

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

CLARENCE MYERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001238

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Whether the PCR court erred in ruling that defense counsel was effective where defense counsel did not seek a ruling on her suppression motion based on the illegal use of a voice stress analysis test prior to Petitioner's entry of an Alford plea?

- II. Whether the PCR court erred in ruling that defense counsel was effective where defense counsel did not discover exculpatory evidence until after acceptance of the Alford plea, despite the evidence having been produced in discovery approximately three years prior, and where defense counsel did not properly advise Petitioner of the significance of the exculpatory evidence?

STATEMENT OF FACTS

Procedural History

On February 12, 2009, the Richland County Grand Jury indicted Petitioner for murder and desecration of human remains. App. 171 – 172; 176 – 177.

On October 19, 2012, Petitioner appeared before the Honorable Casey L. Manning for a pre-trial hearing. App. 1. Petitioner was represented by Jennifer Davis¹ and the State was represented by Luck Campbell, Nichole Simpson, and Meghan Walker. App. 1. After a break in the pre-trial motions hearing, Petitioner entered an Alford² plea to voluntary manslaughter and desecration of human remains. App. 52, 23 – 78, 16.

Judge Manning accepted the Alford plea as to both offenses. App. 78, 7-16. He sentenced Petitioner to concurrent sentences of fifteen years for voluntary manslaughter and ten years for desecration of human remains. App. 82, 9-14.

On October 25, 2012, a post-plea hearing was held before Judge Manning. Petitioner was again represented by Jennifer Davis and the State was represented by Luck Campbell and Meghan Walker. App. 85. Defense counsel stated on the record that she located the discovery material provided by the State that indicated a third party DNA match to Elijah White, which was referenced during the State's recitation of the facts in support of the plea. However, defense counsel was not aware of the report and had not discussed it with Petitioner prior to the plea. App. 88, 10-14. The Petitioner confirmed on the record that he wanted to keep his original plea deal, despite the additional evidence, at that time. App. 89, 17 – 90, 17.

¹ Though they are not listed as counsel on the transcript, testimony at the PCR hearing reflects that Luke Shealey and Fielding Pringle also represented Petitioner. App. 122, 6-8; App. 150, 8-10.

² 400 U.S. 25, 91 S.Ct. 160 (1970).

Petitioner did not file a direct appeal.

On February 14, 2013, Petitioner filed his application for post-conviction relief (“PCR”) alleging ineffective assistance of counsel. App. 98 – 104. The State filed its Return on May 16, 2013. App. 105 – 110.

On March 19, 2014, an evidentiary hearing was held before the Honorable Alison Renee Lee. Petitioner was represented by Anna Good and the State was represented by Megan Harrigan Jameson. App. 111. The witnesses at the hearing were Petitioner and defense counsel, Jennifer Davis. App. 115– 160.

Judge Lee held the record open to obtain a transcript of the October 25, 2012 post-plea hearing. App. 160, 22 – 162, 1. Judge Lee’s Order of Dismissal denying Petitioner’s PCR application was filed May 29, 2014. Judge Lee ruled that counsel’s performance did not fall below the standard required and that there was no resulting prejudice to Petitioner from any alleged deficiencies. App. 164 – 170.

Petitioner filed a Notice of Appeal of the Order of Dismissal and this petition for writ of certiorari follows.

Investigation and Confessions

The charges against Petitioner related to the cold-case murder of Angela Coleman on or about April 20-21, 2001. App. 71, 13-21. The decedent’s body was found naked in an abandoned house, with a blanket wrapped over her body and pair of gray sweatpants wrapped around the back of her neck and head. App. 71, 17-21. The neck and head were set on fire. App. 71, 22-23. The State’s experts would have testified that the cause of death was manual asphyxiation. App. 73, 1-3; App. 76, 7-13. Oral, vaginal, and rectal DNA swabs were taken from decedent, as well as a swab

from her back. App. 73, 4-10. There were no initial CODIS hits, but cold case investigator Mark Vincent had the DNA tested again in 2007 and 2009. App. 74, 14- 20; App. 73, 25-3.

Petitioner became a suspect in November 2007 when the DNA swab from the back of the decedent matched Petitioner's semen.³ App. 5, 15-24; App. 72, 12-16; App. 74, 14-20. Petitioner was in pre-detention in Daytona Beach, Florida when Investigator Vincent met with him in an interview room on December 5, 2007. App. 5, 22-24; App. 7, 6-24; App. 74, 20-23. Petitioner first gave a statement indicating that he did not know decedent personally but had seen a body in the abandoned house through a window and called his mother to notify authorities.⁴ App. 12, 2-11. When confronted with the DNA match and a pair of pants with a check stub belonging to him found in the house, Petitioner gave a second statement indicating that he had ejaculated onto the body but stating that the decedent was already dead when he found her. App. 14, 9-17; App. 16, 11-15. Petitioner agreed to take a polygraph test. App. 29, 21-22. The next day, Investigator Vincent and Detective James Brodick of the Daytona Beach Police Department met with Petitioner and administered a voice stress analysis test. App. 17, 5 – 21, 3. Only after Petitioner was told that he failed the test did he make a third statement confessing to involvement in decedent's death. App. 21, 1-15.

During the State's recitation of the facts in support of the plea, the solicitor indicated that a 2009 DNA test of the vaginal swab matched Elijah White, an ex-boyfriend of decedent, who had kicked her out of his house several weeks earlier. App. 73, 11 – 74, 6. The solicitor admitted that

³ A pair of pants containing a check stub with Petitioner's name on it was found inside the vacant house where the decedent was found during the initial investigation in 2001. App. 6, 3-7 and 18-21.

⁴ The State confirmed that Petitioner's mother made the initial 911 call and gave directions to the house where the body was found. App. 75, 21 – 76, 5.

decendent stated on several occasions that she was afraid of White and that he threatened her. App. 73, 16-19. According to the solicitor, White alleged that he last saw decendent on or about April 18, 2001. App. 73, 23-24. At the time of Petitioner's plea, White was deceased. App. 74, 3-4.

Pre-Trial Hearing, Alford Plea, and Post-Plea Hearing

At the pre-trial hearing on October 19, 2012, Petitioner made a two-part suppression motion regarding his statements, first contending that the statements were coerced and second contending that the third statement should be excluded because it was the result of an illegal voice stress analysis test. App. 49, 15 – 52, 22. Following an evidentiary hearing at which Investigator Vincent and Petitioner both testified, Judge Manning ruled, as to the first suppression argument, that the statements were given freely and voluntarily after being properly advised of his rights and would be admitted. App. 51, 18-23. The Court indicated that it would take a break before hearing argument related to the use of the illegal voice stress analysis since the State had just received Petitioner's written memorandum regarding the issue that morning and requested additional time to review it and prepare.⁵ App. 52, 3-20.

When the case was called back on the record after the break, the parties indicated that Petitioner was going to enter an Alford plea to the offenses of voluntary manslaughter and desecration of human remains. App. 53-54. During the State's recitation of the facts supporting the plea, they stated that DNA testing done in 2009 revealed that the vaginal swab of semen found in decendent matched Elijah White. App. 73, 24 – 74, 3. Defense counsel noted on the record that she

⁵ The memorandum filed by defense counsel was never clocked-in and is not available in the case files at the Richland County courthouse. This is likely because defense counsel did not file a formal motion prior to the pre-trial hearing and the Alford plea was entered prior to the Court's consideration of the issue.

was not aware of the DNA match, but otherwise agreed with the facts presented. App. 77, 15-22. The State indicated that the DNA evidence was provided the defense in 2009. App. 82, 25 – 83, 3.

As a result of an infection, Petitioner had difficulty hearing portions of the pre-trial hearing, guilty plea, and sentencing. App. 6, 9-12; App. 157, 10-21. Defense counsel made the Trial Court aware of Petitioner's hearing problems. App. 6, 9-12; App. 24, 1-2; App. 32, 18-19; App. 33, 7-13. Despite efforts to speak loudly and Petitioner's opportunity to view the notes of co-counsel, the Petitioner testified that he was unable to hear portions of the proceedings on October 19, 2012. App. 157, 8-21; App. 118, 15 – 120, 6. Specifically, Petitioner did not hear all of the argument at the suppression hearing and did not hear the references to White's DNA during and after the plea hearing. App. 119, 24 – 120, 6; App. 138, 24 – 139, 5; 152, 22-24; 146, 24 – 147, 2.

At the post-plea hearing held on October 25, 2012, defense counsel confirmed that though the State had sent the DNA evidence related to White to prior defense counsel in 2009, she did not locate in the discovery materials until after the plea hearing. App. 88, 10-16. Nevertheless, she advised the Court and Petitioner confirmed that he wanted to keep his plea deal at that time. App. 88, 17 – 6, 5.

PCR Hearing

At the PCR hearing on March 19, 2014, Petitioner testified that Jim Mays was his defense attorney for three years prior to Jennifer Davis taking over as lead counsel. App. 116, 14-18. Petitioner testified that he had problems hearing during the suppression hearing because his ears were clogged up and heard only portions of the proceedings. App. 118, 15 – 120, 6. Petitioner testified that after the pre-trial hearing, defense counsel discussed a plea to fifteen years with him, which his attorneys seemed to encourage over proceeding to trial. App. 123, 4-13. He stated that

he was not aware of the DNA match to White before the plea and if he had known about it earlier he would not have pled guilty. App. 121, 20 – 109, 4; App. 124, 16-20; App. 126, 1-5. Petitioner testified that his attorneys should have done a proper investigation of the other three suspects in the case, Alvin Dixon, Elijah White, and Barbara Brown. App. 121, 4-12. If they had done so, then they would have known about the CODIS match to White much earlier. App. 135, 20 – 136, 4.

Defense counsel testified that she took over as lead counsel in May 2012 but that she had met with Petitioner at least once prior to that when she was second chair. App. 140, 10-14. She received Mr. May's copy of the file and all discovery received up to that point. App. 140, 24-25. The defenses strategy was threefold, (1) expert testimony that the cause of death was an overdose; (2) expert testimony regarding false-confessions, if the confessions were admitted; and (3) third party guilt, including Elijah White. App. 144, 22 – 145, 6. Defense counsel admitted that she was not aware of the DNA match to White until the State mentioned it during the plea colloquy. App. 145, 16-22. She contacted Mr. May after the hearing and he was not aware of the match either, though he had filed a motion to compel regarding that information. App. 145, 23 – 146, 1. However, a further review of Mr. May's files revealed that the exculpatory evidence was provided in 2009. App. 146, 2-4.

Defense counsel stated that she met with Petitioner directly after the plea to inform him of the additional evidence. App. 146, 13-18; App. 158, 9-11. Defense counsel then met with Petitioner on October 22, 2012 to further discuss the evidence and his options, including possible withdrawal of the plea. App. 158, 11-14. Defense counsel testified that, at least after their initial conversation, Petitioner did not think the evidence was as significant since he was not charged with a sexual crime. App. 146, 15-20. However, she admitted that the new evidence would have further advanced their theory of third-party guilt. App. 155, 4-6. Defense investigators had also located

one or two witnesses that would confirm that White was seen with something that could have been a person over his shoulder around the time of decedent's death. App. 155, 13 – 156, 7. Defense counsel also testified that they planned to attack the validity of the third confession based on the use of a voice stress analysis test, which is illegal in South Carolina. App. 148, 12-25. However, they never got to that issue because the plea deal was reached during the break in the hearing. App. 149, 13 – 150, 4; App. 156, 10 – 144, 7.

Though the sentencing sheets list the pleas as “without negotiation or recommendation,” according to defense counsel and Petitioner, Judge Manning agreed to give a sentence of fifteen years. App. 120, 14-21; App. 150, 16-18. Both Petitioner and defense counsel also agreed that the discovery was lengthy, over one thousand pages, and that they met many times to go through discovery materials since there were security concerns over having a copy at the prison. App. 127, 4 – 128, 7; App. 137, 15 – 138, 1; App. 142, 3 – 143, 16. They also both testified that prior to the day of the plea, Petitioner always indicated that he wanted to proceed to trial. App. 117, 11-16; App. 151, 1-5; App. 155, 2-3.

ARGUMENT

I. The PCR court erred in ruling that defense counsel was effective where defense counsel did not seek a ruling on her suppression motion based on the illegal use of a voice stress analysis test prior to Petitioner's entry of an Alford plea.

In denying Petitioner post-conviction relief, the PCR court ruled that Petitioner failed to establish that his defense counsel's performance fell below the standard required and found that there was no resulting prejudice to Petitioner from any alleged deficiencies. App. 168 – 169. The PCR court's ruling is unsupported by case law and the evidence presented at the PCR hearing.⁶

Defense counsel was deficient in failing to seek a ruling on the second basis of her suppression motion, the use of an illegal voice stress analysis test. This prejudiced Petitioner because had the suppression motion gone forward, there is a reasonable likelihood that Petitioner's third statement inculcating himself in decedent's death would have been suppressed. Suppression of his third statement would have greatly weakened the State's case against Petitioner. Additionally, defense counsel was deficient in failing to discover exculpatory evidence relating to a DNA match on the vaginal swab taken from decedent to a third party despite disclosure of this evidence by the State approximately three years prior to Petitioner's plea. Petitioner was prejudiced by this deficiency in that the significance of the exculpatory evidence was not fully investigated and explained to Petitioner prior to or after his entry of an Alford plea.

⁶ The PCR court found Counsel's testimony credible and that Petitioner's testimony lacked credibility. App. 167. The only inconsistency pointed to by the PCR Court was Petitioner allegedly testifying on direct that he had no criminal record but conceding on cross-examination that he does have a prior record. App. 165. This is an inaccurate recitation of the facts. Petitioner testified at the PCR hearing that he had never entered an Alford plea. App. 123, 23 – 124, 3. On cross-examination, the Petitioner immediately corrected the Assistant Attorney General's incorrect recitation of his testimony as being that he did not have a prior record and confirmed that he had priors for burglary and robbery. App. 136, 8-14. The remainder of Petitioner's testimony during the PCR hearing is remarkably similar to the testimony of defense counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether 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.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See* Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *see also* Hill v. Lockhart, 474 U.S. 52, 56 (1985) (“The longstanding test

for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “ 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, 33, 528 S.E.2d 418, 420 (2000). In the present case, Petitioner did not learn of defense counsel’s deficiencies until after the plea hearing where he affirmed that he was satisfied with her services as his attorney. App. 138, 18 – 139, 9.

Defense counsel made a two-part suppression motion to the Trial Court. Her first argument for suppression was based on the involuntariness of the statements, related to promises that Petitioner said that the investigator made to him regarding sentencing and protection in prison. App. 49, 15 – 50, 10. The Court was not persuaded by this argument and found that the statements were freely and voluntarily waived after a proper advice of rights. App. 51, 18-23. The second

argument, never argued to the Trial Court, related to the suppression of the statement due to the use of an illegal interrogation technique, the voice stress analysis test. App. 51, 24 – 52, 23; App. 148, 12-25.

A voice stress analysis test (PSE) is a test that allegedly determines deception; it is illegal in South Carolina. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 287 S.C. 190, 192, 336 S.E.2d 472, 473 (1985) (citing S.C. Code Ann. § 40-53-40). The South Carolina Polygraph Examiners Act sets forth the minimum requirements for instruments in S.C. Code Ann. § 40-53-40, which states:

Any instrument used to test or question individuals for the purpose of detecting deception or verifying truth of statements shall record visually, permanently and simultaneously: (1) the subject's cardiovascular pattern and (2) respiratory pattern. Patterns of other physiological changes in addition to (1) and (2) may also be recorded. The use of any instrument or device to detect deception or to verify truth of statements which does not meet these minimum instrumentation requirements is hereby prohibited and the operation or use of such equipment shall be subject to penalties and may be enjoined in the manner hereinafter provided.

“[T]he general consensus in the courts appears to be that is that [sic] the scientific validity of voice stress tests is even *less* established than that of polygraph testing.” Dixon v. Conway, 613 F.Supp2d 330, 379 (W.D.N.Y. 2009) (emphasis in original).

Defense counsel should have sought a ruling on the second portion of her suppression motion, related to the use of the illegal voice stress analysis test, prior to advising Petitioner to plea, or at the very least inquired and advised Petitioner as to whether the State's offer would remain open after the completion of the motions hearing. The pre-trial hearing transcript reflects that the argument related to voice stress analysis was going to be argued after the break during the pre-trial hearing in order to give the State an opportunity to prepare since they received defense counsel's

memorandum on the issue that morning.⁷ App. 52, 1-22. However, the parties never completed the pre-trial motions hearing to receive a ruling on this matter because the plea offer was made and accepted during the break. App. 157, 1-7. The testimony at the PCR hearing reveals that both Petitioner and defense counsel were somehow under the misapprehension that the court was not going to entertain the voice stress analysis argument and had already found all of Petitioner's statements admissible. Compare App. 52, 1-22, with App. 120, 3-21; App. 149, 13-18; App. 157, 1-7.

Defense counsel presented no testimony as to whether she discussed with Petitioner the possibility of completing the pre-trial motions so that their outcome could be factored into Petitioner's decision on whether to enter the plea. This may have been due to defense counsel's own misunderstanding that the Court would not hear further argument regarding suppression. If the court made any indication that it would not entertain the defense's second argument related to suppression off of the record, then defense counsel should have requested that the court's decision be placed on the record to preserve it for future review.

There was a strong likelihood of success on this issue, which would have resulted in the suppression of Petitioner's third statement in which he admitted to involvement in decedent's death. Suppression of this statement would have significantly weakened the State's case against Petitioner. Unlike defense counsel's first suppression argument that the Petitioner's statements

⁷ The pre-trial transcript reflects that when defense counsel raised the alternative suppression argument related to the illegality of the voice stress analysis test, Judge Manning inquired whether the State had an opportunity to review defense counsel's memorandum. App. 52, 1-5: The State indicated that they had just received it that morning and would like some additional time to review and prepare, so the judge agreed to take a break "before we address that issue." App. 52, 7-19. The judge also asked to "see [the attorneys] back here to decide how we're going to proceed from this point on," which apparently resulted in the plea offer. App. 52, 20-22.

were involuntary,⁸ the second argument was that the use of the voice stress test was generally an improper interrogation tool because it is not legal in South Carolina such that Petitioner's third statement made immediately after being told that he failed the test should be excluded. App. 148, 15-25. Though the test was administered in Florida, it was done at the request and in the presence of a Richland County, South Carolina investigator in aid of the investigation of a crime committed in South Carolina.⁹ Notably, Petitioner agreed to take a lie detector test, not a voice stress test. The investigator did not explain the difference in the test being administered to Petitioner from the test that he agreed to take, the fact that such a test cannot be administered in South Carolina, or that the test is less reliable than a lie detector test. As such, the Miranda¹⁰ waiver signed by Petitioner was not valid where Petitioner thought that it was being executed in relation to a lie detector test rather than an illegal voice stress analysis test.

⁸ Though defense counsel testified that she argued to the Trial Court that the voice stress analysis test was used to coerce Petitioner's statement, the record does not reflect that any such argument was made to the Trial Court. App. 148, 15-21; App. 49, 15 – 51, 24.

⁹ In State v. Harvin, 345 S.C. 190, 547 S.E.2d 497 (2001), this Court refused to apply the laws of the State of New York to require suppression based on what would have been an illegal interrogation if conducted there. While in custody in New York on drug and petty larceny charges, Harvin was questioned regarding an armed robbery and murder committed in South Carolina. 345 S.C. at 191-93, 547 S.E.2d at 498-99. New York state law prohibits a defendant represented by counsel on the charge on which he is held in custody from being questioned on *any* matter. Id. at 193-94; 547 S.E.2d at 499. Thus, unlike South Carolina law and the federal constitutional rule, application of New York law would have required suppression of Harvin's statements. Id. This Court determined that South Carolina, not New York law, should apply. Id. Likewise, this Court should not apply Florida law in order to allow the admission of evidence obtained pursuant to what is an illegal interrogation technique in South Carolina, especially when such technique was employed at the request and in the presence of a South Carolina officer. Unlike Harvin, exclusion in the present case would have a legitimate deterrent effect on the conduct of South Carolina officers from employing investigation techniques that are illegal in South Carolina when a defendant is in custody in another state.

¹⁰ 84 U.S. 436, 86 S.Ct. 1602 (1966).

“The exclusionary rule requires suppression of ‘fruits’ obtained ‘as a direct result’ of an illegal search or an invalid interrogation. United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 417 (1963)). However, “evidence is not ‘fruit of the poisonous tree’ if it is not obtained ‘by exploitation of the illegality’ but is come at ‘instead by means sufficiently distinguishable to be purged of the primary taint.’” Id. In the present case, the third confession was “fruit of the poisonous tree” of the illegal voice stress test and there was no intervening event to break the causal connection between the illegal interrogation technique and the confession. As such, suppression of Petitioner’s third statement is warranted. Undoubtedly, suppression of the third statement would have strengthened Petitioner’s defense and he likely would have chosen to proceed to trial rather than plea.

Therefore, defense counsel was ineffective in failing to complete the suppression hearing prior to Petitioner’s entry of the Alford plea, or at minimum, inquire and advise Petitioner regarding whether the State’s offer would remain open after completion of the suppression hearing. Instead, Petitioner was under the misapprehension that the suppression hearing was complete and that his statements would be admissible at a trial against him. Thus, Petitioner entered the plea without an accurate understanding of the remaining potential for suppression of his third statement. The exclusion of the third statement may have resulted in a better plea offer, or, alternatively, in acquittal on the charge of murder at a trial. Admittedly, even with exclusion of the third statement, Petitioner would likely have been found guilty of desecration of human remains. App. 147, 17-19. However, that offense carries a maximum penalty of ten years, which is only two-thirds of Petitioner’s current sentence, a significant difference.

II. The PCR court erred in ruling that defense counsel was effective where defense counsel did not discover exculpatory evidence until after acceptance of the Alford plea, despite the evidence having been produced in discovery approximately three years prior, and where defense counsel did not properly advise Petitioner of the significance of the exculpatory evidence.

Consistent with her averments at the plea hearing and post-plea hearing, defense counsel testified at the PCR hearing that she was not aware of the DNA match to a third party, Elijah White, on the vaginal swab taken from the decedent until the State mentioned this in their recitation of the facts during the plea colloquy. App. 77, 15-22; App. 83, 4-7; App. 88, 10-16; App. 145, 16-22. Defense counsel confirmed that Petitioner did not learn of the DNA match until after acceptance of the plea when she met with him in lock-up.¹¹ App. 147, 1-4; App. 152, 22-24. Defense counsel admitted that the document indicating the DNA match was the subject of prior a Motion to Compel filed by original defense counsel and was provided by the State in discovery in 2009, three years prior to the plea hearing. However, it was overlooked by prior counsel and by her. App. 153, 2 – 154, 1.

Defense counsel's failure to review the DNA evidence provided in discovery "fell below prevailing professional norms." See Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010) (finding ineffective assistance of counsel where plea counsel failed to procure pertinent discovery materials and misadvised defendant regarding the State's plea offers). Neither the transition between attorneys nor the length of the discovery materials excuses defense counsel's failure. Defense counsel testified that the entire case file and discovery documents were provided to her in May 2012, almost a year and half prior to the pre-trial and plea hearing, giving her ample time to

¹¹ Petitioner testified that due to his hearing difficulties, discussed *supra*, he did not hear the references to the DNA evidence during the plea hearing. App. 139, 1-5.

review the materials along with her co-counsel, Luke Shealey and Fielding Pringle. App. 140, 13-25.

Additionally, defense counsel's delay in discovering this evidence necessarily meant that it was never investigated. While some investigation was conducted into White, this investigation was made without the knowledge of the DNA evidence. As such, defense counsel consulted no experts regarding how this discovery affected the potential timeline of events relating to the decedent's death, i.e. how long prior to her death intercourse could have occurred and DNA been present for collection by the crime scene investigators.¹² Moreover, additional investigation could have been conducted while White was still alive if prior defense counsel had reviewed the evidence provided in a timely manner. Defense counsel's failures resulted in Petitioner's entry of an Alford plea without the benefit of all exculpatory information.

Defense counsel testified that when she discussed the DNA evidence with Petitioner after the plea, he did not feel that the DNA evidence was too important because he was not charged with a sexual offense. App. 146, 15-18; 160, 10-14. However, she admitted that the evidence would have aided their defense of third party guilt regardless of the nature of the offense. App. 154, 20 - 155, 10; App. 159, 19-22. There was evidence that the decedent had a sexual relationship with White and used drugs with him, that she had told others that she feared White, and that White may have been seen carrying a body over his shoulder around the time of the decedent's death. App. 73, 12 - 74, 3. App. 155, 13 - 157, 6. While the previously collected evidence was probative of reasonable doubt, the DNA evidence undoubtedly strengthened the defense's theory of third-party guilt.

¹² The State indicated that investigators returned to the crime scene several times, so it is unclear from the record on what date the vaginal specimen was collected. App. 72, 2-16.


At a post-plea hearing held on October 25, 2012, Petitioner was asked if he wanted to keep his plea deal in light of the additional information now known regarding White's DNA match. Petitioner indicated affirmatively that he wanted to keep his deal at that time. App. 89, 17 – 90, 5. Notably, Petitioner was advised regarding withdrawal of the plea by the same attorney who missed the exculpatory evidence in the first place. Additionally, Judge Manning's inquiry of Petitioner was insufficient where he did not ask Petitioner if he had sufficient time to discuss the evidence with defense counsel and for its significance to be further investigated, if he understood that if he withdrew his plea he would have the opportunity to complete the pre-trial motions, and if he understood that if he proceed to trial in front of a jury his plea would not be evidence. Thus, Petitioner's decision to keep the plea was not knowing, intelligent, and voluntary.

Therefore, Defense counsel's failure to review the pertinent discovery material fell below an objective standard of reasonableness for attorney conduct. Her efforts to rectify her deficiency after the plea hearing were insufficient. Had Petitioner been timely and fully advised of not only the existence of the DNA evidence matching White, but also of its significance, Petitioner would not have pled guilty but instead proceeded to trial.

CONCLUSION

For the reasons set forth herein, Petitioner Clarence Myers respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

CLARENCE MYERS,

PETITIONER,

V.


STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001238


CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, and Clarence Myers #352916, Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067, this 2nd day of February, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of February, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.