea agreement is construed in favor of defendant and against the government.

Margalli-Clivura v. U.S., 43 F.3d 345 (8th Cir. 1994).

In the instant case, the defendant's trial counsel indisputably never gave his informed opinion on whether the State's plea offer of January 18, 2005, had merit or should be considered, much less accepted:

Q. Okay. And were there plea offers provided to you by the State?

A. There was no plea, concurrent time was basically the only thing I recall.

Q. All right. Did you ever discuss a cap with Ms. Seay?

A. I don't recall discussing a cap.

Q. All right. Despite the fact, I guess, her initial January 18, 2005 plea offer does state that she was willing to discuss a cap?

1. The State Prosecutor.

A. Yeah, but I don't think we did.

App. p. 84.

By counsel's own admission, he did receive the State's discovery package, which included the plea offer to discuss a cap. The Defendant would respectfully question: What is the definition of a "basically concurrent" time? Counsel also stated:

A. We didn't think that, you know because of his record, that he would get a substantial amount of time. We didn't anticipate the amount of time, but we thought that he was in a good position to get some leniency.

App. p. 91, lines 9-12.

The Defendant submits, while it might not be possible for the litigants to absolutely foresee actual sentencing time, he (Defendant) could have at least had the secure understanding of what time the State was going to pursue, if he had chosen to intelligently plead on all the charges, which, with the exception of the CSC charge, he might have been willing to do.

The Defendant's plea transcript denotes "no plea colloquy" whatsoever between any parties involved in this

case, and as such, the Defendant respectfully questions:

How is it possible - based upon his trial counsel's contradictory testimony in the PER transcript of reviewing the discovery package with the Defendant" (App. pg. 93, lines 8-10), and "talking about appearing in court to plead guilty" (App. pg. 90, lines 16-17), yet, acknowledging "no discussion or disclosure of any plea offers or arrangements, (cap or otherwise)" (App. pg. 85, lines 10-21) - that there was no constance of manifestly ineffective assistance of counsel on this issue alone warranting relief?

This Circuit has held that defendants in a criminal case have the constitutional right to be fully advised about all plea offers and discussions, and then receive counsel's informed opinion as to what pleas should be entered.

Boria v. Keane, 99 F.3d 492 (2nd Cir. 1996).

Second, the duty to give an opinion to an offer is not a delicate tactical matter subject to being unfairly second-guessed after a trial or plea situation is over. It is an unavoidable duty grounded in the Sixth Amendment's guarantee to effective counsel, the benefit of which inures to all criminal defendants whether or not they admit or deny their guilt when they walk in counsel's door. Where counsel does not provide such information, advice, and professional opinion to the defendant, counsel has performed ineffectively.

Boria, citing Strickland v. Washington, 466, US 668 (1984).

The appeals court stated that the attorney breached his duty to advise defendant about the desirability of a plea by grossly underestimating sentencing.

U.S. v. Gordon, 156 F.3d. 376 (2nd Cir. 1998).

Unlike the case in Boria, where the court simply chose not to address the "performance component" of ineffectiveness of defense counsel for failure to disclose the plea offer or properly advise plea options in violation of Strickland, supra, 466 U.S. at 697 (1984), the PER judge in the defendant's case, heard rather extensive testimony from the litigants, did in fact, consider, mitigate, and overrule in favor of the Defendant on admittance of the plea offers. And then ruled by general decree - with no explanation in his final order. That counsel's ineffectiveness on this issue was "unremarkable," against the Defendant's allegations.

Clearly, defense counsel's failure to advise the Defendant of his right to a direct appeal was reversible error.

To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.

Davis v. State, 288 S.C. 290, 342 S.E. 2d 60 (1986); White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

In the instant case, the Defendant testified at PER:

Q And you didn't file an appeal, why not?

A. I had no knowledge of -- I am -- prior to being under -- turning myself in I was an assistant manager at Wal-Mart. I had no idea of the legal sense or concept of what my rights were or anything else. Nor was I advised by my attorney that I should file for an appeal nor was I 100 percent sure even today what a direct appeal is.

Q. So after receiving a 20 year sentence your lawyer said nothing to you about you have a right to appeal, do you wish to do so?

A. That is absolutely correct.

App. pgs. 45-46, lines 24-11.

There was also colloquy between the court and the solicitor:

Solicitor: Regarding the guilty plea issue -- pardon me, the appeal issue, case of *Weather's* vs. State, that's a '95 case, says that trial counsel, it is not incumbent upon them to advise the rights of a guilty plea. That's long standing criminal courts allow. Terms of collateral consequences of

the plea, terms of conditional release ---

The Court: That law you said about appealing a guilty plea, doesn't that essentially say that there has to be some meritorious appeal or are you saying that's a blanket? A blanket rule that no one is ever required to tell a defendant that they have a right to appeal?

App. p. 102, lines 5-15.

Solicitor: *Weather's v. State* says that although a defendant has the right to appeal a guilty plea, there's no constitutional requirement that he be advised of his right absent extraordinary circumstances.

App. p. 102, lines 16-19.

The Defendant contends and submits that in taking into consideration - through hindsight perspective - defense counsel's purported testimonial assertion "that he (counsel) hadn't anticipated substantial time" due to the Defendant's record (or lack thereof), App. p. 91, lines 9-12, - onself such as the Defendant allegedly having counsel's full support by rendering a "meaningful adversarial

testing of the prosecutor's case could have and should have met the criteria of extraordinary circumstances warranting the advice of a direct appeal. Even in, and under the circumstances of a plea.

A criminal defendant is entitled to counsel whose undivided loyalties lie with his client.

U.S. v. Jeffers, 520 F.2d 1256, 1263 (7th Cir. 1975).

Further, it was ruled ineffective assistance when counsel failed to file an appeal despite defendant's request and fact that defendant had pled guilty in prior proceeding.

Martin v. U.S., 81 F.3d 1083, 1084 (11th Cir. 1996); Hooper

v. U.S., 112 F.3d 83, 87 (2d Cir. 1997).

In reiterated summation the Defendant submits that counsel's testimony of allegiance to the Defendant bears several incongruities: i.e.: PER Direct Exam.,

Q. Did you File a Brady Rule 5 in this case

A. I did not do a motion as the normal course. I'm a former prosecutor, I know Bryna and I called her and she said she would give it to me.

Q Did the solicitor in this case have an open File policy?

1. The issue of a direct appeal was raised as the least of the meritorious issues after five years, and three levels of appeal.

11.

A. She did.

Q. Did you make copies of everything that was in her file?

A. I did.

Q. Was there a SLED Report in that file?

A. There wasn't a SLED Report in there.

Q. Were you ever made aware that there was a SLED Report?

A. Never made aware of a SLED Report.

App. p. 80, lines 2-13

The Defendant contends that while there was no SLED Report, there was clear evidence of a rape kit involved and as such, results - either pending or completed. Further, by defense counsel's own admission of being also a "former prosecutor," surely there was the dual benefit of "investigatory prowess" that should have been at the Defendant's disposal, and yet....

on cross-examination by the Defendant's PCR counsel, his trial counsel testified:

Q. All right, so you never had any independent testing done or demanded the SLED results prior to having Mr. Terry plead guilty?

A. Never.

Q. Beg the Court's indulgence. And obviously, because you didn't have the SLED report, you never advised Mr. Terry prior to his plea that there was no semen or any kind of physical hairs or anything found in the rape kit?

A. Right.

Q. And, in fact, you never viewed the rape kit at all to see whether there was any doctor's evidence of any findings of tearing or anything like that?

A. No. We talked about him appearing in court to plead guilty and that he was guilty.

App. p. 90, lines 4-17.

The Defendant submits that the testimony of counsel on the preceding page(s) concerning discovery on cross-examination is clearly contradictory of his testimony on "direct examination" where when asked:

Q. Do you recall how many times you met with Mr. Terry before the plea?

and he responded....

A. I do not recall how many times I met with him. I do recall the time we did enter the plea, that I went over the materials that I had in my possession.

App. p. 79, lines 21-25.

The Defendant respectfully questions, How is it possible that defense counsel stated that he (counsel) copied the discovery under an "open file policy," yet the Defendant at the PCR hearing submitted as an exhibit a document showing that his counsel "hadn't requested" after seven months of being appointed,

and less than sixty days prior to the General Sessions appearance - a discovery. And, in fact, an exhibit listed "itemized discovery documents" forwarded by the solicitor, along with the First plea offer and a mutual request for Brady materials, in return. (See exhibit P-6.)

The Defendant submits that the best explanation for all of counsel's testimonial contradictions can be determined where counsel was asked:

Q. And, again, the State referred in their case just during the plea, in their presentation of the facts, the State referred to Mr. Terry admitting guilt in Family Court and you never challenged that saying, "well no, he admitted sexual abuse, not that he had vaginal and anal intercourse with his daughter?"

and he responded....

A. Right, To me it's all the same.
Sexual conduct. Misconduct

Q. So you didn't make that distinction?

A. I didn't make that distinction

Q. Because sexual abuse was the same as sexual battery?

A. It's all the same, "messing with children".

Q. Is that the way you discussed it with Mr. Terry as well when you were going over it with him?

A. Well, when I told him what the allegations were and he was calm about it. And didn't just say okay. He understood! That's what he was charged with.

App. pgs. 86-87, lines 16-9.

Under sworn direct examination by PER defense counsel, the Defendant testified:

Q. Did he ever review the discovery with you?

A. No Susanna, he did not.

Q. Now at this point have you had a chance to

* The "quotation" was deliberately extricated from the PER Transcript prepared by the solicitor. See PER Order pg. 6, lines 5-8.

review the discovery against you?

A. I have had an opportunity through yourself.

Q. All right.

A. Excuse me, to review what has been presented in the course of this last two and half years your Honor, I've been getting bits and pieces. And of course I'll get as to where that inconsistency falls and why it falls, but I've been managing to get bits and pieces, so to say that I believe that I believe that I have had an opportunity to review the entire discovery, I would have to say no. But I believe I have reviewed enough of the credible evidence for my allegations.

Q. All right. But before you pled guilty had you reviewed your discovery?

A. Absolutely not.

App. pgs. 47-48, lines 19-8.

1. It would be discovered by the Defendant after the PCR hearing, the existence of a Toxicology Report, completed in 2007.

Further :

Q. Now at the time of that guilty plea, how many times had you met and discussed your case with Ernie Hamilton, your defense attorney?

A. That would come to a total of zero.

Q. So it's your testimony that you never met with him.

A. Until the day of my plea hearing for a 10 minute consultation. That's my answer.

Q. All right. And he had never provided or reviewed with you discovery or the evidence against you?

A. Absolutely not.

App. pgs. 50-51, lines 25-9.

And Finally :

Q. And at the time of your plea did he

Let's discuss the fact that the SLED report came back with no evidence of semen or anything like that?

A. My recollection of our brief consultation prior to my being called upstairs was him on one side of the partition, myself on the other. No paperwork exchanged. A brief consultation, unfortunately, which I cannot elaborate back to you word for word.

App. pg. 51, lines 10-17.

Q. Now, if you had known that the SLED -- that there was no forensic evidence of any kind of sexual battery, would you have pled guilty?

A. From what little I understand of legality, Susannah, I think that someone would plea only when there's no evidence that vindicates. No I would not have pled guilty.

App. pg. 53, lines 4-9.

The Defendant finally submits that, clearly taking into consideration the aforementioned discrepancies in counsel's testimonies and admissions there can be no question that under the circumstances the Defendant has become both a party and a victim of substantial constitutional violation(s) under the Fourteenth Amendment "due process" statutes under more than the ineffective counsel based upon failure to explain the definition of sexual battery.

Conclusion

Defendant-Terry-respectfully moves this Court to set aside his conviction and sentence for reconsideration on the Lewd Act charges and vacate his conviction and sentence on the charge of Criminal Sexual Conduct. And/or any other relief within the jurisdiction and discretion(s) of the honorable Court.

"Structural Errors" call into question the very accuracy and reliability of the trial process, and thus, are not amenable to harmless error analysis, but require automatic reversal.

Shawlett v. Alaska, 228 F.3d 1088 (9th Cir. 2000)

Respectfully,

Verification

I, Terrence D. Terry, hereby declare under penalty of perjury that the facts stated in the foregoing memorandum are true and correct.

S. Mr. Terrence D. Terry
Terrence D. Terry
Defendant

Sworn to and before me,
this 28 day of July, 2010.
Joyce L. Young L.S.
Notary Public of South Carolina
My commission expires: _____

My Commission Expires August 23, 2011

JAMR060

03/09/05 02:18

Greenville County Detention Center
Inmate Booking Report

Page 1

(PCR / Exhibit - P-1)

Jail #: 0212 Pack #: 208305 Juv#: Cell: MHC03 Custody Level: MED SS

Name (L/F/M/S): TERRY

TERRENCE

DIMINGO

Addr: [REDACTED] C: GREENVILLE S: SC ZIP: 29605
 POB: WA DOB: [REDACTED] Age: 45 Race: B Sex: M WgtIn: 129 HgtIn: 509
 SSN: [REDACTED] Hair: BLK Eyes: BRO Wgtout: HgtOut:
 Phone: 864-000-0000 Rel Pref: COT Educ: XXX Ins:
 * Attorney: HAMILTON, ER Photo#: 11100719 B.Money: \$0.00

NextKin (L/F/M/S): HARRIS

JACQUELINE

Phone: [REDACTED] Relationship: CO

Addr: [REDACTED] C: BALTIMORE S: MD ZIP: 21217

Notify Victim?: Y Arrs Off: CLARK Records Clerk: DGLENN
 Booked: 10:41 07/10/2004 B.ORI: 000 B.Off: DGLENN S.Off: RLAUPER

Charges: Warrant Case Court & Judge Ori
 LEWD ACT: COMMIT ON MINOR U/16 I466187 04098072 1 SIMMON HUDSON 000
 Indict: 2005GS2301157 Arrest: 07/10/2004 10:41 RR: 03/09/2005 02:17 Y
 (CC) Sentenced on 03/08/2005 to 15 yrs
 LEWD ACT: COMMIT ON MINOR U/16 I466191 04098089 1 SIMMON HUDSON 000
 Indict: 2005GS2301158 Arrest: 07/10/2004 10:41 RR: 03/09/2005 02:17 Y
 (CC) Sentenced on 03/08/2005 to 15 yrs
 CRIMINAL SEXUAL CONDUCT W/MINR 1ST I466186 04097620 1 SIMMON HUDSON 000
 Indict: 2005GS2301274 Arrest: 07/10/2004 10:41 RR: 03/09/2005 02:17 Y
 (CC) Sentenced on 03/08/2005 to 20 yrs

Arrest Date: 3/9/05

Judge: Miller

Release Where? CUST

S.D.C.

Released Off-> P: [REDACTED]

B/F: ADX/61007

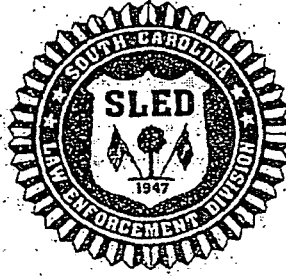
S: [REDACTED]

S: [REDACTED]

Date: 3/9/05

(PER / Exhibit - P-5)

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
GovernorROBERT M. STEWART
Chief

August 9, 2005

Mr. Terrence D. Terry, #307935
McCormick C. I. / F2-150-B
386 Redemption Way
McCormick, SC 29899

RE: SLED LAB NO.: L05-2011
TERRENCE D. TERRY / Minor I

Dear Mr. Terry:

* A search of our database reveals that all testing has not yet been completed concerning the above referenced case.

You may wish to check back with me in a month or so.

Sincerely,

Michael J. Brown, Lieutenant
Supervisory Special Agent
FOIA/Subpoena Compliance Coordinator

MJB/mcp/FOI#2005-418

* This must have been the Toxicology test that was completed in November of 2007!
Two years after my plea! 8 Months after my PER!!



An Accredited Law Enforcement Agency

P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7041

Exhibit - P-6
 State of South Carolina
 Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
 Telefax: 864-467-8610



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

Solicitor
 Robert M. Ariail

January 18, 2005

Ernie Hamilton, Esq.
 311 Mills Ave.
 Greenville, SC 29605

Re: State of South Carolina vs. Terrance Dimingo Terry
Warrant(s) 1466191, 1466187, 1466186

Dear Ernie:

Although I do not have a discovery request from you at this time, I am providing the following documents:

1. Above-referenced ticket (or warrant);
2. GCSO Incident Report by Officer RF Wright, dated 7-7-2004, 1 page;
3. GCSO Supplemental Report by Officer RF Wright, dated 7-4-2004, 1 page;
4. GCSO Supplemental Report by Officer D Kettelson, dated 7-7-2004, 1 page;
- * 5. Property and Evidence Report, 1 page;
6. GCSO Supplemental Report by Inv. TD Bracken, dated 7-7-2004, 1 page;
7. GCSO Supplemental Report by PG Clark, dated 7-10-2004, 1 page;
8. GCSO Supplemental Report by Inv. TD Bracken, dated 7-8-2004, 2 pages;
- * 9. Property and Evidence Report, 1 page;
10. GCSO Incident Report by Officer Jim Austin, dated 7-8-2004, 1 page;
11. GCSO Supplemental Report by Officer Jim Austin, dated 7-8-2004, 1 page;
12. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
13. GCSO Victim/Witness Statement^{Minor 2}, dated 7-8-2004, 1 page;
14. GCSO Incident Report by Inv. Cheryl Cromartie, dated 7-8-2004, 1 page;
15. GCSO Supplemental Report by Inv. Cheryl Cromartie, dated 7-8-2004, 2 pages;
16. GCSO Supplemental Report by Inv. TD Bracken, dated 7-10-2004, 1 page;
17. GCSO Supplemental Report by Officer PG Clark, dated 7-10-2004, 1 page;
18. NCIC Criminal History.

* Property and Evidence reports documented - 5. and 9. Infer 2 reports.
 (See Exhibits)

Exhibit - P-6

Ernie Hamilton, Esq.
January 18, 2005
Page 2

**

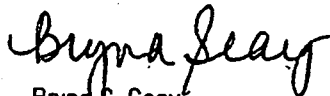
Please contact our office regarding a mutually convenient time for you to view evidence which may be contained in the Property and Evidence Room at the Law Enforcement Center here in Greenville County. Pursuant to discovery rules, we will allow you to inspect the evidence which may be utilized at trial.

*

Also, please find enclosed the State's Request for Reciprocal Discovery and the State's Request for Notice of Alibi and/or Insanity Defense, pursuant to Rule 5, South Carolina Rules of Criminal Procedure.

If you have any questions regarding this defendant's case(s), please do not hesitate to call me. I look forward to working with you.

Sincerely,



Bryna S. Seay
Assistant Solicitor
Thirteenth Circuit Solicitor's Office

BSS/lmb

Re: Terrence Dimingo Terry

*** Please acknowledge receipt of discovery by signing here and returning a copy of this to me within 10 days. If I do not hear from you or receive a copy of this acknowledgement within the allotted time, I will assume you received the enclosed documents and have no objections.

Attorney for Defendant

(PCR / Exhibit - P-7)

* Is this an outdated authorization form?

UCPR003T
06/15/2005Property and Evidence Disposition Report
for the Period of 01/01/1980 to 06/15/2005

Page 1

Investigating Officer: 00546 BRACKEN TD
Date & Time Impounded: 07/07/2004 14:03
Impounded Addr: [REDACTED]No: 1 Unit:
City: GREENVILLE, SCCase Number: 01-2004-097620 Report No: 01
Case Type: 061 SEXUAL CRIMES
Prop Status: EVIDENCE-GS COURT

N#	Name	Ty	Description	Name List	D#
01	TERRY, ZELMA ZELPHINS	11	OWNER OF PROPERTY		00

R#	Item S#	Qty	Item Type	Make/Model/Color	Description	Disp
01	A	01	0001 CLOTHING Storage: 22-3	Val	Out	WHITE JUVENILE SHORTS
01	B	01	0001 CLOTHING Storage: 22-3	Val	Out	PINK JUVENILE PANTIES
01	C	01	0001 MISC Storage: 22-3	Val	Out	BLUE MAGIC HAIR GREASE

Warrant#	Name	DOB	R	S	Offense	Date
I466186	TERRY, TERRENCE DIMINGO	10/12/1960	B	M	CRIMINAL SEXUAL CONDUCT W/LEGAL SPOUSE 1ST	
Court: CLERK	Terry, Terrence D	Status: Plead Guilty				Plead Guilty/Clerk Criminal
Disp: Plead Guilty/Clerk Criminal		Judge: Hudson				Date: 03/08/2005
Sentence: Sentenced						
I466186	TERRY, TERRENCE DIMINGO	10/12/1960	B	M	CRIMINAL SEXUAL CONDUCT W/LEGAL SPOUSE 1ST	
Court: SCC2	Terry, Terrence D	Status: Outstanding				
Disp: [REDACTED]		Judge: [REDACTED]				Date: [REDACTED]
Sentence: [REDACTED]						

AUTHORIZATION FOR DISPOSITION

Disposition Type:
(Circle one)

DISPOSE OF

HOLD

DEPOSIT

AM
Items

Authorized By:

Please Print Name

T. Bracken

Signature

S46

Star No.

0620 05

Date

 * NOTE: PLEASE REPORT TO P&E TO SIGN ALL AUTHORIZATIONS FOR RELEASE TO OWNER. *

CID
 2-28-07
 RECORDS
 COPY

* Same question?

UCR003T
06/15/2005Property and Evidence Disposition Report
for the period of 01/01/1980 to 06/15/2005

Page 2

Investigating Officer: 00546 BRACKEN TD
Date & Time Impounded: 07/07/2004 18:20
Impounded Addr: GROVE RD

Case Number: 01-2004-097620 Report No: 02

No: 701 Unit:
City: GREENVILLE, SCCase Type: 061 SEXUAL/CRIMES
Prop Status: EVIDENCE-GS COURT

N# Name

Ty Description Name List

D#

02 Minor 1

11 OWNER OF PROPERTY

00

R# Item S# Qty Item Type

Make/Model/Color

Description

Disp

02 A 01 0001 SEXUAL ASSAULT COLLE
Storage: REF

VAL

Out

SEXUAL ASSAULT COLLECTION KIT

AUTHORIZATION FOR DISPOSITION

Disposition Type: (DISPOSE OF
(Circle one)

HOLD

DEPOSIT

Items

RECORDS
COPY

Authorized By:

Please Print Name

Signature

Star No.

Date

* NOTE: PLEASE REPORT TO P&E TO SIGN ALL AUTHORIZATIONS FOR RELEASE TO OWNER. *

(Per Exhibit - P-1)

(PCR/Exhibit P-9)



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 8, 2007

Mr. Terrence D. Terry, #307935
McCormick Correctional Inst
F2-A-256
386 Redemption Way
McCormick, Sc 29899

Re: Letter received by this office

Dear Mr. Terry:

We are in receipt of your letter, dated February 5, 2007 concerning an appeal filed on your behalf.

According to our records there is no indication that an appeal has been filed in your behalf. If you were represented at trial by a Public Defender, appointed counsel or by retained counsel, you should immediately contact that individual and advise them of your desire to appeal.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

CLERK

KAR/ab

cc: Ernest Hamilton, Esquire

(PCR/Exhibit-C-1)
 State of South Carolina
 Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
 Telefax: 864-467-8610



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

Solicitor
 Robert M. Ariail

1/18/2005

ERNEST HAMILTON
 311 MILLS AVENUE
 GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466191 Sex / Lewd Act, committing or attempting.

1466187 Sex / Lewd Act, committing or attempting

1466186 CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE

The State will make the following sentence recommendations/negotiation:

I WILL RECOMMEND THAT ALL SENTENCES RUN CONCURRENT. I AM WILLING TO DISCUSS A CAP ON ACTIVE TIME IF YOU WISH.

Other conditions/comments:

DEFENDANT HAS BEEN IN LEC SINCE 7-10-04. HE ADMITTED COMMITTING CSC 1ST W/A MINOR. SENTENCE SHEETS ENCLOSED. PLEASE ADVISE. THANKS, BRYNA

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Bryna Seay
 Bryna Seay
 Assistant Solicitor

(PCR / Exhibit - C-1)
 State of South Carolina
 Solicitor, Thirteenth Judicial Circuit

Telephone: 864-467-8647
 Telefax: 864-467-8610



Greenville County Courthouse
 305 E. North Street, Suite 325
 Greenville, SC 29601-2185

Solicitor
 Robert M. Ariail

2/23/2005

JAIL

ERNEST HAMILTON
 311 MILLS AVENUE
 GREENVILLE, SC 29605

RE: Plea Offer for State v. Terrence Dimingo Terry

Dear Ernest Hamilton :

I am willing to make the following proposal to your above-referenced client in order to dispose of these charges by way of a guilty plea:

The Defendant will plead guilty to the following:

Warrant Number: Charge:

1466186 CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE

1466187 LEWD ACT ON A CHILD

1466191 LEWD ACT ON A CHILD

The State will make the following sentence recommendations/negotiation:

CONCURRENT ON ALL.

Other conditions/comments:

DEFENDANT HAS BEEN IN THE LEC SINCE 7-10-04. MADE COMPLETE ADMISSION OF GUILT IN FAMILY COURT. SENTENCE SHEETS ENCLOSED FOR YOUR CONVENIENCE. ?

Please contact me as soon as possible with your client's response as plea negotiations must be concluded and the guilty plea entered before 5/23/2005 or this and any other offers are automatically withdrawn. If your client does not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without further negotiation.

Yours very truly,

Bryna Seay
 Bryna Seay
 Assistant Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

TERRENCE DIMINGO TERRY,
APPLICANT,

VS.

STATE OF SOUTH CAROLINA,

RESPONDENT.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2005-CP-23-7327

) REF. 2005-GS-23-1157 & 8, -1274

) ORDER

This matter comes before me by way of application of post-conviction relief filed November 11, 2005, alleging prosecutorial misconduct, ineffective assistance of counsel, and lack of subject matter jurisdiction. An amended application was filed February 5, * 2007, incorporating the issues presented in the initial application and adding the additional ground that the plea was not knowingly and voluntarily made in violation of the due process guarantees of the South Carolina and U.S. Constitutions. The Respondent filed its Return on June 6, 2006. A continuance was granted April 19, 2006, and an evidentiary hearing was held on March 1, 2007, at the Greenville County Courthouse. The applicant was present and represented by Susannah C. Ross, Esquire. Karen C. Ratigan, Assistant South Carolina Attorney General represented the Respondent. The applicant testified on his behalf and Ernest Hamilton, Esq. testified for the State.

PROCEDURAL HISTORY

The applicant is presently confined at McCormick Correctional Institution of the South Carolina Department of Corrections. Mr. Terry was indicted by the Greenville County Grand Jury at the February 2005 term of General Sessions for two counts of lewd.

* As well as March 1, 2007, at the hearing where I was allowed to submit my Memorandum of Law!

act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274). On March 8, 2005, the applicant pled guilty before the Honorable Edward W. Miller to all three indictments receiving fifteen years concurrent on the lewd act upon a child indictments, and a twenty year concurrent sentence for the one count of criminal sexual conduct with a minor, first degree. Ernest Hamilton, Esq. represented the applicant. No appeal was filed.

ALLEGATIONS

The applicant requested post-conviction relief for the following reasons:

- I. Prosecutorial misconduct
 - a. Violation of Brady and Rule 5 SCRCrimP
 - b. Failure to test and destruction of evidence
 - c. Use of uncounseled "admission" not in discovery
- II. Ineffective assistance of counsel
 - a. Failure to address mental health issues
 - b. Failure to investigate
 - c. Failure to present mitigating evidence
 - d. Failure to effectively negotiate with the solicitor
 - e. Failure to adequately advise the applicant
- III. Lack of subject matter jurisdiction
 - a. Invalid arrest warrants and indictments
 - b. No preliminary hearing

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court has had the opportunity to review the record and has heard the testimony and arguments presented at the PCR hearing. Pursuant to S.C. Code Ann. § 17-27-80 (2003), following are the relevant finding of facts and conclusions of law.

Prosecutorial Misconduct

The applicant alleged that the solicitor engaged in prosecutorial misconduct by not providing the SLED lab report for the rape kit analysis pursuant to Brady and Rule 5 of the South Carolina Rules of Criminal Procedure, failing to submit a pair of underpants

and shorts in evidence for forensic testing, and stating during the guilty plea that Mr. Terry admitted guilt in Family Court when the alleged admission was only as to the finding sexual abuse not sexual battery and was not provided in discovery. ^{*a.} I find that the allegations of prosecutorial misconduct are without merit.

The applicant submitted as an exhibit the SLED lab report for the rape kit analysis which was dated March 2, 2005. It showed no sperm or semen found and was neither exculpatory nor incriminating. ^{*b.} The applicant pled guilty March 8, 2005. No evidence was presented as to whether the solicitor had received the report prior to the guilty plea. ^{**} However, the report was present in the solicitor's file over one year later when the file was subpoenaed by the applicant. The applicant and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. ^{Rules 5:6 - 6CCrIMP!} While a Brady violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by the applicant failed to adequately support a Brady claim because he failed to demonstrate (1) the evidence was favorable to the accused, ^{SUE PROPERTY REPORT} (2) it was in the possession of ^{Page 2- SLED Report (cc:) Not in discovery! Before Plea!} or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999).

The applicant alleged that the solicitor failed to submit a pair of underpants and shorts collected as evidence to SLED for forensic testing and presented a property and evidence report showing that the potentially exculpatory evidence was destroyed in 2005. ^{*c.} Because the applicant failed to prove the evidence was exculpatory or that the solicitor acted in bad faith, the solicitor's actions did not amount to prosecutorial misconduct. The State does not have an absolute duty to preserve potentially useful evidence that might

exonerate a defendant. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d ^{*a.- No Family Court evidence provided in discovery! *b. SUE SLED Report} ^{*c.- What if the report listed 4/15/05, rather than no (s)!?} ^{*NO, JT WAS NOT!}

281 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means. State v. Mabe, *supra*; State v. Jackson, *supra*.

The transcript of the applicant's guilty plea states in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17). According to the applicant's testimony, he was not represented by counsel at the DSS proceedings and any admission was only the general admission of and agreement with the family court's finding of sexual abuse, not an admission of guilt of sexual battery which Mr. Terry expressly denied. * The applicant submitted a family court order contained in the file subpoenaed from the solicitor which said that Mr. Terry was in agreement with the finding of sexual abuse of his three step-daughters to support the assertion that the solicitor was aware that any admission was of sexual abuse only. I find that this did not entail prosecutorial misconduct, a "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Ineffective Assistance of Counsel

The applicant alleged counsel's performance was deficient because of the following:

* The two Court Orders were submitted to show that a "psychological evaluation" was ordered, that never took place. As well as, NO JAIL TIME! Not a misconduct issue.

(1) failure to request an evaluation or discover mental health issues apparent due to the applicant's housing in the mental health sector of the law enforcement center and the fact the applicant was on prescription mental health medications for the nine months he was incarcerated prior to his guilty plea and at the time of his plea;

(2) failure to investigate by meeting with the applicant to discuss the case only once, the day of the guilty plea, not filing discovery, failing to review the evidence in property and evidence or request independent testing of that evidence, and failing to attend the family court hearing on the matter of alleged sexual abuse when the applicant appeared without counsel;

(3) failure to present mitigating evidence at Mr. Terry's guilty plea by not mentioning the applicant's twelve year military background, depression and mental health background, or the failure of the victims to attend the plea or recommend incarceration;

(4) failing to effectively negotiate with the solicitor pleading "straight up" despite lack of any physical or forensic evidence of sexual battery and the victim's statement that the sexual battery happened with her clothes on; and **The Two Plea Offers w/a cap!*

(5) failing to adequately advise the applicant providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery.

I find that these allegations are without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. The applicant stated that at the time of his guilty plea he had not been advised that sexual battery does not mean any battery of a sexual nature, but, rather, is statutorily defined to include only

certain specific acts, which can be loosely described as involving penetration of some
** Not addressed in this Order! Yet, Please See Court's Exhibit - 1!*

sort. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (S.C. 2001) *rev'd on other grounds*.

The applicant stated that he did not commit a sexual battery on his step-daughter and would not have pled guilty to criminal sexual conduct with a minor if he had known that it involved sexual penetration. Plea counsel testified that he met with the applicant one time, the day of his guilty plea, during the nine months he represented him. Counsel admitted that he did not review the meaning of sexual battery with the applicant saying that lewd act and criminal sexual conduct with a minor are basically the same thing, "messing with children." Plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented the applicant. Based upon the testimony of trial counsel and the applicant, I find that the plea attorney did not advise the applicant of the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree. Considering the entire record including the guilty plea transcript, I find that the error was not cured by the colloquy during the guilty plea.

To receive post-conviction relief for ineffective assistance of counsel a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Reasonable and prevailing professional norms would require that a lawyer advise a criminal defendant of the elements of the crime and that he ensure that the defendant understands the nature of the offense to which he is charged. The applicant's plea counsel did not do this. Where there has been a guilty plea, as here, the applicant must prove prejudice by showing that the result of the proceeding would

have been different and, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991). Upon hearing the testimony and reviewing the transcript of the plea, I find that the applicant has shown prejudice. Had the Applicant known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial.

Subject Matter Jurisdiction

The Applicant argues that the State lacked subject matter jurisdiction because of invalid arrest warrants and indictments as well as the fact that his case did not receive a preliminary hearing. I disagree and find that the indictments contain the necessary elements of the intended charge to confer subject matter jurisdiction regardless of any alleged errors in the warrants and the failure to have a preliminary hearing. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The applicant presents no evidence that a preliminary hearing was properly requested pursuant to Rule 2(b) SCrimP and even if it was properly requested, subject matter jurisdiction exists upon the proper indictment of the case even if a preliminary hearing is not held. State v. Ballington, 551 S.E.2d 280, 346 S.C. 262 (2001).

All Other Allegations

This Court finds that the applicant failed to prove any other allegations that were raised in the application or at the hearing in this case and not specifically addresses herein. Therefore, all such allegations are without merit and denied.

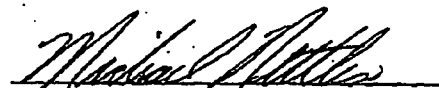
CONCLUSION

This Court grants Mr. Terry's motion for post-conviction relief based on ineffective assistance of counsel. The cases are reversed and remanded for a new trial and Mr. Terry is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated.

IT IS HEREBY ORDERED:

1. That the applicant's motion for post-conviction relief is granted;
2. That applicant's convictions of two counts of lewd act upon a child (2005-GS-23-1157 & -1158), and one count of criminal sexual conduct with a minor, first degree, (2005-GS-23-1274) are reversed and remanded; and
3. That the applicant is to be released to the custody of the Greenville County Detention Center where his original bond will be reinstated. !

AND IT SO ORDERED this 26 day of March, 2007


Michael G. Nettles
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Terrence D. Terry, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Florence County
Honorable Michael G. Nettles, Circuit Court Judge

Opinion No. 26683
Submitted May 28, 2009 – Filed July 13, 2009

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Salley W. Elliott and Assistant Attorney
General Karen C. Ratigan, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina
Commission on Indigent Defense, of Columbia, for
Respondent.

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review the post-conviction relief (PCR) judge's order reversing Terrence Dimingo Terry's (Respondent's) plea of guilty to criminal sexual conduct (CSC) with a minor, first degree and two counts of lewd act upon a child. We reverse.

FACTUAL/PROCEDURAL HISTORY

After Respondent's nine-year-old stepdaughter disclosed to her mother that Respondent had sexually abused her in July 2004, Mother confronted Respondent about the allegations. During this confrontation, it was revealed that Respondent's two other stepdaughters, ages eleven and twelve years old, had also been sexually abused by Respondent.

1st.

Subsequently, a family court proceeding brought by the Department of Social Services was conducted wherein Respondent admitted to the allegations. As a result, a treatment plan was put into effect to address Respondent's conduct. /.

In February 2005, a Greenville County grand jury indicted Respondent for two counts of lewd act upon a child involving the older two stepdaughters and one count of CSC with a minor, first degree regarding the allegations of the nine-year-old stepdaughter.

The next month, Respondent pled guilty to each of the three indicted offenses. At the plea proceeding, the circuit court judge inquired about Respondent's background in terms of his age, education level, and marital status. In terms of his health, Respondent indicated that he was currently taking medication for hypertension but that he felt fine and had not taken any medication, drugs, or alcohol within the twenty-four hours before the proceeding. Respondent acknowledged that he had previously been treated for "drugs and psychiatric." He did not, however, elaborate on this treatment. 2.

After the introductory questions of the plea colloquy, the judge informed Respondent of the offenses for which he was charged¹ and the maximum possible sentences for these offenses. Respondent indicated that he understood the charges and intended to plead guilty to each of the offenses. The judge then instructed Respondent that by pleading guilty he would waive the following constitutional rights: the right to a jury trial, the State's burden of proof, his right to cross-examine the State's witnesses, his right to present a defense, and his right against self-incrimination. Respondent stated that he understood these rights but had made the decision to plead guilty.

After admitting his guilt, Respondent indicated that he was satisfied with his counsel's representation and had been given ample time to review the State's evidence. 1st

The solicitor then provided the following factual basis for Respondent's guilty plea, stating:

On July 4th of 2004, [Respondent] put hair grease on his penis and on the victim's vagina and attempted to have sexual intercourse with her. When he was unable to do so he then penetrated her vagina with his finger and her anus with his penis. This victim was the [Respondent's] nine year old step-daughter.

¹ The judge read excerpts from the indictments. In terms of the charge of CSC with a minor, first degree the judge informed Respondent that the indictment "alleges you did in Greenville County July 4, '04 engage in sexual battery with Minor 1 less than eleven years of age."

As to one of the charges of lewd act upon a child, the judge stated that the indictment "alleges you did in Greenville County on or about - - between June 1st and June 25th, '04 being over the age of fourteen willfully and lewdly committed a lewd and lascivious act upon the body or its parts of child-victim #2, a child under the age of sixteen with the intent of arousing, appealing to, gratifying the lusts, passions, or sexual desires of yourself or the child." The judge reiterated this language as to the second count of lewd act upon a child with the exception that the date of the offense was May 31, 2004, and involved child-victim #1.

In May and June, 2004 [Respondent] also committed numerous lewd acts on his other two step-daughters, eleven and twelve years old by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs. All these incidents occurred while the family resided at [REDACTED] in Greenville County.

^{2nd} The [Respondent's] wife, the mother of all three victims confronted the [Respondent] when the nine-year-old victim disclosed her abuse. And the [Respondent] stated that he did not know why he did it. The [Respondent] admitted guilt in the DSS family court proceedings.

Following the solicitor's recitation of the facts, the judge asked Respondent whether the solicitor's statements were true. Respondent stated that they were true. Respondent's counsel then informed the judge that Respondent had admitted his guilt, but had told him "only a crazy person would do something like that." Counsel clarified that Respondent was not insane but recognized the "terrible act."

Subsequently, the judge sentenced Respondent to twenty years imprisonment for CSC with a minor, first degree and fifteen years for each count of lewd act upon a child. The sentences were to be served concurrently.

Respondent did not file a direct appeal of his guilty plea. Eight months after the plea, Respondent filed an application for PCR. In his application, Respondent requested relief on the following grounds: prosecutorial misconduct, ineffective assistance of counsel, and the plea court's lack of subject matter jurisdiction. In an amended application filed by his PCR counsel, Respondent asserted the following additional grounds for relief: his plea was not knowingly, voluntarily, and intelligently made; his plea counsel did not make him aware of the "nature and crucial elements of the charge against him"; at the time of the plea he was under the influence of prescribed mental health medications that affected his ability to comprehend what he was

doing; and his plea counsel failed to inform him of the right to appeal his guilty plea.

On March 1, 2007, the circuit court held a hearing on Respondent's PCR application. At the start of the proceeding, Respondent's counsel outlined Respondent's bases for his request for PCR. Counsel primarily focused her argument on Respondent's allegations of ineffective assistance of counsel.

Specifically, PCR counsel alleged that plea counsel was ineffective in the following respects: (1) he failed to bring to the court's attention Respondent's mental health issues, particularly the fact that Respondent was housed in the mental health section of the Greenville County detention center for nine months prior to the plea proceeding and was taking "antipsychotic" medication; (2) he failed to evaluate the State's evidence in that he did not make a discovery request and he did not view the physical evidence or the "rape kit"; and (3) he failed to offer any mitigation evidence, such as the lack of physical evidence, the absence of the victims at the plea proceeding, the Respondent's lack of a prior record, and the Respondent's twelve-year military history. Additionally, PCR counsel emphasized that Respondent's plea counsel failed to review the meaning of "sexual battery" with Respondent prior to the plea. Counsel asserted that the failure to review a crucial element of the offense was particularly significant given Respondent's competency was in question.

PCR counsel then called Respondent as a witness. Respondent testified that he met with plea counsel only once, the day of the plea proceeding, for a ten-minute consultation. He further stated that plea counsel never provided or reviewed discovery with him. Because he did not review any discovery materials, Respondent claimed he was unaware of the SLED report stating that no physical evidence was found on the clothing of the nine-year-old victim. Although Respondent acknowledged that he pled guilty, he claimed that he did not understand the nature of the charges, particularly the meaning of "sexual battery." Respondent stated that his plea counsel did not

explain the meaning of this term. He further testified that had he known the definition of "sexual battery," he would not have pled guilty.

Throughout his direct examination, Respondent repeatedly emphasized that he was unable to adequately comprehend the plea proceeding due to his mental health issues and the medications he was taking to treat these issues. Respondent contended that he admitted to the truth of the solicitor's factual recitation at the plea proceeding because he lacked the ability to comprehend and adequately defend himself at that time.

Although Respondent specifically denied committing a sexual battery on the nine-year-old victim, he admitted there was inappropriate touching. Despite the State's assertion that Respondent admitted to committing a sexual battery during the family court proceeding, Respondent testified he could not recall such an admission. Respondent acknowledged that the family court's order included a treatment plan stemming from a finding of sexual abuse. Respondent, however, noted that there was no finding of sexual battery or CSC with a minor. 3rd

On cross-examination, Respondent maintained that he did not inform the plea judge of the extent of his mental health problems because the "psychiatric medication . . . rendered [him] incompetent to speak for [himself]." Although Respondent acknowledged that he was aware of the plea proceeding, he contended he did not want to plead guilty and only did so due to his diminished "mental capabilities."

Respondent's plea counsel was the second and final witness to testify. Counsel testified that he could not recall how many times he met with Respondent prior to the plea proceeding. He did remember that "he went over the materials [he] had in his possession." Plea counsel explained that he did not file a discovery motion because the solicitor had an open file policy and he copied the solicitor's file. Counsel, however, was not aware of the SLED report which indicated that there was no physical evidence found regarding the CSC with a minor offense. Counsel testified he was aware that Respondent had 2nd

gone to a family court hearing, but he did not appear with Respondent because he did not know about the hearing at the time it was conducted. Plea counsel further stated that prior to the plea proceeding he went over the allegations with Respondent who told him that "something happened." Plea counsel testified Respondent was evasive and remorseful but never said he was not guilty. Based on this discussion, plea counsel was "satisfied that it happened" but Respondent did not want to say he did it. When questioned whether Respondent appeared confused about the plea proceeding, plea counsel explained:

The only thing that I would say that he—he wanted to admit without admitting that he did this act. You know. He danced around it but I'm going to plead guilty. You, know I'm going to plead guilty. But, you know, when you get into specifics as to what he did, he would kind of be evasive but something happened. And that's what he told me. I said, "Well you're going to plead guilty to it?" And he said, Yes.

On cross-examination, plea counsel testified that at the time he was appointed he was not aware that Respondent was being housed in the mental health section of the Greenville County detention center. He further stated that his file did not reflect that he had met with Respondent prior to the day of the plea hearing. In terms of the contents of his file, plea counsel testified that he had the "discovery package" provided by the solicitor's office. Counsel, however, acknowledged that this package did not include the SLED examination and he did not go to the law enforcement center to review the evidence. According to plea counsel, the package included the family court order in which there was a finding of sexual abuse. When asked why he did not object to the solicitor's statement that Respondent admitted his guilt in the family court proceeding, plea counsel stated, "To me it's all the same . . . sexual conduct. Misconduct. I didn't make that distinction." When specifically questioned as to whether sexual abuse is the same as sexual battery, plea counsel responded "It's all the same."

With respect to his pre-plea discussions with Respondent, plea counsel stated that he told Respondent what the allegations against him were and that Respondent understood the charges. Plea counsel admitted that he did not discuss the SLED report, the rape kit, or the victim's statement. Instead, counsel "talked about [Respondent] appearing in court to plead guilty and that he was guilty." Counsel ^{3rd} believed he had enough time to go over the discovery, the plea judge's questions, and whether or not Respondent wanted to plead guilty. Counsel maintained that Respondent wanted to plead guilty.

By order dated March 26, 2007, the PCR judge granted Respondent's application and, in turn, reversed and remanded his convictions for CSC with a minor, first degree and two counts of lewd act upon a child. In so holding, the PCR judge found plea counsel was ineffective for failing to advise Respondent regarding the meaning of "sexual battery."² The judge noted that plea counsel "admitted that he did not review the meaning of sexual battery with the [Respondent] saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children." Based on plea counsel's testimony, the judge found counsel "demonstrated a lack of knowledge of the nature of the crimes for which he represented the [Respondent]." In light of this testimony and Respondent's testimony, the judge concluded that plea counsel did not advise Respondent of "the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree." The judge further found that plea counsel's error was not cured by the plea colloquy. Ultimately, the judge held that plea counsel's performance fell below reasonable and prevailing professional norms given counsel did not advise Respondent of the elements of CSC with a minor and did not ensure that Respondent understood the nature of the offense. Finally, the judge found that Respondent proved he was prejudiced by plea counsel's deficient performance given Respondent demonstrated that he would have insisted on going to trial had he known the definition of "sexual battery."

² The PCR judge found Respondent's remaining allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction to be without merit.

The PCR judge denied the State's motion to alter or amend the order. Subsequently, this Court granted the State's petition for a writ of certiorari to review the PCR judge's order.

DISCUSSION

The State argues the PCR judge erred in finding Respondent would not have pled guilty if plea counsel had explained the definition of a "sexual battery." Because plea counsel reviewed the pending charges and the discovery material with Respondent prior to the plea proceeding, the State contends counsel's failure to use the term "sexual battery" did not render counsel's performance deficient. Even if counsel's performance was deficient, the State claims that Respondent did not prove prejudice given he had admitted his misconduct and any error was cured by the plea colloquy. Ultimately, the State seeks a reversal of the PCR judge's decision to grant Respondent a new trial on all of his convictions. 4th

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007). 2/4th

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases- i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58 (1985)).

“When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel.” Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy v. State, 339 S.C. 29, 31, 528 S.E.2d 418, 420 (2000).

“This Court gives great deference to the post-conviction relief (PCR) court’s findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court’s decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith, 369 S.C. at 138, 631 S.E.2d at 261. This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

Section 16-3-655 of the South Carolina Code outlines the crime of first-degree criminal sexual conduct with a minor as follows: “A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.” S.C. Code Ann. § 16-3-655(1) (2003).³

“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, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h) (2003).

³ Because the alleged sexual misconduct occurred in July 2004, we cite to this version of the statute given there have been substantive changes made to section 16-3-655 in subsequent years.

In contrast to "sexual battery," "sexual abuse" has been defined as "(a) actual or attempted sexual contact with a child; or (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child's participation in prostitution or in a live performance or photographic representation of sexual activity or sexually explicit nudity; by any person including, but not limited to, a person responsible for the child's welfare, as defined in Section 20-7-490(5)." S.C. Code Ann. § 17-25-135(B)(2) (2003 & Supp. 2008).

The term "sexual abuse" has been used to generally describe conduct which precipitates a charge of CSC with a minor. See, e.g., State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (affirming conviction for first-degree CSC with a minor and discussing victim's statement and medical evidence indicating victim's injuries were consistent with sexual abuse). This general use, however, has never equated "sexual abuse" with "sexual battery."

Clearly, a severe incident of child sexual abuse may constitute a "sexual battery" and, in turn, CSC with a minor. However, one who sexually abuses a child is not necessarily guilty of CSC with a minor. For example, an inappropriate touching of a child without penetration of the child's "genital or anal openings" would constitute sexual abuse, but would not necessarily rise to the level of a "sexual battery" and a charge of CSC with a minor. Instead, such sexual abuse would warrant a charge of lewd act upon a child. See S.C. Code Ann. § 16-15-140 (2003) ("It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child."). Thus, the terms "sexual abuse" and "sexual battery" are not synonymous.

In the instant case, plea counsel testified at the PCR hearing that he believed the terms were the same. Because plea counsel did not differentiate between the two terms or correctly explain them to Respondent, there is evidence to support the PCR judge's decision that plea counsel's performance was deficient. Given plea counsel did not

comprehend this distinction and did not inform Respondent of a crucial element of the offense of CSC with a minor, first degree, we agree with the PCR judge that counsel's representation fell below an objective standard of reasonableness.

We find, however, plea counsel's deficient performance was cured by the plea colloquy even though there was no specific discussion of the term "sexual battery." Notably, the PCR judge found that any allegations regarding Respondent's competency were not meritorious. In light of this decision, the PCR judge implicitly found that Respondent had the requisite mental capacity to comprehend the plea proceeding.

At the plea proceeding, the judge read the indictments and Respondent acknowledged that he understood these charges. The indictment for CSC with a minor, first degree identified the elements of the offense which included a reference to a "sexual battery." After Respondent affirmatively stated that he understood the charges and admitted his guilt, the solicitor gave a detailed factual basis for the charges. In his factual recitation, the solicitor identified conduct which would constitute the elements of first-degree CSC with a minor. Specifically, the solicitor conveyed that Respondent had penetrated the nine-year-old victim's vagina with his finger and her anus with his penis. Both of these acts clearly meet the definition of a "sexual battery." Respondent admitted that the solicitor's statement of facts was true. Therefore, we find Respondent knowingly and voluntarily entered a plea as to the charge of CSC with a minor, first degree. See Roddy, 339 S.C. at 33-34, 528 S.E.2d at 421 (recognizing that for a guilty plea to be voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him (citing Boykin v. Alabama, 395 U.S. 238 (1969))).

In view of our decision, we further conclude the PCR judge erred in granting Respondent a new trial for the two counts of lewd act upon a child. As previously stated, the PCR judge's primary reason for granting Respondent's petition for relief was plea counsel's failure to

(11.)

correctly inform Respondent of "sexual battery," an element of CSC with a minor, first degree. Given a "sexual battery" is not an element of lewd act upon a child and Respondent admitted to inappropriately touching his stepdaughters, the two charges for lewd act upon a child should not have been affected by plea counsel's deficient performance with regard to the definition of a "sexual battery." Accordingly, we find there is no evidence to support the PCR judge's decision to grant Respondent's relief on these two convictions.

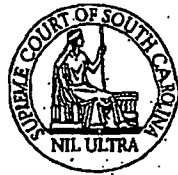
CONCLUSION

In terms of Respondent's conviction for CSC with a minor, first degree, we find any deficient performance by plea counsel was cured by the plea colloquy. As to the remaining two charges, we hold there is no evidence to support the PCR judge's reversal of the two counts of lewd act upon a child given any deficient performance by plea counsel regarding his failure to inform Respondent of the term "sexual battery" would not have affected Respondent's plea of guilty to the charges of lewd act upon a child. Accordingly, the decision of the PCR judge is

REVERSED.

**TOAL, C.J., WALLER, PLEICONES and KITTREDGE,
JJ., concur.**

③



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1459

June 2, 2008

Terrence D. Terry, #307935
McCormick Correctional
Institution
386 Redemption Way
McCormick, SC 29899

Re: Terry, Terrence D. v. The State

Dear Counsel:

The following Order has been endorsed on your Pro Se Motion to Remove Counsel for Self-Representation in the above entitled case on appeal.

*

"Motion to proceed pro se is denied. !"

s/ Jean H. Toal C.J.
For the Court

Justice John H. Waller, Jr., not participating ?

June 02, 2008. *

Why ? was ? I ? Denied ?

Very truly yours,

Daniel J. Shearouse

CLERK

SS

DES/klb

cc: Assistant Attorney General Karen C. Ratigan
Appellate Defender Robert Pachak

Habeas - Exhibit -

F
D
4

State of South Carolina

County of Greenville

Terrence D. Terry

Applicant

v.

State of South Carolina

Respondent

ENTERED COMPUTER

In The Court of Common Pleas

Thirteenth Judicial Circuit

C.A. No. 2005-CP-23-7327

59(e) Motion to Alter or Amend

PROCEDURAL HISTORY

This matter comes before the court by way of Application for Post Conviction Relief, filed on November 11, 2005. The State made its return on June 6, 2006. A hearing on the Motion was held on March 1, 2007. The Applicant was present at this proceeding and represented by Susannah Ross, Esquire, of the Greenville County Bar. Karen C. Rattigan, Assistant Attorney General represented the Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Applicant is incarcerated in the South Carolina Department of Corrections pursuant to an order for commitment from the Greenville County Clerk of Court.

5/2/07
Judge Witches was mailed a copy by inmate.
Terrence D. Terry

Exhibit-11

The Greenville Grand Jury indicted the Applicant at the february 2005 of General Session for lewd act on a child (2005-CP-23-1157) and first degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Earnest Hamilton, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty as indicted. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen (15) years for lewd act on a minor and twenty (20) years for first degree (CSC) with a minor. The Applicant did not appeal his convictions or sentences.

II

In this current application, the Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Prosecutorial Misconduct.
2. Ineffective Assistance of Counsel.
3. Subject Matter Jurisdiction.

III

The Applicant presented several issues and exhibits at his post-conviction relief hearing, and indicated that he did not wish to waive any of these issues for further appellate review.

Prosecutorial Misconduct

Exhibit-12

The Applicant testified that his guilty plea was uninformatively and unintelligently entered, as well as, involuntarily.

The Applicant testified that the prosecutor committed misconduct by using invalid arrest warrants that the Magistrate would not "backdate" in accordance with the (24)twenty-four hour statute of the Const. of the United States.

The Applicant also testified that he was denied (upon request) his right to a preliminary hearing before, the issuing Magistrate according to Gerstein v. Pugh; County of riverside v. McLaughlin, as well as, in violation of his 1st, 4th, 5th, 8th and 14th Amendments rights, which the records (or lack there of) will substantiate, and of which the prosecutor was aware.

The Applicant also submitted that his indictments were not valid, in that, the prosecution failed to file them with the clerk of court-before and after-presentment to the grand jury in violation of rules 3(b)and(3c), of the SCRCrimP; also S.C.Code Ann.§14-17-530.Citing State v. Quattlebaum 338 S.C.441,527 S.E. 2d 105(S.C.200);Burger v. U.S.295 U.S.78,55 Ct.629(1935), and State v. King,71 S.E.2d 293 (S.C.1952).

The Applicant testified, and entered into the record the sled rape analysis report as a speaking exhibit, (dated March 2, 2005), to show both "reasonable doubt", and prove that the prosecutor was made aware of its existence (See second page of report).

Citing: Inre v. Winship, 397,U.S.358 (1970); State v. Quattlebaum, 527 S.E.2d 105(S.C.2000).

Exhibit-13

Ineffective Assistance of Counsel

The Applicant testified that his assigned counsel-Mr. Earnest Hamilton-failed to investigate into(Applicant's)case in that:

A.Mr.Hamilton failed to file a Motion for Discovery in the Applicant's behalf.

B.Mr.Hamilton failed to present any portion of the discovery to the Applicant for review.

C.Mr.Hamilton failed to inform the Applicant of his rights to an arraignment hearing or provide representation therein.

The Applicant testified that these action clearly rendered the Applicant informatively incompetent to enter a guilty plea. Boykin v. Alabama, 395 U.S.238(1969)Pittman v. State, 337 S.C.597, 524 S.E.2d 628(1999);and White v. State, 263 S.C.110, 208 S.E.2d 60(1975).

The Applicant further testified that his counsel's failure to acknowledge the defects of his warrants and indictments-being unfiled-and failure to file a "Motion for Suppression" of the evidence;provide(1)one 10-15 minute collquy between the Applicant's(8)eight month detainment;and the plea hearing(on the day of the hearing)and failure to protect Applicant's(6th) sixth and(14th)forteenth Amendment rights of "due process" showed absolute prejudice.Strickland v. Washington;see also Johnson v. State, 325 S.C.182, 480 S.E.2d 733(1977);Hill v. Lockhart , 474 U.S.52, 106 S.Ct.366, 88 L.Ed.2d 203(1985).

Exhibit H

The Applicant testified that Mr. Hamilton's failure to "secure" the DNA Analysis results prior to advising a guilty plea, as well as, an appropriate "chain of custody" report (which would have revealed destroyed evidence) and not being able to present these facts to the court, and the Applicant, as grounds for "reasonable doubt" in defense, satisfies the "two pronged" requirements in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and that he Mr. Hamilton would have "competently" not advised a guilty plea, and opted for a trial. Cherry v. State, 300 S.C. at 117 386 S.E.2d at 625.

The Applicant testified that his counsel had no knowledge of the court orders requiring the Applicant to have a "psychological evaluation" to determine his mental stability nor made any effort to fulfill the established prerequisite in the Applicant's behalf, to again protect the Applicant from "due process" violation.

The Applicant testified that his counsel advised a guilty plea and allowed the hearing to proceed through to its entirety, when at the onset, the Applicant stated that he had taken mental health medication less than (24) twenty-four hours prior to attempting to plea. State v. Maryott, 492 P.2d 239 (Wa. 1971); see also Jackson v. Denno; and the (14th) fourteenth Amendment right of "equal protection"

The Applicant asserted that his counsel should have requested a recess to assess the Applicant's "true" state of mind or requested that the guilty plea hearing be discontinued.

Lastly, the Applicant testified that his counsel never advised him of his right to a Direct Appeal, and allowed possible self incriminating testimony into court without objection. Davis v. State, 342 S.E.2d 60 (S.C. 1987); State v. Rich, 239 S.E.2d 731 (S.C. 1977).

Exhibit-15

Subject Matter Jurisdiction

The Applicant testified that the court lacked jurisdiction due to inconsistencies pertaining to his warrants, being.

A. The warrants was never served, nor was mandatorially given (read) "Miranda Rights" implemented (officer's signature appears, rather than the Applicant's).

B. The Magistrate Judge would not "backdate" the warrants to the date of the offense, (alleged), in accordance with 22-5-510 of the S.C. Code of Laws, and Art. 1§ 15 of the S.C. Constitution.

C. Falsified document - (warrant no. -1-466191) - judges signature.

Further, The Applicant testified that his indictments was never filed with the Clerk of Court for authoritative / authenticity purpose, in accordance with rules 3(b), and (c) SCRCrimP, and State and Federal Laws.

Lastly, the applicant testified that due to the influence of "tranquilizers" that rendered him incompetent to knowingly, intelligently, and voluntarily enter a plea, or stand trial and by presenting several due process violations (on record), the jurisdiction of the court was/should have been nullified. State v. Maryott, 492 p.2d 239 (wa. 1971).

Conclusion

For the forementioned reasons, the Applicant prays of the court the relief of reverse and remand for a new trial, or vacating of the case with prejudice.

S/ _____
Presiding Judge,
Thirteenth Judicial Circuit

This _____ day of _____, 2007.

Exhibit-16

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

April 12, 2007

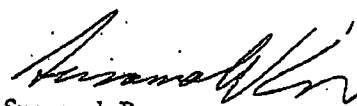
← 1 day after the
Filing of the
Final Order!

Mr. Terrence Terry #307935
McCormick Correctional Inst.
386 Redemption Way
McCormick, SC 29899

Dear Mr. Terry:

Congratulations. Enclosed is a copy of the Order granting relief in your PCR case. You should be released to Greenville County as specified in the Order. I will be closing my file on your case, but it is likely that the State will appeal the judge's ruling. The office of Appellate Defense will represent your interest in the appeal.

Sincerely,



Susannah Ross
Attorney at Law

* Termination of representation -
prior to post-trial motion options ?? (59 e)?

enclosure

2435 E. NORTH ST. #222 • GREENVILLE/SC • 29615-1442
PHONE: (864) 242-0029 • E-MAIL: SUSANNAH.ROSS@SCBAR.ORG

Ross & Enderlin, PA
2435 E. North St. #222
Greenville, SC 29615

Mr. Terrence Terry #3079335
McCormick Correctional Inst
385 Redemption Way
McCormick, SC 29899

11/5/07



USA 24

APR 17 2007
MAIL ROOM
*Day 4 received
the final order!*

Exhibit-17

Exhibit-18

In The Court of Common Pleas

Case No. 2005-CP-23-7327.

Certificate of Service by U.S. Mail

The Applicant, Terrence D. Terry, #307935 hereby certifies that a true and correct copy of his 59(e) Motion to Alter or Amend Judgment is being forwarded to the Honorable Judge Michael Nettles; The Honorable Clerk of Court, Paul B. Wickensimer; the Honorable Clerk of the S.C. Supreme Court, Daniel E. Shearouse; and counsel for the Respondent, Karen C. Ratigan, by U.S. Mail, postage pre-paid and addressed as follows:

Hon. Judge Michael Nettles
c/o Paul B. Wickensimer
305 East North Street
Greenville, SC 29601

Hon. Paul B. Wickensimer
Greenville County Clerk of Court
305 East High Street
Greenville, SC 29601

Hon. Daniel E. Shearouse
Clerk of S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

SWORN TO and subscribed before me
This 25 day of April, 2007.

Mr. Terrence D. Terry
Terrence D. Terry
Applicant

[Signature]
Notary Public for South Carolina

My Commission Expires: 3-30-2009

③

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

July 27, 2009

Terrence D. Terry, #307935
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

Re: Your case

Dear Mr. Terry:

I have reviewed the South Carolina Supreme Court's 13 page decision on your case and see no basis in filing a petition for rehearing that would result in a different decision by the Court. The decision to grant or deny relief on petition for writ of certiorari is discretionary with the Court.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/fkb

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Terrence Dimingo Terry, #307935,

Petitioner,

y.

Mr. Leroy Cartledge, Warden of
McCormick Correctional Institution.

Respondent.

) C/A No. 6:10-2006-JFA-KFM

) RETURN AND MEMORANDUM OF
) LAW IN SUPPORT OF MOTION FOR
) SUMMARY JUDGMENT

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and hereby makes Return to the Rule to Show Cause filed by the Honorable Kevin F. McDonald, United States Magistrate Judge, on August 13, 2010. Respondent asserts that there are no genuine issues of material fact. Respondent is entitled to summary judgment as a matter of law. This habeas action is barred by the statute of limitations. If this Court finds this action is not barred by the statute of limitations, Respondent submits the action constitutes a mixed petition because Petitioner may still seek appellate review upon some of his post-conviction relief claims by utilizing the post-conviction relief procedures outlined by Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Thus, this habeas action should be dismissed without prejudice so that Petitioner can exhaust his remaining state remedy. Finally, Petitioner's claims in this habeas action are subject to procedural bars and are without merit. In support of this Motion, Respondent would show this Court the following:

I. PROCEDURAL HISTORY

Petitioner is currently confined at the McCormick Correctional Institution in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Greenville County. Petitioner was indicted by the Greenville County Grand Jury during the February 2005 Term of the Court of General Sessions for two counts of Lewd Act Upon a Child (2005-GS-23-1157, 2005-GS-23-1158), and one count of Criminal Sexual Conduct with a Minor, First Degree (2005-GS-23-1274). (App. 127-28, 130-31, 133-34). Petitioner was represented by Ernest Hamilton, Esquire. (App. 1-16). The State was represented by Assistant Solicitor John Newkirk, Esquire, of the Sixteenth Judicial Circuit. Id. On March 8, 2005, Petitioner waived his right to a trial by a jury and pled guilty to all of the charges. Id. The Honorable Edward W. Miller, Circuit Court Judge, sentenced Petitioner to twenty years confinement on the criminal sexual conduct with a minor conviction, fifteen years confinement for each of the Lewd Acts with a Minor convictions, all to be served concurrently. (App. 13).

Facts¹

After Petitioner's nine-year-old stepdaughter disclosed to her mother that Petitioner had sexually abused her in July 2004, Mother confronted Petitioner about the allegations. During this confrontation, it was revealed that Petitioner's two other stepdaughters, ages eleven and twelve years old, had also been sexually abused by Petitioner.

¹These are the facts as stated by the South Carolina Supreme Court in the PCR Appeal.

Subsequently, a family court proceeding brought by the Department of Social Services was conducted wherein Petitioner admitted to the allegations. As a result, a treatment plan was put into effect to address Petitioner's conduct.

In February 2005, a Greenville County grand jury indicted Petitioner for two counts of lewd act upon a child involving the older two stepdaughters and one count of CSC with a minor, first degree regarding the allegations of the nine-year-old stepdaughter.

The next month, Petitioner pled guilty to each of the three indicted offenses. At the plea proceeding, the circuit court judge inquired about Petitioner's background in terms of his age, education level, and marital status. In terms of his health, Petitioner indicated that he was currently taking medication for hypertension but that he felt fine and had not taken any medication, drugs, or alcohol within the twenty-four hours before the proceeding. Petitioner acknowledged that he had previously been treated for "drugs and psychiatric." He did not, however, elaborate on this treatment.

After the introductory questions of the plea colloquy, the judge informed Petitioner of the offenses for which he was charged² and the maximum possible sentences for these

²The judge read excerpts from the indictments. In terms of the charge of CSC with a minor, first degree the judge informed Petitioner that the indictment "alleges you did in Greenville County July 4, '04 engage in sexual battery with child-victim #3, less than eleven years of age."

As to one of the charges of lewd act upon a child, the judge stated that the indictment "alleges you did in Greenville County on or about - - between June 1st and June 25th, '04 being over the age of fourteen willfully and lewdly committed a lewd and lascivious act upon the body or its parts of child-victim #2, a child under the age of sixteen with the intent of arousing, appealing to, gratifying the lusts, passions, or sexual desires of yourself or the child." The judge reiterated this language as to the second count of lewd act upon a child with the exception that the date of the offense was May 31, 2004, and involved child-victim #1.

offenses. Petitioner indicated that he understood the charges and intended to plead guilty to each of the offenses. The judge then instructed Petitioner that by pleading guilty he would waive the following constitutional rights: the right to a jury trial, the State's burden of proof, his right to cross-examine the State's witnesses, his right to present a defense, and his right against self-incrimination. Petitioner stated that he understood these rights but had made the decision to plead guilty.

After admitting his guilt, Petitioner indicated that he was satisfied with his counsel's representation and had been given ample time to review the State's evidence.

The solicitor then provided the following factual basis for Petitioner's guilty plea, stating:

On July 4th of 2004, [Petitioner] put hair grease on his penis and on the victim's vagina and attempted to have sexual intercourse with her. When he was unable to do so he then penetrated her vagina with his finger and her anus with his penis. This victim was the [Petitioner's] nine year old step-daughter.

In May and June, 2004 [Petitioner] also committed numerous lewd acts on his other two step-daughters, eleven and twelve years old by kissing them on the mouth, rubbing their breasts, vaginal areas, and buttocks, and rubbing his body against theirs. All these incidents occurred while the family resided at [REDACTED] in Greenville County.

The [Petitioner's] wife, the mother of all three victims confronted the [Petitioner] when the nine-year-old victim disclosed her abuse. And the [Petitioner] stated that he did not know why he did it. The [Petitioner] admitted guilt in the DSS family court proceedings.

Following the solicitor's recitation of the facts, the judge asked Petitioner whether the solicitor's statements were true. Petitioner stated that they were true. Petitioner's counsel then informed the judge that Petitioner had admitted his guilt, but had told him

"only a crazy person would do something like that." Counsel clarified that Petitioner was not insane but recognized the "terrible act."

Subsequently, the judge sentenced Petitioner to twenty years imprisonment for CSC with a minor, first degree and fifteen years for each count of lewd act upon a child. The sentences were to be served concurrently.

Petitioner did not file a direct appeal of his guilty plea. Eight months after the plea, Petitioner filed an application for PCR. In his application, Petitioner requested relief on the following grounds: prosecutorial misconduct, ineffective assistance of counsel, and the plea court's lack of subject matter jurisdiction. In an amended application filed by his PCR counsel, Petitioner asserted the following additional grounds for relief: his plea was not knowingly, voluntarily, and intelligently made; his plea counsel did not make him aware of the "nature and crucial elements of the charge against him"; at the time of the plea he was under the influence of prescribed mental health medications that affected his ability to comprehend what he was doing; and his plea counsel failed to inform him of the right to appeal his guilty plea.

On March 1, 2007, the circuit court held a hearing on Petitioner's PCR application. At the start of the proceeding, Petitioner's counsel outlined Petitioner's bases for his request for PCR. Counsel primarily focused her argument on Petitioner's allegations of ineffective assistance of counsel.

Specifically, PCR counsel alleged that plea counsel was ineffective in the following respects: (1) he failed to bring to the court's attention Petitioner's mental health issues, particularly the fact that Petitioner was housed in the mental health section of the Greenville County detention center for nine months prior to the plea proceeding and was

taking "antipsychotic" medication; (2) he failed to evaluate the State's evidence in that he did not make a discovery request and he did not view the physical evidence or the "rape kit"; and (3) he failed to offer any mitigation evidence, such as the lack of physical evidence, the absence of the victims at the plea proceeding, the Petitioner's lack of a prior record, and the Petitioner's twelve-year military history. Additionally, PCR counsel emphasized that Petitioner's plea counsel failed to review the meaning of "sexual battery" with Petitioner prior to the plea. Counsel asserted that the failure to review a crucial element of the offense was particularly significant given Petitioner's competency was in question.

PCR counsel then called Petitioner as a witness. Petitioner testified that he met with plea counsel only once, the day of the plea proceeding, for a ten-minute consultation. He further stated that plea counsel never provided or reviewed discovery with him. Because he did not review any discovery materials, Petitioner claimed he was unaware of the SLED report stating that no physical evidence was found on the clothing of the nine-year-old victim. Although Petitioner acknowledged that he pled guilty, he claimed that he did not understand the nature of the charges, particularly the meaning of "sexual battery." Petitioner stated that his plea counsel did not explain the meaning of this term. He further testified that had he known the definition of "sexual battery," he would not have pled guilty.

Throughout his direct examination, Petitioner repeatedly emphasized that he was unable to adequately comprehend the plea proceeding due to his mental health issues and the medications he was taking to treat these issues. Petitioner contended that he admitted to the truth of the solicitor's factual recitation at the plea proceeding because he lacked the ability to comprehend and adequately defend himself at that time.

Although Petitioner specifically denied committing a sexual battery on the nine-year-old victim, he admitted there was inappropriate touching. Despite the State's assertion that Petitioner admitted to committing a sexual battery during the family court proceeding, Petitioner testified he could not recall such an admission. Petitioner acknowledged that the family court's order included a treatment plan stemming from a finding of sexual abuse. Petitioner, however, noted that there was no finding of sexual battery or CSC with a minor.

On cross-examination, Petitioner maintained that he did not inform the plea judge of the extent of his mental health problems because the "psychiatric medication . . . rendered [him] incompetent to speak for [himself]." Although Petitioner acknowledged that he was aware of the plea proceeding, he contended he did not want to plead guilty and only did so due to his diminished "mental capabilities."

Petitioner's plea counsel was the second and final witness to testify. Counsel testified that he could not recall how many times he met with Petitioner prior to the plea proceeding. He did remember that "he went over the materials [he] had in his possession." Plea counsel explained that he did not file a discovery motion because the solicitor had an open file policy and he copied the solicitor's file. Counsel, however, was not aware of the SLED report which indicated that there was no physical evidence found regarding the CSC with a minor offense. Counsel testified he was aware that Petitioner had gone to a family court hearing, but he did not appear with Petitioner because he did not know about the hearing at the time it was conducted. Plea counsel further stated that prior to the plea proceeding he went over the allegations with Petitioner who told him that "something happened." Plea counsel testified Petitioner was evasive and remorseful but never said

he was not guilty. Based on this discussion, plea counsel was "satisfied that it happened" but Petitioner did not want to say he did it. When questioned whether Petitioner appeared confused about the plea proceeding, plea counsel explained:

The only thing that I would say that he—he wanted to admit without admitting that he did this act. You know. He danced around it but I'm going to plead guilty. You, know I'm going to plead guilty. But, you know, when you get into specifics as to what he did, he would kind of be evasive but something happened. And that's what he told me. I said, "Well you're going to plead guilty to it?" And he said, Yes.

On cross-examination, plea counsel testified that at the time he was appointed he was not aware that Petitioner was being housed in the mental health section of the Greenville County detention center. He further stated that his file did not reflect that he had met with Petitioner prior to the day of the plea hearing. In terms of the contents of his file, plea counsel testified that he had the "discovery package" provided by the solicitor's office. Counsel, however, acknowledged that this package did not include the SLED examination and he did not go to the law enforcement center to review the evidence. According to plea counsel, the package included the family court order in which there was a finding of sexual abuse. When asked why he did not object to the solicitor's statement that Petitioner admitted his guilt in the family court proceeding, plea counsel stated, "To me it's all the same . . . sexual conduct. Misconduct. I didn't make that distinction." When specifically questioned as to whether sexual abuse is the same as sexual battery, plea counsel responded "It's all the same."

With respect to his pre-plea discussions with Petitioner, plea counsel stated that he told Petitioner what the allegations against him were and that Petitioner understood the

charges. Plea counsel admitted that he did not discuss the SLED report, the rape kit, or the victim's statement. Instead, counsel "talked about [Petitioner] appearing in court to plead guilty and that he was guilty." Counsel believed he had enough time to go over the discovery, the plea judge's questions, and whether or not Petitioner wanted to plead guilty. Counsel maintained that Petitioner wanted to plead guilty.

By order dated March 26, 2007, the PCR judge granted Petitioner's application and, in turn, reversed and remanded his convictions for CSC with a minor, first degree and two counts of lewd act upon a child. In so holding, the PCR judge found plea counsel was ineffective for failing to advise Petitioner regarding the meaning of "sexual battery."³ The judge noted that plea counsel "admitted that he did not review the meaning of sexual battery with the [Petitioner] saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children." Based on plea counsel's testimony, the judge found counsel "demonstrated a lack of knowledge of the nature of the crimes for which he represented the [Petitioner]." In light of this testimony and Petitioner's testimony, the judge concluded that plea counsel did not advise Petitioner of "the meaning of sexual battery and the significance of penetration as it relates to criminal sexual conduct with a minor in the first degree." The judge further found that plea counsel's error was not cured by the plea colloquy. Ultimately, the judge held that plea counsel's performance fell below reasonable and prevailing professional norms given counsel did not advise Petitioner of the elements of CSC with a minor and did not ensure that Petitioner understood the nature

³The PCR judge found Petitioner's remaining allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction to be without merit.