VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

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

INDEX

INDEX ..... i, ii, iii

GUILTY PLEA TRANSCRIPT (MARCH 8, 2005) 1

APPLICATION FOR POST-CONVICTION RELIEF (FILED NOVEMBER 11, 2005) 17

RETURN (JANUARY 6, 2006) 24

AMENDED APPLICATION (FEBRUARY 5, 2007) 29

POST-CONVICTION RELIEF HEARING TRANSCRIPT (MARCH 1, 2007) 31

PLAINTIFF'S EXHIBIT #1 (BOOKING REPORT) 109

PLAINTIFF'S EXHIBIT #2 (SLED LAB REPORT) 110

PLAINTIFF'S EXHIBIT #3 (MEDICAL REQUEST FORM) 112

PLAINTIFF'S EXHIBIT #4 (DRUG RECORD) 113

PLAINTIFF'S EXHIBIT #5 (LETTER DATED AUGUST 9, 2005) 115

PLAINTIFF'S EXHIBIT #6 (LETTER DATED JANUARY 18, 2005) 116

PLAINTIFF'S EXHIBIT #7 (PROPERTY AND EVIDENCE REPORT) 118

PLAINTIFF'S EXHIBIT #8 (MEMORANDUM) 122

PLAINTIFF'S EXHIBIT #9 (LETTER DATED FEBRUARY 8, 2007) 136

COURT'S EXHIBIT #1 (TWO LETTERS DATED FEBRUARY 23, 2005 AND JANUARY 18, 2005) 137

ORDER GRANTING RELIEF (FILED APRIL 11, 2007) 139

MOTION TO ALTER OR AMEND THE FINAL ORDER (APRIL 24, 2007) 147

59(e) MOTION TO ALTER OR AMEND (APRIL 25, 2007) 151

RETURN TO MOTION TO ALTER OR AMEND THE ORDER OF DISMISSAL (APRIL 26, 2007) 158

ORDER DENYING RULE 59(e) MOTION TO ALTER OR AMEND THE FINAL ORDER (JULY 2, 2007) 161

NOTICE OF APPEAL (JULY 12, 2007) 163

PETITION FOR WRIT OF CERTIORARI (MARCH 10, 2008) 166

RETURN TO PETITION FOR WRIT OF CERTIORARI (APRIL 22, 2008) 178

SUPREME COURT ORDER (NOVEMBER 6, 2008) 186

BRIEF OF PETITONER 187

BREIF OF RESPONDENT 201

SUPREME COURT OPINION NO. 26683 (FILED JULY 13, 2009) 210

REMITTITUR (JULY 29, 2009) 223

PETITION FOR WRIT OF HABEAS CORPUS #1 (FILED JULY 29, 2010) 224

PETITION FOR WRIT OF HABEAS CORPUS #2 (FILED JULY 29, 2010) 314

PETITION FOR WRIT OF HABEAS CORPUS #3 (FILED JULY 29, 2010) 393

RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DECEMBER 10, 2010) 492

AMENDED RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (JANUARY 28, 2011) 564

REPORT OF MAGISTRATE JUDGE (JUNE 16, 2011) 621

ORDER TO STAY (SEPTEMBER 30, 2011) 640

APPLICATION FOR POST-CONVICTION RELIEF (FEBRUARY 20, 2012) 650

MEMORANDUM OF LAW IN SUPPORT OF PCR APPLICATION PURSUANT TO AUSTIN V. STATE (FEBRUARY 20, 2012) 657

RETURN AND PARTIAL MOTION TO DISMISS (AUGUST 10, 2012) 762

POST-CONVICTION RELIEF HEARING TRANSCRIPT (DECEMBER 17, 2013) 769

PLAINTIFF'S EXHIBIT #1 (LETTER FROM SUSANNAH ROSS TO TERRANCE TERRY, DATED APRIL 12, 2007) 824

PLAINTIFF'S EXHIBIT #2 (LETTER FROM KAREN RATIGAN TO PAUL WICKENSIMER, DATED APRIL 26, 2007) 825

PLAINTIFF'S EXHIIBT #3 (LETTER FROM SUSANNAH ROSS TO TERRANCE TERRY, DATED APRIL 10, 2008) 826

PLAINTIFF'S EXHIBIT #4 (LETTER FROM TERRANCE TERRY TO SUSANNAH ROSS, DATED NOVEMBER 18, 2007) 827

PLAINTIFF'S EXHIBIT #5 (LETTER FROM TERRRANCE TERRY TO KAREN RATIGAN, DATED MARCH 27, 2007) 832

ORDER OF DISMISSAL (FILED FEBRUARY 17, 2014) 836

MOTION TO ALTER OR AMEND JUDGMENT (FILED FEBRUARY 28, 2014) 844

RETURN TO MOTION TO ALTER OR AMEND JUDGMENT (FILED APRIL 4, 2014) 868

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT (FILED MARCH 25, 2014) 872

INDICTMENTS 874

SENTENCING SHEEETS 880

of the offense. Finally, the judge found that Petitioner proved he was prejudiced by plea counsel's deficient performance given Petitioner demonstrated that he would have insisted on going to trial had he known the definition of "sexual battery."

There Was No Direct Appeal

PCR Action

Petitioner filed an Application for Post-Conviction Relief on November 11, 2005 (2005-CP-23-7327), prosecutorial misconduct, ineffective assistance of counsel, and the court lacked subject matter jurisdiction. (App. 17-24). Specifically, Petitioner asserted the solicitor prosecuted him without disclosure of a valid DNA analysis report or certified chain of custody; counsel was ineffective because he failed to advise client of right to a direct appeal and failed to investigate into Petitioner's case; and the court lacked subject matter jurisdiction because of the evidence presented to the grand jury, and the failure to provide petitioner with a preliminary hearing, violating state and federal constitutional rights, due process and equal protection under the law. (App. 19). The State filed its Return on June 6, 2006. (App. 25-8). Through PCR counsel, Petitioner subsequently filed an Amended Application on February 5, 2007. (App. 29-30). In the Amended Application, Petitioner asserted there was a violation of due process guarantees of the State and U.S. Constitutions in that Petitioner's plea was no knowingly, voluntarily, and intelligently made. (App. 29). Specifically, the record of his guilty plea showed that Petitioner was not made aware of the nature and crucial elements of the charge against him. Id. This was especially problematic because Petitioner was under the influence of prescribed mental

health medications that affected his ability to comprehend what he was doing. (App. 29-30). The Judge also failed to inform Petitioner of his right to appeal. (App. 30).

A hearing in this action was held on March 1, 2007 before the Honorable Michael G. Nettles, Circuit Court Judge. (App. 31-108). Petitioner was present, and he was represented by Susannah C. Ross, Esquire. Id. Assistant Attorney General Karen C. Ratigan, Esquire represented the State. Id. The PCR Court filed its Order on April 11, 2007. (App. 109-16).

In its Order, the PCR court noted it had the opportunity to review the record and had heard the testimony and arguments presented at the PCR hearing. (App. 110). Pursuant to S.C. Code Ann. § 17-27-80 (2003), following are the relevant finding of facts and conclusions of law. (App. 110).

Petitioner 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 Petitioner 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. (App. 110-11). The PCR Court found that the allegations of prosecutorial misconduct were without merit. (App. 111).

Petitioner submitted as an exhibit the SLED lab report for the rape kit analysis which was dated March 2, 2005. (App. 111). It showed no sperm or semen found and was neither exculpatory nor incriminating. Id. Petitioner pled guilty March 8, 2005. Id. No evidence was presented as to whether the solicitor had received the report prior to the

guilty plea. Id. However, the report was present in the solicitor's file over one year later when the file was subpoenaed by Petitioner. Id. Petitioner and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. Id. While a Brady violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by Petitioner 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). (App. 111).

Petitioner 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. (App. 111). Because Petitioner 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. Id. 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). (App. 111-12). 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. (App. 112).

The transcript of Petitioner's guilty plea stated in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17). (App. 112). According to Petitioner'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 Petitioner expressly denied. (App. 112). Petitioner submitted a family court order contained in the file subpoenaed from the solicitor which said that Petitioner 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. Id. The PCR Court found 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). (App. 112).

Petitioner 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 Petitioner 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 Petitioner 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 Petitioner appeared without counsel; (3) failure to present mitigating evidence at Petitioner's guilty plea by not mentioning Petitioner'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 Petitioner providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery. (App. 112-13).

The PCR Court found that these allegations were without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. (App. 113). Petitioner 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*. (App. 113-14). Petitioner 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. (App. 114). Plea counsel testified that he met with Petitioner one time, the day of his guilty plea, during the nine months he represented him. Id. Counsel admitted that he did not review the meaning of sexual battery with Petitioner saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children. Id. Plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented Petitioner. Id. Based upon the testimony of trial counsel and Petitioner, the PCR Court found that the plea attorney 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. Id. Considering the entire record including the guilty plea transcript, the PCR Court found that the error was not cured by the colloquy during the guilty plea. Id.

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). (App. 114). 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. (App. 114). Petitioner's plea counsel did not do this. Id. 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). (App. 114-15). Upon hearing the testimony and reviewing the transcript of the plea, the PCR Court found that Petitioner had shown prejudice. (App. 115). Had Petitioner known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial. Id.

Petitioner argued 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. (App. 115). The PCR Court disagreed and found that the indictments contained 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). (App. 115). Petitioner presented 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). (App. 115).

The PCR Court found that Petitioner failed to prove any other allegations that were raised in the application or at the hearing in this case and not specifically addressed herein. (App. 115). Therefore, all such allegations were without merit and denied. Id.

The PCR Court granted Petitioner's motion for post-conviction relief based on ineffective assistance of counsel. (App. 116). The cases were reversed and remanded for a new trial and Petitioner was to be released to the custody of the Greenville County Detention Center where his original bond would be reinstated. Id.

IT WAS THEREBY ORDERED:

1. That Petitioner's motion for post-conviction relief was 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-G8-23-1274) were reversed and remanded; and
3. That Petitioner was to be released to the custody of the Greenville County Detention Center where his original bond would be reinstated. (App. 116).

On April 24, 2007, the State filed its Motion to Alter or Amend the Final Order. (App. 117-9). Petitioner also filed a pro se Motion for Reconsideration. The PCR Court filed its Order Denying Rule 50(e) Motion to Alter or Amend the Final Order on July 6, 2007. (App. 120-21). In the Order, the PCR Court noted this matter was back before the PCR Court

by way of the Respondent's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 24, 2007; and Petitioner's motion to reconsider pursuant to Rule 59(e), SCRCP, dated April 25, 2007. (App. 120). The Respondent made its return to this motion on April 26, 2007. Id.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Respondent and Petitioner's motion and supporting memorandum, the PCR Court was not persuaded to alter or amend the judgment.[4] (App. 120). The PCR Court further found that oral argument would not aid in the reconsideration of the original judgment. Id. The previous order fully comported with the requirements of Rule 52(a) SCRCP. Id.

IT WAS THEREFORE ORDERED:

1. That the Respondent and Petitioner's motion were denied and dismissed.

PCR Appeal

The State timely filed a Notice of Appeal on July 12, 2007. On appeal, Petitioner was represented by Robert M. Pachak, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The State perfected its appeal with the filing of a Petition for Writ of Certiorari. In the Petition, the State raised two arguments. First, the State argued the PCR judge erred in finding Petitioner met his burden of proving ineffective assistance of counsel. Second, the PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy. Petitioner

---

[4]In addition, Petitioner's motion to reconsider pursuant to Rule 59(e), SCRCP, was ineffective and void because Petitioner was currently represented by counsel. See Rule 11 (a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

filed a Return to the Petition for Writ of Certiorari, asserting 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.[5]

In an Order filed November 6, 2008, the South Carolina Supreme Court granted the Petition for Writ of Certiorari. The Court also ordered the parties to proceed to serve and file the appendix and briefs as provided by Rule 227(j), SCACR. On November 19, 2008, the State filed its Final Brief of Petitioner, raising the same issues raised in the Petition for Writ of Certiorari. Petitioner filed a Final Brief of Respondent, asserting the same argument as in the Return to the Petition for Writ of Certiorari.

In a published Opinion filed July 13, 2009, the South Carolina Supreme Court reversed the PCR Court's Order.[6] The Supreme Court noted the State argued the PCR judge erred in finding Petitioner 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 Petitioner prior to the plea proceeding, the State contended 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 claimed that Petitioner did not prove prejudice given he had admitted his misconduct and any error was cured by the plea colloquy. Ultimately, the State sought a reversal of the PCR judge's decision to grant Petitioner a new trial on all of his convictions.

---

[5]Petitioner did not file a Notice of Appeal or raise any separate issues in the PCR Appeal.

[6]Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009).

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).[7]

"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).

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

---

[7]Because the alleged sexual misconduct occurred in July 2004, the Supreme Court cited to this version of the statute given there have been substantive changes made to section 16-3-655 in subsequent years.

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 Petitioner, 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 Petitioner of a crucial element of the offense of CSC with a minor, first degree, the Supreme Court agreed with the PCR judge that counsel's representation fell below an objective standard of reasonableness.

The Supreme Court found, 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 Petitioner's competency were not meritorious. In light of this decision, the PCR judge implicitly found that Petitioner had the requisite mental capacity to comprehend the plea proceeding.

At the plea proceeding, the judge read the indictments and Petitioner 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 Petitioner 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 Petitioner 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." Petitioner admitted that the solicitor's statement of facts was true. Therefore, the Supreme Court found Petitioner 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 the Supreme Court's decision, it further concluded the PCR judge erred in granting Petitioner a new trial for the two counts of lewd act upon a child. As previously stated, the PCR judge's primary reason for granting Petitioner's petition for relief was plea counsel's failure to correctly inform Petitioner 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 Petitioner 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, the Supreme Court found there was no evidence to support the PCR judge's decision to grant Petitioner's relief on those two convictions.

In terms of Petitioner's conviction for CSC with a minor, first degree, the Supreme Court found any deficient performance by plea counsel was cured by the plea colloquy. As to the remaining two charges, the Supreme Court held hold there was 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 Petitioner of the term "sexual battery" would not have affected Petitioner's plea of guilty to the charges of lewd act upon a child. Accordingly, the decision of the PCR judge was

REVERSED.

The Remittitur was issued on July 29, 2009.

II. ATTACHMENTS

1. Appendix, the Honorable Michael G. Nettles, Circuit Court Judge
2. Notice of Appeal

3. Petition for Writ of Certiorari

4. Return to Petition for Writ of Certiorari

5. South Carolina Supreme Court Order

6. Brief of Petitioner

7. Brief of Respondent

8. South Carolina Supreme Court Opinion

9. Remittitur

10. Copy of Application for Post-Conviction Relief

11. 59(e) Motion to Alter or Amend (filed pro se by Petitioner)

12. Return to Motion to Alter or Amend the Order of Dismissal (filed by the State)

13. Motion to Comply With Established Law and civil Rules Concerning Order Denying or Granting Applicant's Motion to Alter or Amend Pursuant to Rule 59(e)

14. Pro Se Motion to Remove Counsel for Self Representation

15. Letter from Office of Attorney General filed in lieu of formal Return to Pro Se Motion to Remove Counsel for Self Representation

16. South Carolina Supreme Court Order letter Order dated June 2, 2008

17. Exhibits Submitted into Evidence at PCR Evidentiary Hearing

III. FEDERAL HABEAS ACTION[8]

First Habeas Petition

Ground One: Prosecutorial Misconduct - Violation of Rule 5-Brady/Rules 5 and 6 - SCRCrimP. Withholding of SLED results. (See Memorandum)

Supporting Facts:

---

[8]Petitioner filed three separate Petitions for Federal Habeas Corpus. By Order dated September 20, 2010, all three Petitions were combined as one. These are the Grounds raised in each Petition.

1. County Sherriffs[sic] Dept. retrieved from hospital "1 rape 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 sherriff/soclitiors' office - via cc: (6) six days prior to G.S. appearance of March 8, 2005. (See exhibit P-2)
4. 1-18-05/discovery "itemized cover sheet" shows no SLED results (exhibit P-6)

Ground Two: Prosecutorial Misconduct - Use of alleged admission by Applicant from Family Court; (See Memorandum); without appointed counsel

Supporting Facts:
1. Applicant attended a Family Court hearing on October 12, 2004 without appointed counsel. (See Transcript -(PCR) p. 87, l. 12-25; 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, l 17).

Ground Three: Ineffective Assistance of Counsel - Issues 2., 1., and 4. - (Please see PCR Order)(See also Memorandum Argument III)

Supporting Facts:
1. Failure to investigate - met with Applicant once (the day of the plea - 10 minutes) (Plea Transcript - p. 84, l. 9-11; p. 50, l. 25; p. 51, l. 1-9) - No Brady request.
2. Failure to address the Fact of my two court appearances under psychotropic medications (Family and G.S.). (Plea Trans. -p. 54, l. 17-24; p. 56, l. 15-20; p. 59, l. 8-12; p. 59, l. 21-25; pgs. 60-62, l. 1-25). (See exhibits)(See exhibits)
3. Failure to negotiate plea offer(s), esp. 1-18-05! (Trans.-p. 97, l. 15-25; p. 98, l. 1-19)

Ground Four: Ineffective Assistance of Counsel - Issues 3. and 5. (Please see PCR Order)(See also Memorandum Argument III)

Supporting facts:
1. Failure to present mitigating evidence, ie - there was "never" a psychological exam performed in this case, despite "manditory requirement and "two court order mandates." (Plea Trans.-p. 85, l. 23-25; p. 86, l. 1-25; p. 87, l. 1-8). (See exhibit(s)).

2. Failure to adequately advise the Applicant, ie - counsel advised guilty plea despite lack of evidence. (Trans.-p. 38, l. 3-15).

Second Habeas Petition

Ground One: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix)

Supporting Facts:

1. During the course of the PCR hearing I entered (9) nine exhibits into the Court records. The PCR judge - in turn - entered "two document," (the plea offers), as well. (See exhibit); (See also, PCR Transcript - pgs. 97-98, l. 15-19).

2. I recieved[sic] 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).

Ground Two: Ineffective Appellate Counsel - (See Memorandum) - Failure to provide no more than a "less than perfunctory" representation/investigation.

Supporting Facts: From our very first communique it was established that we had "opposing views" concerning presenting the misconduct (PCR) issue as "highly meritorious" in certiorari. Me -for, him -against. This view was escalated further, counsel refused to pursue stipulation - 3. In the PCR 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 States' inaccurate "case statement.

Ground Three: Misinterpretation of the Record on Appeal (Appendix) resulting in "reversal" of the PCR Order granting relief. (See Memorandum)

Supporting Facts: Discrepancies are per page No. 5 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 witheld[sic] from the "record on appeal."
   * This would be (PCR exhibit P-8)!

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.

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 were 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. Pro se representation denied by Chief Justice (See exhibit)

Third Habeas Petition

Ground One: 14th Amendment due process violation of Brady. "No Relief" at PCR failure to disclose DNA (Sled results) or toxicology report. (See Memorandum)

Supporting facts:

1. Greenville Co. Sherriff's Investigator prepared 2 "Property Control and Custody Reports" for the Rape Kit Forwarded and returned from SLED.
2. Copy of "results" also forwarded (cc:) - to Solicitor (dated March 2, 2005).
3. "Itemized" discovery list dated 1-18-05-shows P, and, 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 destroyed 3 months after plea. (except toxicology results). Facts 1-3 argued at PCR. Judge ruled issue of DNA results "unmeritorious" for relief.

Ground Two: Misconduct/abuse of descretion/use of "alleged admission" from Family Court by the Applicant without counsel-, (See Memorandum); not in discovery. Supporting facts:

1. Applicant attended a Family Court hearing on October 12, 2004, without appointed counsel. (See, PCR 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. (PCR 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. PCR Judge ruled issue "unmeritorious"

Ground Three: The PCR Judge erred in granting relief based upon "one issue" of I.A.C., (See Memorandum), Abuse of descretion.

Supporting facts: At the PCR hearing the Petitioner submitted that his counsel failed to investigate and asa result: A.) Defendant pled under the influence of "psychotropic drugs" B.) Failed to request "manditory[sic] psychological evaluation. (Court ordered!) C.) Failed to present SLED 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 PCR Judge found "no ineffective counsel" or Prosecutorial Misconduct

IV. APPLICABILITY OF THE AEDPA

The present habeas action was filed on July 28, 2010.[9] Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of" clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

V. EXHAUSTION

The record does not support a finding of exhaustion. 28 U.S.C. § 2254(b)(1). There may be an available remedy for some of Petitioner's claims. There was no direct appeal in this case. Petitioner did file an Application for Post-Conviction Relief. In his APCR, Petitioner arguably raised the claims now raised in Grounds One, Two, Three, and Four

[9]This was the date of receipt from the South Carolina Department Corrections stamped on the envelopes to Petitioner's habeas petitions.

of the first habeas petition, and the Grounds raised in Grounds One, Two, and Three of the third habeas petition. The PCR Court granted relief on a claim Petitioner does not raise in this habeas action, but denied relief upon these claims. The State appealed. Petitioner did not file a cross-appeal. On appeal, the South Carolina Supreme Court reversed the PCR Court's Order. During the appeal, Petitioner did file a motion to proceed pro se with the South Carolina Supreme Court, thus arguably raising the claim he now raises in Ground Four of the second habeas petition. The South Carolina Supreme Court denied the motion.

Respondent submits Petitioner may have an available state remedy to seek relief upon the claims he now raises in his first and third habeas petitions. Petitioner asserts in Grounds Two and Four of the second habeas petition that he requested PCR appellate counsel challenge the denial of relief upon his other PCR claims. He may be able to seek additional post-conviction relief and secure a belated PCR appeal on these claims. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). "Under Austin, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal." Odom v. State, 337 S.C. 256, 259-260, 523 S.E.2d 753, 755 (1999) (further noting the 1 year statute of limitations contained in S.C. Code Ann. § 17-27-45(A) does not apply to Austin filings). It is unclear from the record in this case whether Petitioner is entitled to relief upon Austin.[10] As of the date of this filing, Petitioner has not filed a post-conviction relief action seeking appellate

[10]The PCR Court could find Petitioner cannot meet the requirements for Austin review.

review of the denied claims pursuant to Austin v. State. Since Petitioner may still seek appellate review of his PCR claims via a PCR action filed pursuant to Austin, Petitioner has not exhausted all available state remedies for these claims. Since Petitioner did not properly exhaust these claims in state court, and he could seek appellate review in state court upon many of the claims raised in the first and third habeas petitions, Respondent submits these petitions are unexhausted. Thus, this habeas action contains both exhausted and unexhausted claims. Respondent submits it should therefore be dismissed to allow for state court review of the unexhausted claims. Rose v. Lundy, 455 U.S. 509, 520-522, 102 S.Ct. 1198 (1982).

VI. STATUTE OF LIMITATIONS

Petitioner's habeas petition should be dismissed because all of Petitioner's claims are not timely and are barred by the statute of limitations. The AEDPA provides that "[a] 1 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." 28 U.S.C. § 2244(d)(1). The time limit begins to run at the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). A "properly filed application for State post conviction relief," however, will toll the time for filing. 28 U.S.C. § 2244 (d)(2). Even with the filing of his first post-conviction relief action in this case, Petitioner is barred from filing his habeas petition by the AEDPA statute of limitations.

Petitioner pled guilty on March 8, 2005. He did not file an appeal. Thus, his conviction became final on March 18, 2005.[11] At the time, Petitioner did not file a Petition

[11]A notice of appeal must be served within ten days after sentenced is imposed. Rule 203(b), SCACR.

for Rehearing. Thus, the statute of limitations began to run on March 19, 2005, the date Petitioner's conviction became final. Petitioner would have had 365 days from March 18, 2005 to file his petition for federal habeas corpus.

The statute of limitations ran until Petitioner filed his post-conviction relief action on November 11, 2005. Two hundred and thirty-seven days elapsed between the date Petitioner's conviction became final and the date he filed his post-conviction relief action. The statute remained tolled during the pendency of the first PCR action which began on November 11, 2005 and lasted until the PCR appeal was reversed on July 13, 2009. The Remittitur for the PCR Appeal was issued on July 29, 2009. Thus, the statute of limitations began to run on July 30, 2009, the after day the Remittitur was filed. Petitioner had 128 days from July 29, 2009 to file his federal habeas corpus petition. The deadline to file his habeas petition ran on December 4, 2009. The statute continued to run until the filing of this habeas petition on July 28, 2010. Petitioner exceeded the statute of limitations by 236 days. All of Petitioner's claims are barred under the statute of limitations and he is not entitled to equitable tolling, even if available. Id. (denying equitable tolling where the petitioner waited years to file his habeas action.).

Petitioner has offered no valid explanation in his habeas petition to explain why it is untimely and why the statute of limitations should be equitably tolled. "The 1 year limitation period of Section 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments." Duncan v. Walker, 533 U.S. at 179. While the U.S. Supreme Court and the Fourth Circuit have held that the AEDPA statute of limitations is subject to equitable tolling,, both have also underscored the very limited circumstances where equitable tolling will be permitted. Holland v. Florida, 130 S. Ct. 2549, 2562-63, 177

L. Ed. 2d 130 (2010), Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000), Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc). The limits on equitable tolling stem from the fact that "Congress enacted AEDPA to reduce delays in execution of state and federal criminal sentences, particularly capital cases...and to further principles of comity, finality and federalism.". Woodford v. Garceau, 538 U.S. 202, 206 (2003)(internal citations and quotation marks omitted).

"To be entitled to equitable tolling, [Petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) and some extraordinary circumstance stood in his way' and prevented timely filing." Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 1085 (2007)(citation omitted)(holding petitioner was not entitled to equitable tolling when at the time he neglected to file timely, law was not questionable where federal circuits were in agreement petitioning U.S. Supreme Court for certiorari did not toll habeas corpus statute of limitations). The requirement that he prove he was prevented from timely filing by extraordinary circumstances, which were beyond his control or external to his own conduct, does not include the failure of his attorney to advise him of the statute of limitations or mis-advice from counsel. Id. ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel"); Rouse, supra. The U.S. Supreme Court has noted that far more serious instances of attorney misconduct may warrant equitable tolling, if the circumstances are extraordinary. Holland, supra. Ignorance of the statute of limitations or inadequacy of the prison law library also do not suffice. See Marsh v. Soares, 223 F.3d 1217 (10th Cir. 2000) ("[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing"(quotation omitted)); Id. (holding assistance

petitioner received from inmate law clerk did not relieve him of personal responsibility to file within AEDPA's one-year period); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (holding illiteracy does not merit equitable tolling). See also Cross-Bey v. Gammon, 322 F.3d 1012, 1015 (8th Cir. 2003)(rejecting equitable tolling where petitioner alleged lack of legal knowledge and legal resources), cert. denied, 540 U.S. 971 (2003); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2002)(as amended)(recognizing that the lack of access to library materials does not automatically qualify as grounds for equitable tolling) cert. denied, 535 U.S. 1055 (2002).

There is nothing in the record nor has Petitioner put forth any facts supportive of equitable tolling, if available. First, Petitioner has not shown he has pursued his rights diligently. Two, Petitioner has not shown some extraordinary circumstance stood in his way and prevented him from timely filing. Therefore, all of Petitioner's habeas claims are barred by 28 U.S.C. § 2244(d)(1).

VII. PROCEDURAL BARS/DEFAULT

Petitioner's claims in Grounds One, Two, and Three of his second habeas petition are procedurally barred. Ground One asserts a claim of prosecutorial misconduct in the preparation of the Appendix in the PCR appeal. Ground Two asserts a claim of ineffective assistance of PCR appellate counsel. Ground Three asserts the South Carolina Supreme Court made factual errors in its opinion reversing the PCR Court's Order. None of these claims were raised in state court. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would find any attempt to raise these claims now to be procedurally improper, then these claims are procedurally barred from review in federal

habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

To date, Petitioner has not filed a PCR action to seek Austin review of the claims that were denied in his PCR. In the event Petitioner waives his opportunity to seek relief under Austin v. State, supra, or in event the state courts deny Petitioner's request for appellate review of his PCR claims, Respondent submits all of Petitioner's claims in the first habeas petition are procedurally barred. In Ground One of the first petition, Petitioner asserts claims of prosecutorial misconduct relating to the failure to provide the defense with a SLED report and the destruction of evidence after Petitioner's guilty plea. In Ground Two, Petitioner asserts a claim of prosecutorial misconduct based upon the State's repeating admissions he made during a Family Court hearing in the State's recitation of the facts at the guilty plea hearing. In Ground Three, Petitioner asserts several claims of ineffective assistance of counsel. He claims counsel failed to investigate his case, failed to file a Brady motion, failed to meet with Petitioner, failed to address Petitioner's allegation that he appeared before the Family Court and the plea court while under the influence of psychotropic drugs, and failed to advise Petitioner about his right to appeal his guilty plea. In Ground Four, Petitioner asserts plea counsel was ineffective for not presenting mitigating evidence at sentencing, and for advising Petitioner to plead guilty even though there was allegedly a lack of evidence to support a finding of guilt.

All of these claims were raised in Petitioner's PCR Action. The PCR Court denied relief upon all of these claims. The State filed an appeal based upon the PCR Court's grant of relief on another claim of ineffective assistance of counsel. Petitioner did not file a cross-appeal. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would have necessarily found his attempt to raise these claims now to be procedurally improper under Austin, these claims are procedurally barred from review in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

Similarly, Petitioner's claims in his third petition are also subject to procedural bars if Petitioner fails to seek Austin review, or if Austin review is denied by the state courts. In Ground One, Petitioner reasserts the Brady claim raised in Ground One of the first petition. In Ground Two, Petitioner reasserts the claim raised in Ground Two of the first petition. He also appears to assert a claim that the statement made by the solicitor at the plea hearing was false. In Ground Three, Petitioner asserts counsel was ineffective for not properly handling the fact Petitioner was allegedly under the influence of psychotropic drugs when he pled guilty and when he appeared before the Family Court. Petitioner also asserts counsel was ineffective for not requesting a mandatory psychological evaluation, not presenting the results in the SLED report to Petitioner, not negotiating a plea offer with

the State, and not advising Petitioner of his right to file a direct appeal to his guilty plea. While these claims were arguably ruled upon by the PCR Court, Petitioner did not raise them on appeal to the South Carolina Supreme Court. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would have necessarily found his attempt to raise these claims now to be procedurally improper under Austin, these claims are procedurally barred from review in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

Cause and Prejudice

Grounds One, Two, and Three of the second habeas petition are procedurally barred absent a showing of cause and actual prejudice, or actual innocence. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997). Similarly, all of Petitioner's claims in the first and third habeas petitions will also be procedurally barred if Petitioner fails to seek appellate review under Austin, or if the state courts deny Petitioner's request for appellate review pursuant to Austin. The existence of cause must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's or his efforts to comply with the State's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner expresses no particular cause for procedurally defaulting on his grounds. Petitioner had a PCR hearing and an appeal from

the PCR in which to raise these issues and he failed to raise them, raise them properly, or preserve these issues for habeas review. Petitioner cannot establish cause and prejudice because he has consistently abandoned opportunities to preserve these specific issues.

In the alternative, Petitioner must show a miscarriage of justice. In order to demonstrate a miscarriage of justice, Petitioner must show he is actually innocent. Actual innocence is defined as factual innocence, not legal innocence. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 (1998). Petitioner cannot establish that the errors he complains of probably resulted in the conviction of an innocent person. Sclup v. Delo, 513 U.S. 298, 327 (1995). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id.

The record would make an assertion of actual innocence incredible. Petitioner admitted that he was pleading guilty because he was guilty. (App. 11). Petitioner also admitted at the plea hearing that he engaged in the conduct that constituted criminal sexual conduct with a minor in the first degree, and the lewd acts upon children. (App. 12). Petitioner cannot show actual innocence. The procedural bar should be applied without exception. Murray, supra. Furthermore, actual innocence is not a claim but merely lifts the procedural bar, if established, and allows consideration of the habeas petition on the merits. Bousley, supra. Petitioner cannot establish actual innocence. The procedural bars should not be lifted.

VIII. MERITS

In the alternative, Respondent submits Petitioner's federal habeas claims are all without merit. He has not shown that the state courts made unreasonable determination of the facts in addressing these claims, or that the state courts unreasonably applied

federal law in addressing these claims. He has not shown that he is entitled to federal habeas relief upon any of the claims. As a result, this federal habeas action should be denied and dismissed.

A. STANDARD OF REVIEW

The standard of review to be applied in habeas is "quite deferential to the rulings of state courts." Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001). Petitioner cannot prevail before this Court on the merits of this claim.

To prevail on an ineffective assistance of counsel claim, Petitioner must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id. With guilty pleas, "in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A guilty plea is constitutionally valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Lockhart, 474 U.S. at 56. A plea is knowingly and intelligently made if a defendant is fully aware of the direct consequences of his guilty plea and not induced by threats, misrepresentation, including unfulfilled or unfulfillable promises, or by promises that are by their nature improper as having no relationship to the prosecutor's business. Brady v. U.S., 397 U.S. 742, 755, 90 S.Ct. 1463 (1970). The defendant may not later assert that his plea was invalid except in

extremely limited situations, such as where counsel was ineffective. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977).

Petitioner also bears the burden of showing he is entitled to habeas corpus relief. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain habeas relief, Petitioner must show the PCR judge or the South Carolina Supreme Court unreasonably applied federal law, as determined by the United States Supreme Court, or made "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d); Carey v. Musladin, 549 U.S. 70 (2007). Here, Petitioner has shown neither. The South Carolina Supreme Court did not unreasonably apply clearly established federal law, as decided by the United States Supreme Court, nor was the factual determination unreasonable in light of the facts.

To establish an unreasonable application of federal law, Petitioner must show more than "an incorrect or erroneous application of federal law." Williams v. Taylor, 529 U.S. 362, 413 (2000). Thus, "a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be 'unreasonable' for habeas relief to be granted. This is a substantially higher threshold." Id. at 410. Petitioner has failed to overcome this threshold.

First Habeas Petition

Ground One: Prosecutorial Misconduct - Violation of Rule 5-Brady/Rules 5 and 6 - SCRCrimP. Withholding of SLED results. (See Memorandum)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims of prosecutorial conduct in Ground One of his first habeas petition are

without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law in addressing this claim. Since Petitioner has failed to show that he is entitled to federal habeas relief upon these claims, Ground One should be dismissed.

Claims Related to SLED Report

In Ground One, Petitioner asserts there were prosecutorial misconduct, Rule 5 and Rule 6 SCRCrimP violations, and Brady violations because a SLED report was not submitted to the defense before Petitioner pled guilty. The PCR Court found this claim was without merit. The PCR Court noted that Petitioner submitted the SLED lab report for the rape kit analysis dated March 2, 2005 as an exhibit supporting this claim. (App. 111). It showed no sperm or semen was found. Id. The PCR Court noted that was neither exculpatory nor incriminating. Id. The PCR Court indicated that 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. Id. The PCR Court found that Petitioner's Brady claim failed because he failed to demonstrate (1) the evidence was favorable to the accused; (2) it was in the possession or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment. Id.

Petitioner cannot show that the PCR Court's ruling on this issue was the result of an unreasonable determination of the facts. All of the factual findings made by the PCR Court are supported by the record. The SLED report that was admitted into evidence indicated that no sperm or semen was found. (App. 49-50, see Attachment No. 17, at pg.

17-18). There was no evidence presented at the PCR hearing that indicated when the SLED report was received by the solicitor's office. However, it was noted that the SLED report was found in the file by PCR counsel in April 2006, over one year after Petitioner's guilty plea. (App. 96-7).

Petitioner also cannot show that the PCR Court's ruling was an unreasonable application of federal law. "A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

"[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

The PCR Court's findings are not an unreasonable application of federal law. First, as noted by the PCR Court, Petitioner failed to show that the SLED report was favorable. The report clearly indicates that no sperm of semen was identified from the samples submitted by the Greenville County Sheriff's Office. As a result, no testing could be done. Thus, the results neither inculpate or exculpate Petitioner as a possible suspect. Further, the SLED report does not impeach any witness (none testified) or any statement made by the solicitor at the plea hearing. (See App. 12). Similarly, Petitioner fails to show that the SLED report was material. Thus, Petitioner did not establish two of the elements of his Brady claim, i.e., that the evidence in question must be favorable to the defendant and that

the evidence was material. As a result, the PCR Court's finding that Petitioner had failed to establish his Brady claim was not contrary to federal law as defined by the U.S. Supreme Court. As a result, this claim in Ground One should be denied and dismissed.

To the extent that Petitioner asserts there were violations of Rules 5 and 6 of the South Carolina Rules of Criminal Procedure, Respondent submits that those claims are not cognizable for federal habeas relief. They clearly hinge on the interpretation of state criminal law and rules of procedure, not federal law. Thus, those claims fall outside of the jurisdiction of this Court. Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998). Petitioner fails to assert that any federal law is at issue as to those claims. Since these claims strictly rely upon the interpretation of state law, they must be summarily dismissed. Estelle v. McGuire, 502 U.S. 62, 67 (1991)("Federal habeas corpus relief does not lie in errors of state law.").

Claims Related to Destruction of Evidence

To the extent Petitioner raises a claim of prosecutorial misconduct for the destruction of some of the evidence the State may have intended to present had Petitioner gone to trial, Petitioner's claim is also without merit. The PCR Court found Petitioner failed to prove the evidence was exculpatory or that the solicitor acted in bad faith. As a result, the solicitor's actions did not amount to prosecutorial misconduct. The PCR Court further noted that the State did not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant, citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); and State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990).

Petitioner cannot show that the PCR Court's findings were the result of either an unreasonable determination of the facts or an unreasonable application of federal law. The PCR Court's findings were not an unreasonable application of federal law. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). Here, Petitioner did not show in state court that the police acted in bad faith in destroying some of the evidence may have intended to present had Petitioner gone to trial. None of the items were destroyed before Petitioner's guilty plea. (See Attachment #17, pgs 25-8). The Property and Evidence Reports were disclosed to the defense prior to Petitioner's guilty plea. (See Attachment #17, pgs 23-4). Clearly, the evidence was available to Petitioner and his counsel prior to Petitioner's guilty plea. Thus, Petitioner cannot show that the police acted in bad faith when they destroyed the evidence after Petitioner pled guilty. As a result, to the extent Petitioner asserts there was a due process violation because of the destruction of some of the evidence the State may have intended to present had Petitioner gone to trial, his claim is without merit. Ground One of Petitioner's first habeas petition should therefore be denied and dismissed.

Ground Two: Prosecutorial Misconduct - Use of alleged admission by Applicant from Family Court; (See Memorandum); without appointed counsel

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground Two are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing this claim. Further, Petitioner fails to show that a state court unreasonably applied federal law in addressing

this claim of prosecutorial misconduct. Since Petitioner has not established that he is entitled to federal habeas relief upon this claim, Ground Two in Petitioner's first habeas petition should be denied and dismissed with prejudice.

In Ground Two, Petitioner asserts it was prosecutorial misconduct for the State to use his admissions in Family Court against him at the plea hearing. This claim is without merit. The PCR Court found that Petitioner's claim did not entail prosecutorial misconduct. (App. 112). Petitioner cannot show that this ruling was either based upon an unreasonable determination of the facts or an unreasonable application of federal law.

First, Petitioner cannot show that the PCR Court made an unreasonable determination of the facts in addressing this claim. The PCR Court noted that the transcript of Petitioner's guilty plea stated that he admitted guilt in the DSS family court proceedings. (App. 112). It also noted that Petitioner testified that he was not represented at the DSS proceedings and that 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. Id. The PCR Court also noted that Petitioner expressly denied engaging in sexual battery. Id. The PCR Court also found that Petitioner submitted a family court order contained in the file subpoenaed from the solicitor that said Petitioner was in agreement with the finding of sexual abuse of his three step-daughters supported his assertion that the solicitor was aware that any admission was of sexual abuse only. Id. These findings are supported by the record. At Petitioner's plea hearing, it is noted that Petitioner admitted guilt in the DSS proceedings. (App. 12). Further, at the PCR hearing, Petitioner testified defense counsel was not present at the DSS proceedings, and he was not represented at the DSS proceedings. (App. 57, 67). Petitioner also expressly denied

engaging in sexual battery at the PCR hearing. (App. 63). Petitioner also argued that the treatment plans indicated he only admitted to general sexual abuse, and not sexual battery. (App. 66-7). Since the PCR Court's factual findings are clearly supported by the record, Petitioner fails to show that the PCR Court's decision was the result of an unreasonable determination of the facts.

Petitioner also fails to show that the PCR Court unreasonably applied federal law in denying this claim of prosecutorial misconduct. In reviewing Petitioner's brief on this issue, it appears that Petitioner is essentially asserting that there was prosecutorial misconduct because the State did not provide him with a copy of his testimony from the DSS family court hearings before noting that he had admitted his guilt at the plea hearing. This claim is without merit. As already noted in response to Ground One, "the Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978). The statement in question was made by **Petitioner** at his DSS proceeding. Clearly, Petitioner could have informed counsel of the statements, and if necessary, counsel could have contacted the court reporter for the Family Court proceeding to obtain a copy of the transcript of those proceedings.

To the extent Petitioner asserts that the statements made at the DSS proceeding were not admissible because he was not represented by counsel, Petitioner's claim is also

without merit. See Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602 (1973) ("when a criminal defendant has solemnly admitted in open court that he is, in fact, guilty of the offense with which he is charged [he may only attack the voluntary and intelligent character of the plea, and] he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea"); United States v. Willis, 992 F.2d 489, 490 (4th Cir.1993); see also State v. Passaro, 350 S.C. 499, 567 S.E.2d 862, 866 (2002).

In all, Petitioner fails to show that he is entitled to federal habeas relief upon these claims. As a result, Ground Two should be denied and dismissed.

Ground Three: Ineffective Assistance of Counsel - Issues 2., 1., and 4. - (Please see PCR Order)(See also Memorandum Argument III)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims of ineffective assistance of counsel in Ground Three are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law to these claims. Since Petitioner has not established that he is entitled to federal habeas relief upon these claims, Ground Three should be denied and dismissed.

In Ground Three, Petitioner asserts four claims of ineffective assistance of counsel. First, he argues that counsel was ineffective because counsel failed to investigate the claims against Petitioner, counsel only met with Petitioner once, on the day of the plea hearing; and counsel failed to make a Brady motion. Second, Petitioner contends counsel was ineffective for not addressing the fact that Petitioner made two court appearances

while under the influence of psychotropic medications. Third, Petitioner asserts counsel was ineffective in failing to negotiate for a plea offer. The fourth claim, which is not listed on the habeas petition but is contained in the brief attached to it, was that counsel was ineffective for not advising him of his right to a direct appeal.

A. Trial Counsel was not ineffective for not investigating, making a Brady motion, or meeting with Petitioner

In the first set of claims, Petitioner presents several arguments. First, he claims that counsel failed to investigate the claims against Petitioner. In the brief attached to the habeas petition, Petitioner also argues that counsel failed to review the rape kit and clothing that was in possession of the Greenville County Sheriff's Department. According to Petitioner, counsel could have become aware of the SLED report had he engaged in further investigation into the whereabouts of the clothing and rape kit. Second, Petitioner argues plea counsel only met with him once, on the day of the plea. Third, he contended that counsel failed to file a Brady motion.

The PCR Court denied relief on the first argument in this set of claims, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. Petitioner did not show that he was prejudiced by any deficiency in his plea counsel's investigation. Specifically, Petitioner did not present any exculpatory evidence that would have been found had counsel engaged in a more thorough investigation. At the PCR hearing, Petitioner did present nine exhibits. The first

was his booking report. The second was the SLED lab report at issue in Ground One of this first petition. The third exhibit was a medical request form completed by Petitioner when he was being held by at the Greenville County Detention Center. The fourth exhibit consisted of his medication records from the detention center. Petitioner's fifth exhibit was the letter he received from SLED in response to his request for test results in his case. The sixth exhibit was the discovery disclosure letter sent by the solicitor's office to Petitioner's plea counsel on January 18, 2005. The seventh exhibit included the property and evidence records included in the State's file. The eighth exhibit was Petitioner's Memorandum of Law in Support of his PCR Application. The ninth exhibit was the letter Petitioner received from the South Carolina Court of Appeals indicating no appeal had been filed in his case. In all, none of these exhibits show that Petitioner did not commit the crimes to which he pled guilty. Thus, it was not unreasonable for the PCR Court to find that Petitioner's claim was not meritorious. He had not established that counsel was ineffective because he had not shown he was prejudiced by any deficiency of counsel. Thus, this claim for relief should be denied and dismissed.

Petitioner's second contention in this set of claims, that counsel was ineffective in investigating by only meeting with Petitioner once before his guilty plea, was also found to be without merit by the PCR Court. (App. 113). Petitioner cannot show that this decision by the PCR Court was based upon an unreasonable determination of the facts. The PCR Court did not outline any findings of fact in addressing this claim.

Further, Petitioner cannot show that the PCR Court unreasonably applied federal law in addressing this claim. At the plea hearing, Petitioner told the plea court that he was totally and completely satisfied with the representation of his attorney, and that his attorney

had done everything that he thought was reasonably necessary to adequately prepare his defense. (App. 11). Further, Petitioner informed the plea court that he had ample opportunity to review the evidence the State had against him, and that he had no complaints with respect to the charges he faced. (App. 11). "Absent clear and convincing evidence to the contrary, [a petitioner] is bound by the representations he made during the plea colloquy." Burket v. Angelone, 208 F.3d 172, 191 (4th Cir. 2000); see Beck v. Angelone, 261 F.3d 377, 396 (4th Cir. 2001)(same). At the PCR hearing, counsel testified that Petitioner wanted to plead guilty, and that Petitioner never indicated that he wanted to go to trial. (App. 80-2). Counsel also testified that when he spoke with Petitioner about the incident, Petitioner maintained that something happened, but he was evasive about any details. (App. 81-2). Counsel also noted that Petitioner never informed him about being on psychiatric medication, and there was no indication by Petitioner's behavior that he had any psychiatric problems. (See App. 81, 83). Petitioner presented no probative testimony or evidence that would have been discovered by counsel had counsel met with Petitioner on more than one occasion. While Petitioner asserted that further meetings with counsel would have led counsel to investigate into Petitioner's mental state, Petitioner presented no evidence to support this claim. Furthermore, Petitioner presented no evidence that established he was incompetent to plead guilty at his plea hearing, or that he was incompetent for his Family Court hearing. Since Petitioner did not present evidence to support a finding that he was prejudiced by any deficiency of counsel in this regard, the PCR Court was not unreasonable in finding this claim of ineffective assistance of counsel was without merit. As a result, this claim should be denied and dismissed.

Petitioner's third assertion in this first claim is also without merit. Petitioner asserts counsel was ineffective for not filing a Brady motion. This claim was arguably denied by the PCR Court. (See App. 113). The PCR Court issued no factual findings in addressing this claim. Thus, Petitioner cannot show that the PCR Court made an unreasonable determination of the facts in addressing this claim.

Petitioner also cannot show that the PCR Court unreasonably applied federal law in dismissing this claim. First, Petitioner did not show that counsel was deficient. At the PCR hearing, counsel testified that he did not file a Brady motion because he knew the solicitor on the case, and he called her, and the solicitor indicated she would give him all of the discovery. (App. 80). Counsel also indicated that the solicitor had an open file policy, and he copied everything that was in the file for Petitioner's case. Id. In light of the fact that counsel had access and received everything that he would have received had he filed a Brady/Rule 5 Motion, Petitioner cannot establish counsel was deficient in this regard. Further, Petitioner fails to show that he was prejudiced by any error of counsel in not filing a Brady motion. Specifically, Petitioner did not present any exculpatory evidence at the PCR hearing that could have been obtained by counsel had counsel filed a Brady motion in this case. The only new document presented at the PCR hearing was the SLED report, which as explained in response to Ground One of this first petition, was neither inculpatory nor exculpatory. As a result, Petitioner's third assertion in his first claim in Ground Three should be denied and dismissed. See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); see Savino v. Murray, 82 F.3d 593 (4th Cir. 1996) (rejecting habeas claim that attorneys should have

pursued intoxication defense where petitioner offered no proof his alleged cocaine usage made him incapable of intent or deliberation); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

B. Court Appearances/Psychotropic drugs

In his second assertion in this first claim in Ground Three, Petitioner contends counsel was ineffective for not addressing the fact Petitioner made two court appearances while under the influence of psychotropic medications. This claim is without merit. The PCR Court denied relief on this claim, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. First, Petitioner failed to establish in state court he was under the influence of psychotropic drugs at the plea hearing. At the hearing, Petitioner indicated the only medication he had taken on the day of the hearing was for hypertension. (App. 5-6). Petitioner also indicated the only psychiatric treatment he had received was through a Salvation Army rehabilitation program that he had graduated from the year before the plea hearing. (App. 6-7). "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Respondent submits the records Petitioner presented at the PCR hearing did not conclusively establish he was under the influence of psychotropic drugs on the day of his plea. Thus, this claim should be dismissed.

Furthermore, counsel was not ineffective because Petitioner never informed him of his psychiatric condition. See Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1985) (finding no ineffective assistance of counsel for failing to investigate past psychological problems where defendant did not inform counsel of the past problem, and nothing during representation indicated existence of a psychological problem); see also Clanton v. Blair, 826 F.2d 1354, 1358 (4th Cir. 1987). At the PCR hearing, counsel testified that Petitioner never told him he was on any psychiatric medication. (App. 81). He further noted Petitioner did not present any symptoms of having any psychiatric issues when he met with Petitioner. Id. Petitioner's testimony also indicates he never told counsel he was on psychiatric medication. (See App. 61-2). Petitioner cannot show that counsel was ineffective in not addressing Petitioner allegedly being under the influence of psychiatric drugs. Thus, this claim should be denied and dismissed.

C. Negotiating Plea Offer

In his third claim in Ground Three, Petitioner asserts counsel was ineffective in failing to negotiate for a plea offer. This claim is without merit. The PCR Court denied relief on the argument in this set of claims, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. Even if counsel was deficient, Petitioner failed to present any evidence that he was prejudiced by any error of counsel in this regard. As already noted, with guilty pleas, "in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors,

he would not have pleaded guilty and would have insisted on going to trial." Hill, supra. v. Lockhart. This claim clearly indicates Petitioner would have still pled guilty had counsel negotiated a plea offer. He only complains that he would have received a better sentence. Thus, Petitioner has not established he was prejudiced in this regard. Hooper v. Garraghty, 845 F.2d 471 (4th Cir.1988); see Fields v. Attorney General of State of Md., 956 F.2d 1290, 1297-98 (4th Cir.1992) (finding no prejudice when argument was counsel was ineffective and petitioner he would have pled to a different plea bargain and received a more favorable sentence with competent counsel); see also Craker v. McCotter, 805 F.2d 538, 542 (5th Cir.1986). As a result, this claim for relief should be denied and dismissed.[12]

D. Failure to Advise Regarding Right to Direct Appeal

In his memorandum, Petitioner asserts that plea counsel was ineffective for not advising him of his right to appeal the guilty plea. The PCR Court denied relief upon this claim. The PCR Court denied relief on this claim, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. "[C]ounsel has a constitutionally imposed duty to

---

[12]Petitioner also presented no probative evidence at the PCR hearing of what an attempt at plea negotiations would have garnered. At best, Petitioner presented information to the PCR Court that the State had mentioned a cap on his sentence. In agreement with the statements made in the letters, the State did recommend that Petitioner's sentences be served concurrently. (App. 12). Petitioner did receive a concurrent sentence. (App. 13). There was no testimony or evidence presented at trial to indicate what cap the State would have considered. Since Petitioner did not present any evidence establishing what would have resulted had plea negotiations taken place, Petitioner fails to show that he was prejudiced.

consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036 (2000).

> Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Id. "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 483, 120 S.Ct. at 1038.

Here, Petitioner cannot show that counsel was deficient in this regard. Under the facts of this case, counsel did not have a duty to consult with Petitioner about an appeal. First, there was no reason to think Petitioner would want to file an appeal in this case. Petitioner pled guilty to the charges. The record of the plea hearing does not indicate there were any nonfrivolous issues preserved for appeal. The record indicates Petitioner's plea was knowingly and voluntarily made under Boykin v. Alabama, 395 U.S. 238(1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial,

and the right to confront one's accusers. Id. The record clearly reflects that Petitioner's plea was knowingly, voluntarily, and intelligently made. He was advised of those rights by the plea court. (App. 10). Petitioner was also advised of the charges against him, and the maximum sentences for each offense. (App. 7-8). Petitioner's sentences were within the maximum sentences allowed under South Carolina law.[13] See S.C. Code Ann. § 16-3-652(2)(1985)(CSC first degree punishable by sentence of no more than thirty years); S.C. Code Ann. § 16-3-655(1)(1985) (defining CSC first degree with a minor); S.C. Code Ann. § 16-15-140 (Supp. 2001)(defining lewd act with a minor; punishable by sentence of fifteen years); see State v. Outlaw, 304 S.C. 347, 250, 404 S.E.2d 516, 517-18 (S.C.Ct.App.1991) (finding sentence for CSC with a minor second degree was proper; while statute for CSC with a minor second degree did not provide a sentencing range, the statute for CSC second degree did) rev'd on other grounds, 307 S.C. 177, 414 S.E.2d 147 (1992). Petitioner was sentenced to the terms of the recommendation offered by the solicitor. (See App. 12-3). Since Petitioner waived all of the non-jurisdictional claims with the exception of ineffective assistance of defense counsel and the voluntariness of the plea, there were no non-frivolous issues to raise on appeal in this case. Johnson v. Catoe, 336 S.C. 357-58, 520 S.E.2d 617, 619 (1999). Petitioner also did not show that he indicated to plea counsel that he wanted to file an appeal. Petitioner acknowledged that he did not do so because he was unaware that he could appeal at the time. (App. 45-6). Since Petitioner did not establish that counsel had a duty to consult with him regarding his right to appeal in this case, Petitioner did not establish counsel was deficient in this regard.

---

[13]S.C. Code Ann. § 16-3-655 has been amended several times since Petitioner's guilty plea.

Petitioner failed to establish he was prejudiced by counsel's failure to consult with him regarding an appeal. Had counsel consulted with Petitioner and informed Petitioner that there were no non-frivolous matters to appeal, and that he had waived nearly all claims by pleading guilty, Respondent submits Petitioner would not have requested counsel file a direct appeal to his guilty plea. Petitioner presented no testimony or evidence to show he would have otherwise requested an appeal had he been consulted. Since Petitioner has not established counsel was deficient or that he was prejudiced, he cannot show that the PCR Court's denial of relief upon this claim was contrary to federal law as established by the United States Supreme Court. As a result, this claim for relief should be denied and dismissed.

Ground Four: Ineffective Assistance of Counsel - Issues 3. and 5. (Please see PCR Order)(See also Memorandum Argument III)

Some of Petitioner's claims in Ground Four are procedurally barred. Further, all of his claims are barred by the statute of limitations. In addition, Petitioner's claims should be denied and dismissed because they are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing either of the two claims of ineffective assistance of counsel. Petitioner also fails to show that a state court unreasonably applied federal law to either of these claims. Since Petitioner has not established that he is entitled to federal habeas relief upon these claims, Ground Four should be dismissed.

In Ground Four, Petitioner asserts two claims of ineffective assistance of counsel. First, he claims that defense counsel was ineffective because he failed to present any mitigating evidence at Petitioner's plea hearing. He specifically asserts that counsel should

have made the plea court aware of the fact Petitioner was required to submit to a psychological exam pursuant to two Family Court Orders. Petitioner's second claim is that defense counsel was ineffective for failing to advise Petitioner to plead guilty despite a lack of evidence against him.

Petitioner is not entitled to federal habeas relief upon his first claim. As already noted, this claim is procedurally barred. Further, Petitioner cannot show that the PCR Court unreasonably applied federal law or made an unreasonable determination of the facts in addressing this claim. The PCR Court found this claim was without merit. (App. 113). In doing so, the PCR Court made no specific findings of fact. Thus, Petitioner cannot show the PCR Court's decision was based upon an unreasonable determination of the facts.

The PCR Court's dismissal of this claim was not an unreasonable application of federal law. In essence, the PCR Court found that Petitioner had not met his burden of showing that counsel was deficient and that he was prejudiced as a result. Petitioner did not meet his burden in his PCR action. First, the Family Court Orders to which Petitioner refers were never admitted into evidence at the PCR hearing. Had they been introduced at the plea hearing, Respondent submits they would not have been mitigating. The Treatment Plans specifically instructed Petitioner to contact the specified doctor to schedule an appointment for a psychological evaluation within 15 days or upon Petitioner's release from the detention center, **whichever occurs first**. (Docket Entry #1-2, page 31, 33). Petitioner did not present any evidence or testimony at the PCR hearing that he attempted to contact the doctor specified by the Family Court. Thus, any failure to obtain a psychiatric evaluation based upon the Family Court Orders clearly lies with Petitioner.

Further, Petitioner never presented any diagnosis from a mental health professional that indicated he was suffering from a psychiatric condition. Even the medication records presented at the evidentiary hearing indicated a diagnosis was not specified. As a result, Petitioner never established he was suffering from a psychiatric condition that could have been presented as mitigation at his plea hearing. Respondent submits it would not have been mitigating for the plea court to hear that he did not comply with the Family Court's directives, which were provided to Petitioner on two separate occasions. The PCR Court was well within reason to find counsel was not deficient in this regard. Also, Petitioner failed to establish he was prejudiced because he did not present credible evidence he suffered from a psychiatric condition when he committed the crimes. Finally, Petitioner also fails to establish he was prejudiced because he does not contend that he would not have pled guilty but for counsel's alleged failure to present mitigating evidence. As a result, this claim in Ground Four should be denied and dismissed.

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's second claim for relief in Ground Four is without merit. In the second claim, Petitioner asserts that plea counsel was ineffective because he provided inadequate advice. Specifically, he asserts counsel advised him to plead guilty even though there was a lack of evidence against Petitioner. The PCR Court found this claim was without merit. In doing so, the PCR Court made no specific findings of fact. Thus, Petitioner cannot show the PCR Court's decision was based upon an unreasonable determination of the facts.

The PCR Court's dismissal of this claim was not an unreasonable application of federal law. In essence, the PCR Court found that Petitioner had not met his burden of showing counsel was deficient and he was prejudiced as a result. Petitioner did not meet

his burden in his PCR action. First, Petitioner did not establish counsel was deficient. Respondent submits there was evidence of Petitioner's guilt. It appears from the records and the discovery provided to plea counsel that the State could have presented the testimony of the victims and evidence to corroborate the CSC victim's version of the events. (See App. 12, 88-9; Attachment No. 17 at pgs. 23-28). Contrary to Petitioner's assertions, the results of the SLED testing of the sexual assault collection kit conducted on the CSC victim were not fatal to the State's case. As noted in response to Ground One, the test results did not exculpate Petitioner from guilt. Furthermore, the State likely could have used statements made by Petitioner in his Family Court proceedings. In all, Petitioner failed to show that counsel was deficient because there was sufficient evidence to support his conviction.

Petitioner also fails to show that he was prejudiced. Respondent submits Petitioner did not establish it was counsel's advice that led him to plead guilty. Counsel testified that Petitioner indicated something did happen, and that he wanted to plead guilty from the beginning. (See App. 80-1). Counsel also stated that Petitioner "never said he wanted to go to trial." (App. 81). While Petitioner testified counsel failed to complete a litany of tasks that he considered to be necessary, he never asserted that he pled guilty because counsel told him to plead guilty. In all, Petitioner did not meet his burden of establishing that but for counsel's alleged error, he would not have pled guilty. As a result, this claim for relief should be denied and dismissed.

Second Habeas Petition

Ground One: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix)

Petitioner's claims in Ground One are procedurally barred and barred by the statute of limitations. Petitioner's claims are also not cognizable claims for federal habeas relief. In Ground One, Petitioner asserts claims of prosecutorial misconduct that allegedly occurred in his post-conviction relief action. Specifically, he complains that exhibits entered into evidence at his PCR hearing were not included in the Appendix to the State's Petition for Writ of Certiorari. The Fourth Circuit has held that alleged infirmities in a state post-conviction action are not matters that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). Since the claims in this ground stem solely from Petitioner's PCR appeal, Ground One should be dismissed because it is not a cognizable claim.

Ground Two: Ineffective Appellate Counsel - (See Memorandum) - Failure to provide no more than a "less than perfunctory" representation/investigation.

Petitioner's claim in Ground Two is procedurally barred and barred by the statute of limitations. Further, Petitioner fails to state a claim upon which federal habeas relief can be granted. In Ground Two, Petitioner asserts that appellate counsel in his PCR appeal was ineffective. The Fourth Circuit has held that alleged infirmities in a state

post-conviction action are not matters that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). Any claim against trial or appellate counsel in his state PCR actions fails to state a claim upon which relief may be granted, and Respondent is entitled to dismissal or in the alternative summary judgment on this issue. Rule 12(b), F.R.C.P.

Ground Three: Misinterpretation of the Record on Appeal (Appendix) resulting in "reversal" of the PCR Order granting relief. (See Memorandum)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claim in Ground Three is without merit. Petitioner's claims that there were errors in the South Carolina Supreme Court's factual statements in the opinion reversing the PCR Court's grant of relief are not supported by the record.

Petitioner asserts there were several misstatements of fact in the South Carolina Supreme Court's Opinion. First, he asserts the South Carolina Supreme Court's statement in the procedural and factual history about the DSS proceedings was not substantiated in the Record on Appeal or Appendix.[14] This claim is without merit because the statement was substantiated by testimony at the plea hearing. Prior to the statement challenged by

[14] The specific statement in the opinion was "[s]ubsequently, 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."

Petitioner, the Supreme Court noted "[a]fter [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]." These statements are clearly supported by the recitation of the facts presented at the plea hearing by the solicitor. (App. 11-12). At the plea hearing, Petitioner admitted those statements were true. (App. 12). Thus, the statements in the South Carolina Supreme Court's opinion regarding the actions that led to the Family Court proceeding and his statements at the Family Court were substantiated by Petitioner. Both Petitioner and plea counsel testified a treatment plan was submitted by the Family Court. (App. 66-7; 85). Thus, there was support in the record for this finding by Supreme Court.

Petitioner is correct that the Supreme Court incorrectly states that he had not taken any medication within the twenty-four hour period before the plea. At the plea hearing, Petitioner admitted to taking medication for hypertension, and he indicated to the plea court that he felt fine. (App. 6). However, Petitioner's assertion that the Supreme Court's statement that he did not elaborate on his treatment is not supported by the record. Petitioner did state at the plea hearing that he graduated from a Salvation Army rehabilitation program. (App. 6-7). He did not provide any other information about why he sought treatment, or what the treatment involved. (See App. 7). Thus, he cannot show that the Supreme Court was unreasonable in stating that he did not elaborate on the treatment. Since the issue before the South Carolina Supreme Court was whether Petitioner would not have pled guilty if counsel had explained the definition of "sexual

battery," Respondent submits Petitioner cannot show the error in the procedural/factual history in the opinion resulted in the reversal of the PCR Court's Order. Petitioner's statement about his medication was not relevant to the Supreme Court's decision.

Petitioner next complains about a statement made by the Supreme Court regarding his PCR testimony. The statement was "[d]espite 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." This was supported by Petitioner's PCR testimony. (App. 66-7). Similarly, Petitioner's complaint about the Supreme Court's recitation of counsel's testimony regarding his decision not to file discovery requests and the contents of the discovery he obtained. This portion of the Supreme Court's opinion is supported by the testimony by plea counsel at the PCR hearing. (App. 79-82; 86-90). In all, Respondent submits that Petitioner has not shown the Supreme Court's ruling in the PCR appeal was the result of an unreasonable determination of the facts. With the exception of the Supreme Court's finding that Petitioner stated he had not taken any drugs within the past 24 hours, the Supreme Court's recitation of the facts and procedural history was supported by the plea and PCR transcripts. Thus, he is not entitled to relief upon this claim.

To the extent Petitioner asserts the South Carolina Supreme Court Opinion did not take into account his Memorandum of Law in Support of PCR Application, Respondent submits this claim is without merit. While the exhibits to the PCR evidentiary hearing should have been included in the Appendix to the State's Petition for Writ of Certiorari,[15]

---

[15]Rule 243(f), SCACR ("The Appendix shall contain: (1) the entire lower court record. . .").

Petitioner cannot show that he was prejudiced by the fact the Memorandum of Law was not included in his appeal. The issue on appeal was whether Petitioner was entitled to relief due to ineffective assistance of counsel for failure to explain the definition of "sexual battery." This issue was not addressed by Petitioner in the Memorandum of Law in Support of PCR Application. Since Petitioner did not file a cross-appeal to raise any of the issues addressed by the Memorandum, the Memorandum was not relevant to any issue presented to the South Carolina Supreme Court. As a result, this claim should be denied and dismissed.

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.

In addition to being barred by the statute of limitations, Petitioner's claim in Ground Four is not a claim upon which federal habeas relief can be granted. The Sixth Amendment guarantees a defendant in a state criminal trial both a right to counsel and a right of self-representation. Faretta v. California, 422 U.S. 806, 806, 819-20 (1975). The constitutional right to counsel attaches at trial. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Hill v. Jones, 81 F.3d 1015, 1024 (11th Cir.2004). However, Petitioner had no right to represent himself in his PCR appeal. See Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163-164, 120 S.Ct. 684, 692 (2000) (recognizing there is no federal constitutional right to self-representation in direct appeal); Coleman v. Thompson, 501 U.S. 722, 755 (1991)(a defendant possesses no corresponding Sixth Amendment right to counsel in a post-conviction collateral proceeding); Finley, 481 U.S. at 555(same). Further, as with Petitioner's claims in Ground One and Two, Petitioner's claim is not cognizable because it is an allegation of error in the collateral action, and not

an allegation of error in the criminal action. The Fourth Circuit has held that alleged infirmities in a state post-conviction action are not matters that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lawrence v. Branker, 517 F.3d 700, 717 (4th Cir. 2008)("[E]ven where there is some error in state post-conviction proceedings, a petitioner is not entitled to federal habeas relief because the assignment of error relating to those post-conviction proceedings represents an attack on a proceeding collateral to detention and not to the detention itself."); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004).

Third Habeas Petition

Ground One: 14th Amendment due process violation of Brady. "No Releif" at PCR failure to disclose DNA (Sled results) or toxicology report. (See Memorandum)

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground One should be dismissed because they are without merit. These claims are essentially the same claims raised by Petitioner in Ground One of his first habeas petition. Thus, for the reasons stated in response to Ground One of the first habeas petition, Respondent submits the claims in this Ground One should be denied and dismissed.

Ground Two: Misconduct/abuse of descretion/use of "alleged admission" from Family Court by the Applicant without counsel-, (See Memorandum); not in discovery.

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground Two should be dismissed because they are without merit. These claims are essentially the same claims raised by Petitioner in Ground Two of his first habeas petition. Thus, for the reasons stated in response to Ground Two of the first habeas petition, Respondent submits the claims in this Ground Two should be denied and dismissed.

To the extent Petitioner further argues that the statement made by the solicitor at the plea hearing may have been false, Respondent submits that Petitioner has failed to show that he is entitled to relief upon that claim. Petitioner never presented any evidence to support this claim in state court.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). 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 (1972) (quoted in Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006)). A claim along these lines requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity. See also Basden, 290 F.3d at 614. Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when "'there is any reasonable likelihood that the false testimony could have affected the

judgment of the jury.'" Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

> However, "mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." Id. Rather, "the alleged perjured testimony must bear a direct relationship to the defendant's guilt or innocence." Id. Finally, when a defendant alleges that the prosecution used perjured testimony, we must inquire into whether the defendant had adequate opportunity to expose the alleged perjury on cross-examination.

Simental v. Matrisciano, 363 F.3d 607, 615 (7th Cir.2004) (quoting United States v. Saadeh, 61 F.3d 510, 523 (7th Cir.1995).

Petitioner presented no evidence to support his assertion that the statement made by the solicitor was not true. "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). "Absent clear and convincing evidence to the contrary, [petitioner] is bound by the representations made during his plea colloquy." Beck v. Angelone, 261 F.3d 377, 396 (4th Cir.2001)(internal quotations and citations omitted). A defendant who has entered a valid guilty plea has admitted his guilt and cannot challenge the sufficiency of the evidence presented as a factual basis for his guilty plea. United States v. Willis, 992 F.2d 489, 490-91 (4th Cir.1993). Petitioner stated at the plea hearing that the solicitor's representation that he had admitted his guilt in the DSS Family Court proceedings was true. (App. 12). Petitioner presented no clear and convincing evidence at the PCR hearing the statements were not true. At best, Petitioner indicated he did not recall what he said

at the DSS proceedings. (App. 77). Thus, Petitioner could not meet his burden of showing the statement made by the solicitor at the plea hearing was false. As a result, this claim should be denied and dismissed.

Ground Three: The PCR Judge erred in granting relief based upon "one issue" of I.A.C., (See Memorandum), Abuse of descretion.

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims in Ground Three are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law to these claims. Since Petitioner has not established that he is entitled to federal habeas relief upon these claims, Ground Three should be denied and dismissed.

A. Ineffective assistance of counsel for failing to (pled under influence of psychotropic drugs).

For the reasons stated in Section B in response to Petitioner's claims in Ground Three in the first habeas petition, Respondent submits this claim for relief should be denied and dismissed.

B. Ineffective assistance of counsel for failing to request mandatory psychological evaluation

This claim is without merit. Petitioner failed to present any evidence at the post-conviction relief hearing that established plea counsel represented Petitioner in the Family Court action. There was no order from the plea court that required Petitioner to submit to a psychological evaluation. The treatment plans Petitioner attached to his petitions clearly reflect a Family Court instruction that Petitioner was responsible for contacting the doctor and setting an appointment for a psychological evaluation. As noted Section B in response

to Ground Three of the first habeas petition, plea counsel indicated that he had no basis for thinking that Petitioner suffered from any psychiatric problems. Thus, Petitioner did not establish counsel was deficient in this regard. Furthermore, Petitioner has not established he was prejudiced. He did not present the results of any psychological evaluation at his PCR hearing. While he presented documentation for medication he was prescribed, those records indicated that no diagnosis was specified in Petitioner's case. Petitioner did not establish what the results of a psychological evaluation would have been. Thus, Petitioner could not establish that he would not have pled guilty but for counsel's failure to seek a psychological evaluation in Petitioner's case. See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); see Savino v. Murray, 82 F.3d 593 (4th Cir. 1996) (rejecting habeas claim that attorneys should have pursued intoxication defense where petitioner offered no proof his alleged cocaine usage made him incapable of intent or deliberation); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

C. Ineffective assistance of counsel for failing to present SLED results to Petitioner before advising about guilty plea.

Respondent submits this claim overlaps with Petitioner's second claim in Ground Four of the first habeas petition. In this claim, it appears Petitioner argues plea counsel failed to advise him about the SLED results, which did not connect Petitioner to the tested materials. This is part of Petitioner's claim in the second claim in Ground Four of the first habeas petition, in which he claims counsel was ineffective for not advising him of the lack of evidence against him. Thus, for the reasons stated in response to the second claim in

Ground Four of the first habeas petition, Respondent submits this claim for relief should be denied and dismissed.

D. Ineffective assistance of counsel for failing to negotiate plea offer with State for "a cap" on "active time."

Respondent submits this claim is the same claim raised by Petitioner in his third claim in Ground Three of the first habeas petition. Thus, for the reasons stated in response to the third claim in Ground Three of that petition, Respondent submits this claim for relief should be denied and dismissed.

E. Ineffective assistance of counsel for failing to advise about right to file a direct appeal.

In the discussion in the memorandum filed in connection with this Ground, Petitioner asserts plea counsel was ineffective for not consulting with him about filing a direct appeal to his guilty plea. Respondent submits that for the reasons stated in response to Section D to Ground Three of the first habeas petition, this claim for relief should be denied and dismissed.

IX. CONCLUSION

Each and every allegation contained within the Petition which was not previously either expressly admitted, qualified, or explained is hereby denied.

WHEREFORE, having made Return, Respondent submits there is no genuine issue of material fact and that the State is entitled to prevail as a matter of law. Thus, Respondent respectfully requests that this Court grant its motion for summary judgment and dismiss the action.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
ID No. 10199
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

December 10, 2010

By: s/ Alphonso Simon Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Terrence Dimingo Terry, #307935,	) C/A No. 6:10-2006-JFA-KFM
Petitioner,	)
v.	) **AMENDED RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Mr. Leroy Cartledge, Warden of McCormick Correctional Institution,	)
Respondent.	)

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 15(a)(2), Fed. R. Civ.P., hereby requests leave to amend its Return filed on December 10, 2010 (Entry #42).[1] 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

[1]Petitioner initially filed three separate habeas petitions. The first consisted of four grounds with at least thirteen claims. Attached to it was a thirty-seven page handwritten brief in support of the petition. The second petition consisted of four grounds with at least ten individual claims. Attached to it was a fifty page handwritten brief in support of the petition. The third habeas petition asserted three grounds. Attached to it was a forty page handwritten brief in support of the petition. By Order of this Court filed September 20, 2010, all three habeas petitions were combined into this action. (Entry #13).

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).

Facts[2]

On July 4, 2004, Petitioner put hair grease on his penis and on his nine-year-old stepdaughter's vagina. (App. 12). He then attempted to have sexual intercourse with her. (App. 12). When he was unable to do so, he penetrated her vagina with her finger and her anus with his penis. (App. 12). In May and June of 2004, Petitioner committed lewd acts on his two other step-

[2]These are the facts as stated by the solicitor at the plea hearing. (App. 12). Petitioner agreed to these facts. (App. 12).

daughters.[3] (App. 12). Specifically, he kissed them on the mouth; rubbed their breasts, vaginal areas, and buttocks; and rubbed his body against their bodies. (App. 12). The nine year old disclosed the abuse to her mother. (App. 12). Her mother then confronted Petitioner about the allegations. (App. 12). Subsequently, Petitioner admitted his guilt at a family court proceeding brought by the Department of Social Services. (App. 12).

There Was No Direct Appeal

PCR Action

Petitioner filed an Application for Post-Conviction Relief on November 11, 2005 (2005-CP-23-7327), prosecutorial misconduct, ineffective assistance of counsel, and the court lacked subject matter jurisdiction. (App. 17-24). Specifically, Petitioner asserted the solicitor prosecuted him without disclosure of a valid DNA analysis report or certified chain of custody; counsel was ineffective because he failed to advise client of right to a direct appeal and failed to investigate into Petitioner's case; and the court lacked subject matter jurisdiction because of the evidence presented to the grand jury, and the failure to provide petitioner with a preliminary hearing, violating state and federal constitutional rights, due process and equal protection under the law. (App. 19). The State filed its Return on June 6, 2006. (App. 25-8). Through PCR counsel, Petitioner subsequently filed an Amended Application on February 5, 2007. (App. 29-30). In the Amended Application, Petitioner asserted there was a violation of due process guarantees of the State and U.S. Constitutions in that Petitioner's plea was no knowingly, voluntarily, and intelligently made. (App. 29). Specifically, the record of his guilty plea showed that Petitioner was not made aware of the nature and crucial elements of the charge against him. Id. This was especially problematic because

[3]One was eleven years old. The other was twelve years old. (App. 12).

Petitioner was under the influence of prescribed mental health medications that affected his ability to comprehend what he was doing. (App. 29-30). The Judge also failed to inform Petitioner of his right to appeal. (App. 30).

A hearing in this action was held on March 1, 2007 before the Honorable Michael G. Nettles, Circuit Court Judge. (App. 31-108). Petitioner was present, and he was represented by Susannah C. Ross, Esquire. Id. Assistant Attorney General Karen C. Ratigan, Esquire represented the State. Id. The PCR Court filed its Order on April 11, 2007. (App. 109-16).

In its Order, the PCR court noted Petitioner 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 Petitioner 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. (App. 110-11). The PCR Court found that the allegations of prosecutorial misconduct were without merit. (App. 111). Petitioner submitted as an exhibit the SLED lab report for the rape kit analysis which was dated March 2, 2005. (App. 111). It showed no sperm or semen found and was neither exculpatory nor incriminating. Id. Petitioner pled guilty March 8, 2005. Id. No evidence was presented as to whether the solicitor had received the report prior to the guilty plea. Id. However, the report was present in the solicitor's file over one year later when the file was subpoenaed by Petitioner. Id. Petitioner and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. Id. While a Brady violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by Petitioner 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). (App. 111).

Petitioner 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. (App. 111). Because Petitioner 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. Id. 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). (App. 111-12). 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. (App. 112).

The transcript of Petitioner's guilty plea stated in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17). (App. 112). According to Petitioner'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 Petitioner expressly denied. (App. 112). Petitioner submitted a family court order contained in the file subpoenaed from the solicitor which said that Petitioner 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. Id. The PCR Court found 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). (App. 112).

Petitioner 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 Petitioner 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 Petitioner 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 Petitioner appeared without counsel; (3) failure to present mitigating evidence at Petitioner's guilty plea by not mentioning Petitioner'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 Petitioner providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery. (App. 112-13).

The PCR Court found that these allegations were without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery. (App. 113). Petitioner

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.* (App. 113-14). Petitioner 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. (App. 114). Plea counsel testified that he met with Petitioner one time, the day of his guilty plea, during the nine months he represented him. Id. Counsel admitted that he did not review the meaning of sexual battery with Petitioner saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children. Id. Plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented Petitioner. Id. Based upon the testimony of trial counsel and Petitioner, the PCR Court found that the plea attorney 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. Id. Considering the entire record including the guilty plea transcript, the PCR Court found that the error was not cured by the colloquy during the guilty plea. Id.

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. (App. 114). Petitioner's plea counsel did not do this. Id. Upon hearing the testimony and reviewing the transcript of the plea, the PCR Court found that Petitioner had shown prejudice. (App. 115). Had Petitioner known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial. Id.

Petitioner argued 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. (App. 115). The PCR Court disagreed and found that the indictments contained 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). (App. 115). Petitioner presented 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). (App. 115).

The PCR Court granted Petitioner's motion for post-conviction relief based on ineffective assistance of counsel. (App. 116). The cases were reversed and remanded for a new trial and Petitioner was to be released to the custody of the Greenville County Detention Center where his original bond would be reinstated. Id.

On April 24, 2007, the State filed its Motion to Alter or Amend the Final Order. (App. 117-9). Petitioner also filed a pro se Motion for Reconsideration. The PCR Court filed its Order Denying Rule 59(e) Motion to Alter or Amend the Final Order on July 6, 2007. (App. 120-21).

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Respondent and Petitioner's motion and supporting memorandum, the PCR Court was not persuaded to alter or amend the judgment.[4] (App. 120). The PCR Court further found that

---

[4]In addition, Petitioner's motion to reconsider pursuant to Rule 59(e), SCRCP, was ineffective and void because Petitioner was currently represented by counsel. See Rule 11 (a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002).

oral argument would not aid in the reconsideration of the original judgment. Id. The previous order fully comported with the requirements of Rule 52(a) SCRCP. Id.

PCR Appeal

The State timely filed a Notice of Appeal on July 12, 2007. On appeal, Petitioner was represented by Robert M. Pachak, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The State perfected its appeal with the filing of a Petition for Writ of Certiorari. In the Petition, the State raised two arguments. First, the State argued the PCR judge erred in finding Petitioner met his burden of proving ineffective assistance of counsel. Second, the PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy. Petitioner filed a Return to the Petition for Writ of Certiorari, asserting 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. Petitioner did not file a Notice of Appeal or raise any separate issues in the PCR Appeal.

In an Order filed November 6, 2008, the South Carolina Supreme Court granted the Petition for Writ of Certiorari. The Court also ordered the parties to proceed to serve and file the appendix and briefs as provided by Rule 227(j), SCACR. On November 19, 2008, the State filed its Final Brief of Petitioner, raising the same issues raised in the Petition for Writ of Certiorari. Petitioner filed a Final Brief of Respondent, asserting the same argument as in the Return to the Petition for Writ of Certiorari.

In a published Opinion filed July 13, 2009, the South Carolina Supreme Court reversed the PCR Court's Order. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009). In the opinion, the South Carolina Supreme Court distinguished the definitions for "sexual battery" and "sexual abuse." Id.

at 371-72, 680 S.E.2d at 283. In the instant case, plea counsel testified at the PCR hearing that he believed the terms "sexual battery" and "sexual abuse" were the same. Id. at 372, 680 S.E.2d at 283. Because plea counsel did not differentiate between the two terms or correctly explain them to Petitioner, there was evidence to support the PCR judge's decision that plea counsel's performance was deficient. Id. Given plea counsel did not comprehend this distinction and did not inform Petitioner of a crucial element of the offense of CSC with a minor, first degree, the Supreme Court agreed with the PCR judge that counsel's representation fell below an objective standard of reasonableness. Id.

The Supreme Court found, however, plea counsel's deficient performance was cured by the plea colloquy even though there was no specific discussion of the term "sexual battery." Terry, 383 S.C. at 373, 680 S.E.2d at 283. The PCR judge found that any allegations regarding Petitioner's competency were not meritorious. Id. In light of this decision, the PCR judge implicitly found that Petitioner had the requisite mental capacity to comprehend the plea proceeding. Id.

At the plea proceeding, the judge read the indictments and Petitioner acknowledged that he understood these charges. Terry, 383 S.C. at 373, 680 S.E.2d at 283. The indictment for CSC with a minor, first degree identified the elements of the offense which included a reference to a "sexual battery." Id. After Petitioner affirmatively stated that he understood the charges and admitted his guilt, the solicitor gave a detailed factual basis for the charges. Id. In the factual recitation, the solicitor identified conduct that constituted the elements of first-degree CSC with a minor. Id. Specifically, the solicitor conveyed that Petitioner had penetrated the nine-year-old victim's vagina with his finger and her anus with his penis. Id. Both of these acts clearly meet the definition of a "sexual battery." Id. Petitioner admitted that the solicitor's statement of facts was true. Id.

Therefore, the Supreme Court found Petitioner knowingly and voluntarily entered a plea as to the charge of CSC with a minor, first degree. Terry, 383 S.C. at 373, 680 S.E.2d at 283-4 (citing Roddy v. State, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000)(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 the Supreme Court's decision, it further concluded the PCR judge erred in granting Petitioner a new trial for the two counts of lewd act upon a child. Terry, 383 S.C. at 373, 680 S.E.2d at 284. Given a "sexual battery" is not an element of lewd act upon a child and Petitioner 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." Id. Accordingly, the Supreme Court found there was no evidence to support the PCR judge's decision to grant Petitioner's relief on those two convictions. Id.

Accordingly, the decision of the PCR judge was reversed. Terry, 383 S.C. at 373, 680 S.E.2d at 284.

The Remittitur was issued on July 29, 2009.

II. ATTACHMENTS

1. Appendix, the Honorable Michael G. Nettles, Circuit Court Judge
2. Notice of Appeal
3. Petition for Writ of Certiorari
4. Return to Petition for Writ of Certiorari
5. South Carolina Supreme Court Order

6. Brief of Petitioner

7. Brief of Respondent

8. South Carolina Supreme Court Opinion

9. Remittitur

10. Copy of Application for Post-Conviction Relief

11. 59(e) Motion to Alter or Amend (filed pro se by Petitioner)

12. Return to Motion to Alter or Amend the Order of Dismissal (filed by the State)

13. Motion to Comply With Established Law and civil Rules Concerning Order Denying or Granting Applicant's Motion to Alter or Amend Pursuant to Rule 59(e)

14. Pro Se Motion to Remove Counsel for Self Representation

15. Letter from Office of Attorney General filed in lieu of formal Return to Pro Se Motion to Remove Counsel for Self Representation

16. South Carolina Supreme Court Order letter Order dated June 2, 2008

17. Exhibits Submitted into Evidence at PCR Evidentiary Hearing

III. FEDERAL HABEAS ACTION[5]

First Habeas Petition

Ground One: Prosecutorial Misconduct - Violation of Rule 5-Brady/Rules 5 and 6 - SCRCrimP. Withholding of SLED results. (See Memorandum)

Supporting Facts:

1. County Sherriffs[sic] Dept. retrieved from hospital "1 rape 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 sherriff/soclitiors' office - via cc: (6) six days prior to G.S. appearance of March 8, 2005. (See exhibit P-2)

[5]Petitioner filed three separate Petitions for Federal Habeas Corpus. By Order dated September 20, 2010, all three Petitions were combined as one. These are the Grounds raised in each Petition.

4. 1-18-05/discovery "itemized cover sheet" shows no SLED results (exhibit P-6)

Ground Two: Prosecutorial Misconduct - Use of alleged admission by Applicant from Family Court; (See Memorandum); without appointed counsel

Supporting Facts:

1. Applicant attended a Family Court hearing on October 12, 2004 without appointed counsel. (See Transcript -(PCR) p. 87, l. 12-25; 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, l 17).

Ground Three: Ineffective Assistance of Counsel - Issues 2., 1., and 4. - (Please see PCR Order)(See also Memorandum Argument III)

Supporting Facts:

1. Failure to investigate - met with Applicant once (the day of the plea - 10 minutes) (Plea Transcript - p. 84, l. 9-11; p. 50, l. 25; p. 51, l. 1-9) - No Brady request.
2. Failure to address the Fact of my two court appearances under psychotropic medications (Family and G.S.). (Plea Trans. -p. 54, l. 17-24; p. 56, l. 15-20; p. 59, l. 8-12; p. 59, l. 21-25; pgs. 60-62, l. 1-25). (See exhibits)(See exhibits)
3. Failure to negotiate plea offer(s), esp. 1-18-05! (Trans.-p. 97, l. 15-25; p. 98, l. 1-19)

Ground Four: Ineffective Assistance of Counsel - Issues 3. and 5. (Please see PCR Order)(See also Memorandum Argument III)

Supporting facts:

1. Failure to present mitigating evidence, ie - there was "never" a psychological exam performed in this case, despite "manditory requirement and "two court order mandates." (Plea Trans.-p. 85, l. 23-25; p. 86, l. 1-25; p. 87, l. 1-8). (See exhibit(s)).
2. Failure to adequately advise the Applicant, ie - counsel advised guilty plea despite lack of evidence. (Trans.-p. 38, l. 3-15).

Second Habeas Petition

Ground One: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix)

Supporting Facts:

1. During the course of the PCR hearing I entered (9) nine exhibits into the Court records. The PCR judge - in turn - entered "two document," (the plea offers), as well. (See exhibit); (See also, PCR Transcript - pgs. 97-98, l. 15-19).

2. I recieved[sic] 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).

Ground Two: Ineffective Appellate Counsel - (See Memorandum) - Failure to provide no more than a "less than perfunctory" representation/investigation.

Supporting Facts: From our very first communique it was established that we had "opposing views" concerning presenting the misconduct (PCR) issue as "highly meritorious" in certiorari. Me -for, him -against. This view was escalated further, counsel refused to pursue stipulation - 3. In the PCR 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 States' inaccurate "case statement.

Ground Three: Misinterpretation of the Record on Appeal (Appendix) resulting in "reversal" of the PCR Order granting relief. (See Memorandum)

Supporting Facts: Discrepancies are per page No. 5 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 witheld[sic] from the "record on appeal."
   * This would be (PCR exhibit P-8)!

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.

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 were 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. Pro se representation denied by Chief Justice (See exhibit)

Third Habeas Petition

Ground One: 14th Amendment due process violation of Brady. "No Relief" at PCR failure to disclose DNA (Sled results) or toxicology report. (See Memorandum)

Supporting facts:

1. Greenville Co. Sherriff's Investigator prepared 2 "Property Control and Custody Reports" for the Rape Kit Forwarded and returned from SLED.
2. Copy of "results" also forwarded (cc:) - to Solicitor (dated March 2, 2005).
3. "Itemized" discovery list dated 1-18-05-shows P, and, 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 destroyed 3 months after plea. (except toxicology results). Facts 1-3 argued at PCR. Judge ruled issue of DNA results "unmeritorious" for relief.

Ground Two: Misconduct/abuse of descretion/use of "alleged admission" from Family Court by the Applicant without counsel-, (See Memorandum); not in discovery. Supporting facts:

1. Applicant attended a Family Court hearing on October 12, 2004, without appointed counsel. (See, PCR 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. (PCR 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. PCR Judge ruled issue "unmeritorious"

Ground Three: The PCR Judge erred in granting relief based upon "one issue" of I.A.C., (See Memorandum), Abuse of descretion.

Supporting facts: At the PCR hearing the Petitioner submitted that his counsel failed to investigate and asa result: A.) Defendant pled under the influence of "psychotropic drugs" B.) Failed to request "manditory[sic] psychological evaluation. (Court ordered!) C.) Failed to present SLED 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 PCR Judge found "no ineffective counsel" or Prosecutorial Misconduct

IV. APPLICABILITY OF THE AEDPA

The present habeas action was filed on July 28, 2010.[6] Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of" clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

V. EXHAUSTION

The record does not support a finding of exhaustion. 28 U.S.C. § 2254(b)(1). There may be an available remedy for some of Petitioner's claims. There was no direct appeal in this case. Petitioner did file an Application for Post-Conviction Relief. In his APCR, Petitioner arguably raised the claims now raised in Grounds One, Two, Three, and Four of the first habeas petition, and the Grounds raised in Grounds One, Two, and Three of the third habeas petition. The PCR Court granted relief on a claim Petitioner does not raise in this habeas action, but denied relief upon these claims. The State appealed. Petitioner did not file a cross-appeal. On appeal, the South Carolina Supreme Court reversed the PCR Court's Order. During the appeal, Petitioner did file a motion to proceed pro se with the South Carolina Supreme Court, thus arguably raising the claim he now raises

[6]This was the date of receipt from the South Carolina Department Corrections stamped on the envelopes to Petitioner's habeas petitions.

in Ground Four of the second habeas petition. The South Carolina Supreme Court denied the motion.

Respondent submits Petitioner may have an available state remedy to seek relief upon the claims he now raises in his first and third habeas petitions. Petitioner asserts in Grounds Two and Four of the second habeas petition that he requested PCR appellate counsel challenge the denial of relief upon his other PCR claims. He may be able to seek additional post-conviction relief and secure a belated PCR appeal on these claims. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). "Under Austin, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal." Odom v. State, 337 S.C. 256, 259-260, 523 S.E.2d 753, 755 (1999) (further noting the 1 year statute of limitations contained in S.C. Code Ann. § 17-27-45(A) does not apply to Austin filings). It is unclear from the record in this case whether Petitioner is entitled to relief upon Austin.[7] As of the date of this filing, Petitioner has not filed a post-conviction relief action seeking appellate review of the denied claims pursuant to Austin v. State. Since Petitioner may still seek appellate review of his PCR claims via a PCR action filed pursuant to Austin, Petitioner has not exhausted all available state remedies for these claims. Since Petitioner did not properly exhaust these claims in state court, and he could seek appellate review in state court upon many of the claims raised in the first and third habeas petitions, Respondent submits these petitions are unexhausted. Thus, this habeas action contains both exhausted and unexhausted claims. Respondent submits it should therefore be dismissed to allow

[7]The PCR Court could find Petitioner cannot meet the requirements for Austin review.

for state court review of the unexhausted claims. Rose v. Lundy, 455 U.S. 509, 520-522, 102 S.Ct. 1198 (1982).

VI. STATUTE OF LIMITATIONS

Petitioner's habeas petition should be dismissed because all of Petitioner's claims are not timely and are barred by the statute of limitations. The AEDPA provides that "[a] 1 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." 28 U.S.C. § 2244(d)(1). The time limit begins to run at the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). A "properly filed application for State post conviction relief," however, will toll the time for filing. 28 U.S.C. § 2244 (d)(2). Even with the filing of his first post-conviction relief action in this case, Petitioner is barred from filing his habeas petition by the AEDPA statute of limitations.

Petitioner pled guilty on March 8, 2005. He did not file an appeal. Thus, his conviction became final on March 18, 2005.[8] At the time, Petitioner did not file a Petition for Rehearing. Thus, the statute of limitations began to run on March 19, 2005, the date Petitioner's conviction became final. Petitioner would have had 365 days from March 18, 2005 to file his petition for federal habeas corpus.

The statute of limitations ran until Petitioner filed his post-conviction relief action on November 11, 2005. Two hundred and thirty-seven days elapsed between the date Petitioner's conviction became final and the date he filed his post-conviction relief action. The statute remained tolled during the pendency of the first PCR action which began on November 11, 2005 and lasted

[8]A notice of appeal must be served within ten days after sentenced is imposed. Rule 203(b), SCACR.

until the PCR appeal was reversed on July 13, 2009. The Remittitur for the PCR Appeal was issued on July 29, 2009. Thus, the statute of limitations began to run on July 30, 2009, the after day the Remittitur was filed. Petitioner had 128 days from July 29, 2009 to file his federal habeas corpus petition. The deadline to file his habeas petition ran on December 4, 2009. The statute continued to run until the filing of this habeas petition on July 28, 2010. Petitioner exceeded the statute of limitations by 236 days. All of Petitioner's claims are barred under the statute of limitations and he is not entitled to equitable tolling, even if available. Id. (denying equitable tolling where the petitioner waited years to file his habeas action.).

Petitioner has offered no valid explanation in his habeas petition to explain why it is untimely and why the statute of limitations should be equitably tolled. "The 1 year limitation period of Section 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments." Duncan v. Walker, 533 U.S. at 179. While the U.S. Supreme Court and the Fourth Circuit have held that the AEDPA statute of limitations is subject to equitable tolling,, both have also underscored the very limited circumstances where equitable tolling will be permitted. Holland v. Florida, 130 S. Ct. 2549, 2562-63, 177 L. Ed. 2d 130 (2010), Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000), Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc). The limits on equitable tolling stem from the fact that "Congress enacted AEDPA to reduce delays in execution of state and federal criminal sentences, particularly capital cases...and to further principles of comity, finality and federalism.". Woodford v. Garceau, 538 U.S. 202, 206 (2003)(internal citations and quotation marks omitted).

"To be entitled to equitable tolling, [Petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) and some extraordinary circumstance stood in his way' and prevented timely

filing." Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 1085 (2007)(citation omitted)(holding petitioner was not entitled to equitable tolling when at the time he neglected to file timely, law was not questionable where federal circuits were in agreement petitioning U.S. Supreme Court for certiorari did not toll habeas corpus statute of limitations). The requirement that he prove he was prevented from timely filing by extraordinary circumstances, which were beyond his control or external to his own conduct, does not include the failure of his attorney to advise him of the statute of limitations or mis-advice from counsel. Id. ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel"); Rouse, supra. The U.S. Supreme Court has noted that far more serious instances of attorney misconduct may warrant equitable tolling, if the circumstances are extraordinary. Holland, supra. Ignorance of the statute of limitations or inadequacy of the prison law library also do not suffice. See Marsh v. Soares, 223 F.3d 1217 (10th Cir. 2000) ("[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing"(quotation omitted)); Id. (holding assistance petitioner received from inmate law clerk did not relieve him of personal responsibility to file within AEDPA's one-year period); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (holding illiteracy does not merit equitable tolling). See also Cross-Bey v. Gammon, 322 F.3d 1012, 1015 (8th Cir. 2003)(rejecting equitable tolling where petitioner alleged lack of legal knowledge and legal resources), cert. denied, 540 U.S. 971 (2003); Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2002)(as amended)(recognizing that the lack of access to library materials does not automatically qualify as grounds for equitable tolling) cert. denied, 535 U.S. 1055 (2002).

There is nothing in the record nor has Petitioner put forth any facts supportive of equitable tolling, if available. First, Petitioner has not shown he has pursued his rights diligently. Two, Petitioner has not shown some extraordinary circumstance stood in his way and prevented him from timely filing. Therefore, all of Petitioner's habeas claims are barred by 28 U.S.C. § 2244(d)(1).

VII. PROCEDURAL BARS/DEFAULT

Petitioner's claims in Grounds One, Two, and Three of his second habeas petition are procedurally barred. Ground One asserts a claim of prosecutorial misconduct in the preparation of the Appendix in the PCR appeal. Ground Two asserts a claim of ineffective assistance of PCR appellate counsel. Ground Three asserts the South Carolina Supreme Court made factual errors in its opinion reversing the PCR Court's Order. None of these claims were raised in state court. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would find any attempt to raise these claims now to be procedurally improper, then these claims are procedurally barred from review in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

To date, Petitioner has not filed a PCR action to seek Austin review of the claims that were denied in his PCR. In the event Petitioner waives his opportunity to seek relief under Austin v. State, supra, or in event the state courts deny Petitioner's request for appellate review of his PCR

claims, Respondent submits all of Petitioner's claims in the first habeas petition are procedurally barred. In Ground One of the first petition, Petitioner asserts claims of prosecutorial misconduct relating to the failure to provide the defense with a SLED report and the destruction of evidence after Petitioner's guilty plea. In Ground Two, Petitioner asserts a claim of prosecutorial misconduct based upon the State's repeating admissions he made during a Family Court hearing in the State's recitation of the facts at the guilty plea hearing. In Ground Three, Petitioner asserts several claims of ineffective assistance of counsel. He claims counsel failed to investigate his case, failed to file a Brady motion, failed to meet with Petitioner, failed to address Petitioner's allegation that he appeared before the Family Court and the plea court while under the influence of psychotropic drugs, and failed to advise Petitioner about his right to appeal his guilty plea. In Ground Four, Petitioner asserts plea counsel was ineffective for not presenting mitigating evidence at sentencing, and for advising Petitioner to plead guilty even though there was allegedly a lack of evidence to support a finding of guilt.

All of these claims were raised in Petitioner's PCR Action. The PCR Court denied relief upon all of these claims. The State filed an appeal based upon the PCR Court's grant of relief on another claim of ineffective assistance of counsel. Petitioner did not file a cross-appeal. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would have necessarily found his attempt to raise these claims now to be procedurally improper under Austin, these claims are procedurally barred from review in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d

353, 363 (4th Cir. 1996) (issues not presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

Similarly, Petitioner's claims in his third petition are also subject to procedural bars if Petitioner fails to seek Austin review, or if Austin review is denied by the state courts. In Ground One, Petitioner reasserts the Brady claim raised in Ground One of the first petition. In Ground Two, Petitioner reasserts the claim raised in Ground Two of the first petition. He also appears to assert a claim that the statement made by the solicitor at the plea hearing was false. In Ground Three, Petitioner asserts counsel was ineffective for not properly handling the fact Petitioner was allegedly under the influence of psychotropic drugs when he pled guilty and when he appeared before the Family Court. Petitioner also asserts counsel was ineffective for not requesting a mandatory psychological evaluation, not presenting the results in the SLED report to Petitioner, not negotiating a plea offer with the State, and not advising Petitioner of his right to file a direct appeal to his guilty plea. While these claims were arguably ruled upon by the PCR Court, Petitioner did not raise them on appeal to the South Carolina Supreme Court. Since Petitioner did not properly present these claims to the South Carolina appellate courts in a procedurally viable manner when he had the opportunity, and the state courts would have necessarily found his attempt to raise these claims now to be procedurally improper under Austin, these claims are procedurally barred from review in federal habeas corpus. See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (issues not

presented to the state's highest court may be treated as exhausted if it is clear that the claims would be procedurally defaulted under state law if the petitioner attempted to raise them now).

Cause and Prejudice

Grounds One, Two, and Three of the second habeas petition are procedurally barred absent a showing of cause and actual prejudice, or actual innocence. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997). Similarly, all of Petitioner's claims in the first and third habeas petitions will also be procedurally barred if Petitioner fails to seek appellate review under Austin, or if the state courts deny Petitioner's request for appellate review pursuant to Austin. The existence of cause must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's or his efforts to comply with the State's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner expresses no particular cause for procedurally defaulting on his grounds. Petitioner had a PCR hearing and an appeal from the PCR in which to raise these issues and he failed to raise them, raise them properly, or preserve these issues for habeas review. Petitioner cannot establish cause and prejudice because he has consistently abandoned opportunities to preserve these specific issues.

In the alternative, Petitioner must show a miscarriage of justice. In order to demonstrate a miscarriage of justice, Petitioner must show he is actually innocent. Actual innocence is defined as factual innocence, not legal innocence. Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604 (1998). Petitioner cannot establish that the errors he complains of probably resulted in the conviction of an innocent person. Sclup v. Delo, 513 U.S. 298, 327 (1995). In order to pass through the actual innocence gateway, a petitioner's case must be "truly extraordinary." Id.

The record would make an assertion of actual innocence incredible. Petitioner admitted that he was pleading guilty because he was guilty. (App. 11). Petitioner also admitted at the plea hearing that he engaged in the conduct that constituted criminal sexual conduct with a minor in the first degree, and the lewd acts upon children. (App. 12). Petitioner cannot show actual innocence. The procedural bar should be applied without exception. Murray, supra. Furthermore, actual innocence is not a claim but merely lifts the procedural bar, if established, and allows consideration of the habeas petition on the merits. Bousley, supra. Petitioner cannot establish actual innocence. The procedural bars should not be lifted.

VIII. MERITS

Respondent submits Petitioner's federal habeas claims are all without merit. He has not shown that the state courts made unreasonable determination of the facts in addressing these claims, or that the state courts unreasonably applied federal law in addressing these claims. He has not shown that he is entitled to federal habeas relief upon any of the claims. As a result, this federal habeas action should be denied and dismissed.

A. STANDARD OF REVIEW

The standard of review to be applied in habeas is "quite deferential to the rulings of state courts." Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001). Petitioner cannot prevail before this Court on the merits of this claim.

To prevail on an ineffective assistance of counsel claim, Petitioner must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have

been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id. With guilty pleas, "in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A guilty plea is constitutionally valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Lockhart, 474 U.S. at 56. A plea is knowingly and intelligently made if a defendant is fully aware of the direct consequences of his guilty plea and not induced by threats, misrepresentation, including unfulfilled or unfulfillable promises, or by promises that are by their nature improper as having no relationship to the prosecutor's business. Brady v. U.S., 397 U.S. 742, 755, 90 S.Ct. 1463 (1970). The defendant may not later assert that his plea was invalid except in extremely limited situations, such as where counsel was ineffective. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977).

Petitioner also bears the burden of showing he is entitled to habeas corpus relief. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain habeas relief, Petitioner must show the PCR judge or the South Carolina Supreme Court unreasonably applied federal law, as determined by the United States Supreme Court, or made "an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d); Carey v. Musladin, 549 U.S. 70 (2007). Here, Petitioner has shown neither. The South Carolina Supreme Court did not unreasonably apply clearly established federal law, as decided by the United States Supreme Court, nor was the factual determination unreasonable in light of the facts.

To establish an unreasonable application of federal law, Petitioner must show more than "an incorrect or erroneous application of federal law." Williams v. Taylor, 529 U.S. 362, 413 (2000). Thus, "a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be 'unreasonable' for habeas relief to be granted. This is a substantially higher threshold." Id. at 410. Petitioner has failed to overcome this threshold.

First Habeas Petition

Ground One: Prosecutorial Misconduct - Violation of Rule 5-Brady/Rules 5 and 6 - SCRCrimP. Withholding of SLED results. (See Memorandum)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims of prosecutorial conduct in Ground One of his first habeas petition are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law in addressing this claim. Since Petitioner has failed to show that he is entitled to federal habeas relief upon these claims, Ground One should be dismissed.

Claims Related to SLED Report

In Ground One, Petitioner asserts there were prosecutorial misconduct, Rule 5 and Rule 6 SCRCrimP violations, and Brady violations because a SLED report was not submitted to the defense before Petitioner pled guilty. The PCR Court found this claim was without merit. The PCR Court noted that Petitioner submitted the SLED lab report for the rape kit analysis dated March 2, 2005 as an exhibit supporting this claim. (App. 111). It showed no sperm or semen was found. Id. The PCR Court noted that was neither exculpatory nor incriminating. Id. The PCR Court indicated that

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. Id. The PCR Court found that Petitioner's Brady claim failed because he failed to demonstrate (1) the evidence was favorable to the accused; (2) it was in the possession or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment. Id.

Petitioner cannot show that the PCR Court's ruling on this issue was the result of an unreasonable determination of the facts. All of the factual findings made by the PCR Court are supported by the record. The SLED report that was admitted into evidence indicated that no sperm or semen was found. (App. 49-50, see Attachment No. 17, at pg. 17-18). There was no evidence presented at the PCR hearing that indicated when the SLED report was received by the solicitor's office. However, it was noted that the SLED report was found in the file by PCR counsel in April 2006, over one year after Petitioner's guilty plea. (App. 96-7).

Petitioner also cannot show that the PCR Court's ruling was an unreasonable application of federal law. "A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality

does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

"[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

The PCR Court's findings are not an unreasonable application of federal law. First, as noted by the PCR Court, Petitioner failed to show that the SLED report was favorable. The report clearly indicates that no sperm of semen was identified from the samples submitted by the Greenville

County Sheriff's Office. As a result, no testing could be done. Thus, the results neither inculpate or exculpate Petitioner as a possible suspect. Further, the SLED report does not impeach any witness (none testified) or any statement made by the solicitor at the plea hearing. (See App. 12). Similarly, Petitioner fails to show that the SLED report was material. Thus, Petitioner did not establish two of the elements of his Brady claim, i.e., that the evidence in question must be favorable to the defendant and that the evidence was material. As a result, the PCR Court's finding that Petitioner had failed to establish his Brady claim was not contrary to federal law as defined by the U.S. Supreme Court. As a result, this claim in Ground One should be denied and dismissed.

To the extent that Petitioner asserts there were violations of Rules 5 and 6 of the South Carolina Rules of Criminal Procedure, Respondent submits that those claims are not cognizable for federal habeas relief. They clearly hinge on the interpretation of state criminal law and rules of procedure, not federal law. Thus, those claims fall outside of the jurisdiction of this Court. Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998). Petitioner fails to assert that any federal law is at issue as to those claims. Since these claims strictly rely upon the interpretation of state law, they must be summarily dismissed. Estelle v. McGuire, 502 U.S. 62, 67 (1991)("Federal habeas corpus relief does not lie in errors of state law.").

Claims Related to Destruction of Evidence

To the extent Petitioner raises a claim of prosecutorial misconduct for the destruction of some of the evidence the State may have intended to present had Petitioner gone to trial, Petitioner's claim is also without merit. The PCR Court found Petitioner failed to prove the evidence was exculpatory or that the solicitor acted in bad faith. As a result, the solicitor's actions did not amount to prosecutorial misconduct. The PCR Court further noted that the State did not have an absolute duty

to preserve potentially useful evidence that might exonerate a defendant, citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988); State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (1991); and State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990).

Petitioner cannot show that the PCR Court's findings were the result of either an unreasonable determination of the facts or an unreasonable application of federal law. The PCR Court's findings were not an unreasonable application of federal law. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). Here, Petitioner did not show in state court that the police acted in bad faith in destroying some of the evidence may have intended to present had Petitioner gone to trial. None of the items were destroyed before Petitioner's guilty plea. (See Attachment #17, pgs 25-8). The Property and Evidence Reports were disclosed to the defense prior to Petitioner's guilty plea. (See Attachment #17, pgs 23-4). Clearly, the evidence was available to Petitioner and his counsel prior to Petitioner's guilty plea. Thus, Petitioner cannot show that the police acted in bad faith when they destroyed the evidence after Petitioner pled guilty. As a result, to the extent Petitioner asserts there was a due process violation because of the destruction of some of the evidence the State may have intended to present had Petitioner gone to trial, his claim is without merit. Ground One of Petitioner's first habeas petition should therefore be denied and dismissed.

Ground Two: Prosecutorial Misconduct - Use of alleged admission by Applicant from Family Court; (See Memorandum); without appointed counsel

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground Two are without merit. Petitioner fails to show that a state court made an

unreasonable determination of the facts in addressing this claim. Further, Petitioner fails to show that a state court unreasonably applied federal law in addressing this claim of prosecutorial misconduct. Since Petitioner has not established that he is entitled to federal habeas relief upon this claim, Ground Two in Petitioner's first habeas petition should be denied and dismissed with prejudice.

In Ground Two, Petitioner asserts it was prosecutorial misconduct for the State to use his admissions in Family Court against him at the plea hearing. This claim is without merit. The PCR Court found that Petitioner's claim did not entail prosecutorial misconduct. (App. 112). Petitioner cannot show that this ruling was either based upon an unreasonable determination of the facts or an unreasonable application of federal law.

First, Petitioner cannot show that the PCR Court made an unreasonable determination of the facts in addressing this claim. The PCR Court noted that the transcript of Petitioner's guilty plea stated that he admitted guilt in the DSS family court proceedings. (App. 112). It also noted that Petitioner testified that he was not represented at the DSS proceedings and that 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. Id. The PCR Court also noted that Petitioner expressly denied engaging in sexual battery. Id. The PCR Court also found that Petitioner submitted a family court order contained in the file subpoenaed from the solicitor that said Petitioner was in agreement with the finding of sexual abuse of his three step-daughters supported his assertion that the solicitor was aware that any admission was of sexual abuse only. Id. These findings are supported by the record. At Petitioner's plea hearing, it is noted that Petitioner admitted guilt in the DSS proceedings. (App. 12). Further, at the PCR hearing, Petitioner testified defense counsel was not present at the DSS

proceedings, and he was not represented at the DSS proceedings. (App. 57, 67). Petitioner also expressly denied engaging in sexual battery at the PCR hearing. (App. 63). Petitioner also argued that the treatment plans indicated he only admitted to general sexual abuse, and not sexual battery. (App. 66-7). Since the PCR Court's factual findings are clearly supported by the record, Petitioner fails to show that the PCR Court's decision was the result of an unreasonable determination of the facts.

Petitioner also fails to show that the PCR Court unreasonably applied federal law in denying this claim of prosecutorial misconduct. In reviewing Petitioner's brief on this issue, it appears that Petitioner is essentially asserting that there was prosecutorial misconduct because the State did not provide him with a copy of his testimony from the DSS family court hearings before noting that he had admitted his guilt at the plea hearing. This claim is without merit. As already noted in response to Ground One, "the Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978). The statement in question was made by **Petitioner** at his DSS proceeding. Clearly, Petitioner could have informed counsel of the statements, and if necessary, counsel could have contacted the court reporter for the Family Court proceeding to obtain a copy of the transcript of those proceedings.

To the extent Petitioner asserts that the statements made at the DSS proceeding were not admissible because he was not represented by counsel, Petitioner's claim is also without merit. See

Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602 (1973) ("when a criminal defendant has solemnly admitted in open court that he is, in fact, guilty of the offense with which he is charged [he may only attack the voluntary and intelligent character of the plea, and] he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea"); United States v. Willis, 992 F.2d 489, 490 (4th Cir.1993); see also State v. Passaro, 350 S.C. 499, 567 S.E.2d 862, 866 (2002).

In all, Petitioner fails to show that he is entitled to federal habeas relief upon these claims. As a result, Ground Two should be denied and dismissed.

Ground Three: Ineffective Assistance of Counsel - Issues 2., 1., and 4. - (Please see PCR Order)(See also Memorandum Argument III)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims of ineffective assistance of counsel in Ground Three are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law to these claims. Since Petitioner has not established that he is entitled to federal habeas relief upon these claims, Ground Three should be denied and dismissed.

In Ground Three, Petitioner asserts four claims of ineffective assistance of counsel. First, he argues that counsel was ineffective because counsel failed to investigate the claims against Petitioner, counsel only met with Petitioner once, on the day of the plea hearing; and counsel failed to make a Brady motion. Second, Petitioner contends counsel was ineffective for not addressing the fact that Petitioner made two court appearances while under the influence of psychotropic medications. Third, Petitioner asserts counsel was ineffective in failing to negotiate for a plea offer.

The fourth claim, which is not listed on the habeas petition but is contained in the brief attached to it, was that counsel was ineffective for not advising him of his right to a direct appeal.

A. Trial Counsel was not ineffective for not investigating, making a Brady motion, or meeting with Petitioner

In the first set of claims, Petitioner presents several arguments. First, he claims that counsel failed to investigate the claims against Petitioner. In the brief attached to the habeas petition, Petitioner also argues that counsel failed to review the rape kit and clothing that was in possession of the Greenville County Sheriff's Department. According to Petitioner, counsel could have become aware of the SLED report had he engaged in further investigation into the whereabouts of the clothing and rape kit. Second, Petitioner argues plea counsel only met with him once, on the day of the plea. Third, he contended that counsel failed to file a Brady motion.

The PCR Court denied relief on the first argument in this set of claims, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. Petitioner did not show that he was prejudiced by any deficiency in his plea counsel's investigation. Specifically, Petitioner did not present any exculpatory evidence that would have been found had counsel engaged in a more thorough investigation. At the PCR hearing, Petitioner did present nine exhibits. The first was his booking report. The second was the SLED lab report at issue in Ground One of this first petition. The third exhibit was a medical request form completed by Petitioner when he was being held by at the Greenville County Detention Center. The fourth exhibit consisted of his medication records from

the detention center. Petitioner's fifth exhibit was the letter he received from SLED in response to his request for test results in his case. The sixth exhibit was the discovery disclosure letter sent by the solicitor's office to Petitioner's plea counsel on January 18, 2005. The seventh exhibit included the property and evidence records included in the State's file. The eighth exhibit was Petitioner's Memorandum of Law in Support of his PCR Application. The ninth exhibit was the letter Petitioner received from the South Carolina Court of Appeals indicating no appeal had been filed in his case. In all, none of these exhibits show that Petitioner did not commit the crimes to which he pled guilty. Thus, it was not unreasonable for the PCR Court to find that Petitioner's claim was not meritorious. He had not established that counsel was ineffective because he had not shown he was prejudiced by any deficiency of counsel. Thus, this claim for relief should be denied and dismissed.

Petitioner's second contention in this set of claims, that counsel was ineffective in investigating by only meeting with Petitioner once before his guilty plea, was also found to be without merit by the PCR Court. (App. 113). Petitioner cannot show that this decision by the PCR Court was based upon an unreasonable determination of the facts. The PCR Court did not outline any findings of fact in addressing this claim.

Further, Petitioner cannot show that the PCR Court unreasonably applied federal law in addressing this claim. At the plea hearing, Petitioner told the plea court that he was totally and completely satisfied with the representation of his attorney, and that his attorney had done everything that he thought was reasonably necessary to adequately prepare his defense. (App. 11). Further, Petitioner informed the plea court that he had ample opportunity to review the evidence the State had against him, and that he had no complaints with respect to the charges he faced. (App. 11). "Absent clear and convincing evidence to the contrary, [a petitioner] is bound by the representations he made

during the plea colloquy." Burket v. Angelone, 208 F.3d 172, 191 (4th Cir. 2000); see Beck v. Angelone, 261 F.3d 377, 396 (4th Cir. 2001)(same). At the PCR hearing, counsel testified that Petitioner wanted to plead guilty, and that Petitioner never indicated that he wanted to go to trial. (App. 80-2). Counsel also testified that when he spoke with Petitioner about the incident, Petitioner maintained that something happened, but he was evasive about any details. (App. 81-2). Counsel also noted that Petitioner never informed him about being on psychiatric medication, and there was no indication by Petitioner's behavior that he had any psychiatric problems. (See App. 81, 83). Petitioner presented no probative testimony or evidence that would have been discovered by counsel had counsel met with Petitioner on more than one occasion. While Petitioner asserted that further meetings with counsel would have led counsel to investigate into Petitioner's mental state, Petitioner presented no evidence to support this claim. Furthermore, Petitioner presented no evidence that established he was incompetent to plead guilty at his plea hearing, or that he was incompetent for his Family Court hearing. Since Petitioner did not present evidence to support a finding that he was prejudiced by any deficiency of counsel in this regard, the PCR Court was not unreasonable in finding this claim of ineffective assistance of counsel was without merit. As a result, this claim should be denied and dismissed.

Petitioner's third assertion in this first claim is also without merit. Petitioner asserts counsel was ineffective for not filing a Brady motion. This claim was arguably denied by the PCR Court. (See App. 113). The PCR Court issued no factual findings in addressing this claim. Thus, Petitioner cannot show that the PCR Court made an unreasonable determination of the facts in addressing this claim.

Petitioner also cannot show that the PCR Court unreasonably applied federal law in dismissing this claim. First, Petitioner did not show that counsel was deficient. At the PCR hearing, counsel testified that he did not file a Brady motion because he knew the solicitor on the case, and he called her, and the solicitor indicated she would give him all of the discovery. (App. 80). Counsel also indicated that the solicitor had an open file policy, and he copied everything that was in the file for Petitioner's case. Id. In light of the fact that counsel had access and received everything that he would have received had he filed a Brady/Rule 5 Motion, Petitioner cannot establish counsel was deficient in this regard. Further, Petitioner fails to show that he was prejudiced by any error of counsel in not filing a Brady motion. Specifically, Petitioner did not present any exculpatory evidence at the PCR hearing that could have been obtained by counsel had counsel filed a Brady motion in this case. The only new document presented at the PCR hearing was the SLED report, which as explained in response to Ground One of this first petition, was neither inculpatory nor exculpatory. As a result, Petitioner's third assertion in his first claim in Ground Three should be denied and dismissed. See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); see Savino v. Murray, 82 F.3d 593 (4th Cir. 1996) (rejecting habeas claim that attorneys should have pursued intoxication defense where petitioner offered no proof his alleged cocaine usage made him incapable of intent or deliberation); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

B. Court Appearances/Psychotropic drugs

In his second assertion in this first claim in Ground Three, Petitioner contends counsel was ineffective for not addressing the fact Petitioner made two court appearances while under the

influence of psychotropic medications. This claim is without merit. The PCR Court denied relief on this claim, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts.

Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. First, Petitioner failed to establish in state court he was under the influence of psychotropic drugs at the plea hearing. At the hearing, Petitioner indicated the only medication he had taken on the day of the hearing was for hypertension. (App. 5-6). Petitioner also indicated the only psychiatric treatment he had received was through a Salvation Army rehabilitation program that he had graduated from the year before the plea hearing. (App. 6-7). "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Respondent submits the records Petitioner presented at the PCR hearing did not conclusively establish he was under the influence of psychotropic drugs on the day of his plea. Thus, this claim should be dismissed.

Furthermore, counsel was not ineffective because Petitioner never informed him of his psychiatric condition. See Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1985) (finding no ineffective assistance of counsel for failing to investigate past psychological problems where defendant did not inform counsel of the past problem, and nothing during representation indicated existence of a psychological problem); see also Clanton v. Blair, 826 F.2d 1354, 1358 (4th Cir. 1987). At the PCR hearing, counsel testified that Petitioner never told him he was on any psychiatric

medication. (App. 81). He further noted Petitioner did not present any symptoms of having any psychiatric issues when he met with Petitioner. Id. Petitioner's testimony also indicates he never told counsel he was on psychiatric medication. (See App. 61-2). Petitioner cannot show that counsel was ineffective in not addressing Petitioner allegedly being under the influence of psychiatric drugs. Thus, this claim should be denied and dismissed.

C. Negotiating Plea Offer

In his third claim in Ground Three, Petitioner asserts counsel was ineffective in failing to negotiate for a plea offer. This claim is without merit. The PCR Court denied relief on the argument in this set of claims, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts. Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. Even if counsel was deficient, Petitioner failed to present any evidence that he was prejudiced by any error of counsel in this regard. As already noted, with guilty pleas, "in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, supra. v. Lockhart. This claim clearly indicates Petitioner would have still pled guilty had counsel negotiated a plea offer. He only complains that he would have received a better sentence. Thus, Petitioner has not established he was prejudiced in this regard. Hooper v. Garraghty, 845 F.2d 471 (4th Cir.1988); see Fields v. Attorney General of State of Md., 956 F.2d 1290, 1297-98 (4th Cir.1992) (finding no prejudice when argument was counsel was ineffective and petitioner he would have pled to a different plea bargain and received a more favorable sentence with competent counsel); see also

Craker v. McCotter, 805 F.2d 538, 542 (5th Cir.1986). As a result, this claim for relief should be denied and dismissed.[9]

D. Failure to Advise Regarding Right to Direct Appeal

In his memorandum, Petitioner asserts that plea counsel was ineffective for not advising him of his right to appeal the guilty plea. The PCR Court denied relief upon this claim. The PCR Court denied relief on this claim, finding it was without merit. (App. 113). The PCR Court did not make any findings of fact in addressing this claim. Thus, Petitioner cannot show that this claim was based upon an unreasonable determination of the facts. Petitioner also cannot establish that the PCR Court's decision on this issue was an unreasonable application of federal law. "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036 (2000).

> Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved

[9]Petitioner also presented no probative evidence at the PCR hearing of what an attempt at plea negotiations would have garnered. At best, Petitioner presented information to the PCR Court that the State had mentioned a cap on his sentence. In agreement with the statements made in the letters, the State did recommend that Petitioner's sentences be served concurrently. (App. 12). Petitioner did receive a concurrent sentence. (App. 13). There was no testimony or evidence presented at trial to indicate what cap the State would have considered. Since Petitioner did not present any evidence establishing what would have resulted had plea negotiations taken place, Petitioner fails to show that he was prejudiced.

> or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

Id. "[T]o show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." Id. at 483, 120 S.Ct. at 1038.

Here, Petitioner cannot show that counsel was deficient in this regard. Under the facts of this case, counsel did not have a duty to consult with Petitioner about an appeal. First, there was no reason to think Petitioner would want to file an appeal in this case. Petitioner pled guilty to the charges. The record of the plea hearing does not indicate there were any nonfrivolous issues preserved for appeal. The record indicates Petitioner's plea was knowingly and voluntarily made under Boykin v. Alabama, 395 U.S. 238(1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. The record clearly reflects that Petitioner's plea was knowingly, voluntarily, and intelligently made. He was advised of those rights by the plea court. (App. 10). Petitioner was also advised of the charges against him, and the maximum sentences for each offense. (App. 7-8).

Petitioner's sentences were within the maximum sentences allowed under South Carolina law.[10] See S.C. Code Ann. § 16-3-652(2)(1985)(CSC first degree punishable by sentence of no more than thirty years); S.C. Code Ann. § 16-3-655(1)(1985) (defining CSC first degree with a minor);

---

[10]S.C. Code Ann. § 16-3-655 has been amended several times since Petitioner's guilty plea.

S.C. Code Ann. § 16-15-140 (Supp. 2001)(defining lewd act with a minor; punishable by sentence of fifteen years); see State v. Outlaw, 304 S.C. 347, 250, 404 S.E.2d 516, 517-18 (S.C.Ct.App.1991) (finding sentence for CSC with a minor second degree was proper; while statute for CSC with a minor second degree did not provide a sentencing range, the statute for CSC second degree did) rev'd on other grounds, 307 S.C. 177, 414 S.E.2d 147 (1992). Petitioner was sentenced to the terms of the recommendation offered by the solicitor. (See App. 12-3). Since Petitioner waived all of the non-jurisdictional claims with the exception of ineffective assistance of defense counsel and the voluntariness of the plea, there were no non-frivolous issues to raise on appeal in this case. Johnson v. Catoe, 336 S.C. 357-58, 520 S.E.2d 617, 619 (1999). Petitioner also did not show that he indicated to plea counsel that he wanted to file an appeal. Petitioner acknowledged that he did not do so because he was unaware that he could appeal at the time. (App. 45-6). Since Petitioner did not establish that counsel had a duty to consult with him regarding his right to appeal in this case, Petitioner did not establish counsel was deficient in this regard.

Petitioner failed to establish he was prejudiced by counsel's failure to consult with him regarding an appeal. Had counsel consulted with Petitioner and informed Petitioner that there were no non-frivolous matters to appeal, and that he had waived nearly all claims by pleading guilty, Respondent submits Petitioner would not have requested counsel file a direct appeal to his guilty plea. Petitioner presented no testimony or evidence to show he would have otherwise requested an appeal had he been consulted. Since Petitioner has not established counsel was deficient or that he was prejudiced, he cannot show that the PCR Court's denial of relief upon this claim was contrary to federal law as established by the United States Supreme Court. As a result, this claim for relief should be denied and dismissed.

Ground Four: Ineffective Assistance of Counsel - Issues 3. and 5. (Please see PCR Order)(See also Memorandum Argument III)

Some of Petitioner's claims in Ground Four are procedurally barred. Further, all of his claims are barred by the statute of limitations. In addition, Petitioner's claims should be denied and dismissed because they are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing either of the two claims of ineffective assistance of counsel. Petitioner also fails to show that a state court unreasonably applied federal law to either of these claims. Since Petitioner has not established that he is entitled to federal habeas relief upon these claims, Ground Four should be dismissed.

In Ground Four, Petitioner asserts two claims of ineffective assistance of counsel. First, he claims that defense counsel was ineffective because he failed to present any mitigating evidence at Petitioner's plea hearing. He specifically asserts that counsel should have made the plea court aware of the fact Petitioner was required to submit to a psychological exam pursuant to two Family Court Orders. Petitioner's second claim is that defense counsel was ineffective for failing to advise Petitioner to plead guilty despite a lack of evidence against him.

Petitioner is not entitled to federal habeas relief upon his first claim. As already noted, this claim is procedurally barred. Further, Petitioner cannot show that the PCR Court unreasonably applied federal law or made an unreasonable determination of the facts in addressing this claim. The PCR Court found this claim was without merit. (App. 113). In doing so, the PCR Court made no specific findings of fact. Thus, Petitioner cannot show the PCR Court's decision was based upon an unreasonable determination of the facts.

The PCR Court's dismissal of this claim was not an unreasonable application of federal law. In essence, the PCR Court found that Petitioner had not met his burden of showing that counsel was deficient and that he was prejudiced as a result. Petitioner did not meet his burden in his PCR action. First, the Family Court Orders to which Petitioner refers were never admitted into evidence at the PCR hearing. Had they been introduced at the plea hearing, Respondent submits they would not have been mitigating. The Treatment Plans specifically instructed Petitioner to contact the specified doctor to schedule an appointment for a psychological evaluation within 15 days or upon Petitioner's release from the detention center, **whichever occurs first**. (Docket Entry #1-2, page 31, 33). Petitioner did not present any evidence or testimony at the PCR hearing that he attempted to contact the doctor specified by the Family Court. Thus, any failure to obtain a psychiatric evaluation based upon the Family Court Orders clearly lies with Petitioner. Further, Petitioner never presented any diagnosis from a mental health professional that indicated he was suffering from a psychiatric condition. Even the medication records presented at the evidentiary hearing indicated a diagnosis was not specified. As a result, Petitioner never established he was suffering from a psychiatric condition that could have been presented as mitigation at his plea hearing. Respondent submits it would not have been mitigating for the plea court to hear that he did not comply with the Family Court's directives, which were provided to Petitioner on two separate occasions. The PCR Court was well within reason to find counsel was not deficient in this regard. Also, Petitioner failed to establish he was prejudiced because he did not present credible evidence he suffered from a psychiatric condition when he committed the crimes. Finally, Petitioner also fails to establish he was prejudiced because he does not contend that he would not have pled guilty but for counsel's alleged

failure to present mitigating evidence. As a result, this claim in Ground Four should be denied and dismissed.

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's second claim for relief in Ground Four is without merit. In the second claim, Petitioner asserts that plea counsel was ineffective because he provided inadequate advice. Specifically, he asserts counsel advised him to plead guilty even though there was a lack of evidence against Petitioner. The PCR Court found this claim was without merit. In doing so, the PCR Court made no specific findings of fact. Thus, Petitioner cannot show the PCR Court's decision was based upon an unreasonable determination of the facts.

The PCR Court's dismissal of this claim was not an unreasonable application of federal law. In essence, the PCR Court found that Petitioner had not met his burden of showing counsel was deficient and he was prejudiced as a result. Petitioner did not meet his burden in his PCR action. First, Petitioner did not establish counsel was deficient. Respondent submits there was evidence of Petitioner's guilt. It appears from the records and the discovery provided to plea counsel that the State could have presented the testimony of the victims and evidence to corroborate the CSC victim's version of the events. (See App. 12, 88-9; Attachment No. 17 at pgs. 23-28). Contrary to Petitioner's assertions, the results of the SLED testing of the sexual assault collection kit conducted on the CSC victim were not fatal to the State's case. As noted in response to Ground One, the test results did not exculpate Petitioner from guilt. Furthermore, the State likely could have used statements made by Petitioner in his Family Court proceedings. In all, Petitioner failed to show that counsel was deficient because there was sufficient evidence to support his conviction.

Petitioner also fails to show that he was prejudiced. Respondent submits Petitioner did not establish it was counsel's advice that led him to plead guilty. Counsel testified that Petitioner indicated something did happen, and that he wanted to plead guilty from the beginning. (See App. 80-1). Counsel also stated that Petitioner "never said he wanted to go to trial." (App. 81). While Petitioner testified counsel failed to complete a litany of tasks that he considered to be necessary, he never asserted that he pled guilty because counsel told him to plead guilty. In all, Petitioner did not meet his burden of establishing that but for counsel's alleged error, he would not have pled guilty. As a result, this claim for relief should be denied and dismissed.

Second Habeas Petition

Ground One: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix)

Petitioner's claims in Ground One are procedurally barred and barred by the statute of limitations. Petitioner's claims are also not cognizable claims for federal habeas relief. In Ground One, Petitioner asserts claims of prosecutorial misconduct that allegedly occurred in his post-conviction relief action. Specifically, he complains that exhibits entered into evidence at his PCR hearing were not included in the Appendix to the State's Petition for Writ of Certiorari. The Fourth Circuit has held that alleged infirmities in a state post-conviction action are not matters that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). Since the claims in this ground stem solely from Petitioner's PCR appeal, Ground One should be dismissed because it is not a cognizable claim.

Ground Two: Ineffective Appellate Counsel - (See Memorandum) - Failure to provide no more than a "less than perfunctory" representation/investigation.

Petitioner's claim in Ground Two is procedurally barred and barred by the statute of limitations. Further, Petitioner fails to state a claim upon which federal habeas relief can be granted. In Ground Two, Petitioner asserts that appellate counsel in his PCR appeal was ineffective. The Fourth Circuit has held that alleged infirmities in a state post-conviction action are not matters that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004). Any claim against trial or appellate counsel in his state PCR actions fails to state a claim upon which relief may be granted, and Respondent is entitled to dismissal or in the alternative summary judgment on this issue. Rule 12(b), F.R.C.P.

Ground Three: Misinterpretation of the Record on Appeal (Appendix) resulting in "reversal" of the PCR Order granting relief. (See Memorandum)

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claim in Ground Three is without merit. Petitioner's claims that there were errors in the South Carolina Supreme Court's factual statements in the opinion reversing the PCR Court's grant of relief are not supported by the record.

Petitioner asserts there were several misstatements of fact in the South Carolina Supreme Court's Opinion. First, he asserts the South Carolina Supreme Court's statement in the procedural and factual history about the DSS proceedings was not substantiated in the Record on Appeal or

Appendix.[11] This claim is without merit because the statement was substantiated by testimony at the plea hearing. Prior to the statement challenged by Petitioner, the Supreme Court noted "[a]fter [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]." These statements are clearly supported by the recitation of the facts presented at the plea hearing by the solicitor. (App. 11-12). At the plea hearing, Petitioner admitted those statements were true. (App. 12). Thus, the statements in the South Carolina Supreme Court's opinion regarding the actions that led to the Family Court proceeding and his statements at the Family Court were substantiated by Petitioner. Both Petitioner and plea counsel testified a treatment plan was submitted by the Family Court. (App. 66-7; 85). Thus, there was support in the record for this finding by Supreme Court.

Petitioner is correct that the Supreme Court incorrectly states that he had not taken any medication within the twenty-four hour period before the plea. At the plea hearing, Petitioner admitted to taking medication for hypertension, and he indicated to the plea court that he felt fine. (App. 6). However, Petitioner's assertion that the Supreme Court's statement that he did not elaborate on his treatment is not supported by the record. Petitioner did state at the plea hearing that he graduated from a Salvation Army rehabilitation program. (App. 6-7). He did not provide any other information about why he sought treatment, or what the treatment involved. (See App. 7). Thus, he cannot show that the Supreme Court was unreasonable in stating that he did not elaborate

---

[11] The specific statement in the opinion was "[s]ubsequently, 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."

on the treatment. Since the issue before the South Carolina Supreme Court was whether Petitioner would not have pled guilty if counsel had explained the definition of "sexual battery," Respondent submits Petitioner cannot show the error in the procedural/factual history in the opinion resulted in the reversal of the PCR Court's Order. Petitioner's statement about his medication was not relevant to the Supreme Court's decision.

Petitioner next complains about a statement made by the Supreme Court regarding his PCR testimony. The statement was "[d]espite 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." This was supported by Petitioner's PCR testimony. (App. 66-7). Similarly, Petitioner's complaint about the Supreme Court's recitation of counsel's testimony regarding his decision not to file discovery requests and the contents of the discovery he obtained. This portion of the Supreme Court's opinion is supported by the testimony by plea counsel at the PCR hearing. (App. 79-82; 86-90). In all, Respondent submits that Petitioner has not shown the Supreme Court's ruling in the PCR appeal was the result of an unreasonable determination of the facts. With the exception of the Supreme Court's finding that Petitioner stated he had not taken any drugs within the past 24 hours, the Supreme Court's recitation of the facts and procedural history was supported by the plea and PCR transcripts. Thus, he is not entitled to relief upon this claim.

To the extent Petitioner asserts the South Carolina Supreme Court Opinion did not take into account his Memorandum of Law in Support of PCR Application, Respondent submits this claim is without merit. While the exhibits to the PCR evidentiary hearing should have been included in the Appendix to the State's Petition for Writ of Certiorari,[12] Petitioner cannot show that he was

[12]Rule 243(f), SCACR ("The Appendix shall contain: (1) the entire lower court record. . .").

prejudiced by the fact the Memorandum of Law was not included in his appeal. The issue on appeal was whether Petitioner was entitled to relief due to ineffective assistance of counsel for failure to explain the definition of "sexual battery." This issue was not addressed by Petitioner in the Memorandum of Law in Support of PCR Application. Since Petitioner did not file a cross-appeal to raise any of the issues addressed by the Memorandum, the Memorandum was not relevant to any issue presented to the South Carolina Supreme Court. As a result, this claim should be denied and dismissed.

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.

In addition to being barred by the statute of limitations, Petitioner's claim in Ground Four is not a claim upon which federal habeas relief can be granted. The Sixth Amendment guarantees a defendant in a state criminal trial both a right to counsel and a right of self-representation. Faretta v. California, 422 U.S. 806, 806, 819-20 (1975). The constitutional right to counsel attaches at trial. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Hill v. Jones, 81 F.3d 1015, 1024 (11th Cir.2004). However, Petitioner had no right to represent himself in his PCR appeal. See Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163-164, 120 S.Ct. 684, 692 (2000) (recognizing there is no federal constitutional right to self-representation in direct appeal); Coleman v. Thompson, 501 U.S. 722, 755 (1991)(a defendant possesses no corresponding Sixth Amendment right to counsel in a post-conviction collateral proceeding); Finley, 481 U.S. at 555(same). Further, as with Petitioner's claims in Ground One and Two, Petitioner's claim is not cognizable because it is an allegation of error in the collateral action, and not an allegation of error in the criminal action. The Fourth Circuit has held that alleged infirmities in a state post-conviction action are not matters

that may be addressed in federal habeas actions. Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988). The federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the Petitioner's collateral proceeding does not enter into the habeas calculations. 28 U.S.C. 2254(i); Lawrence v. Branker, 517 F.3d 700, 717 (4th Cir. 2008)("[E]ven where there is some error in state post-conviction proceedings, a petitioner is not entitled to federal habeas relief because the assignment of error relating to those post-conviction proceedings represents an attack on a proceeding collateral to detention and not to the detention itself."); Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004).

Third Habeas Petition

Ground One: 14th Amendment due process violation of Brady. "No Releif" at PCR failure to disclose DNA (Sled results) or toxicology report. (See Memorandum)

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground One should be dismissed because they are without merit. These claims are essentially the same claims raised by Petitioner in Ground One of his first habeas petition. Thus, for the reasons stated in response to Ground One of the first habeas petition, Respondent submits the claims in this Ground One should be denied and dismissed.

Ground Two: Misconduct/abuse of descretion/use of "alleged admission" from Family Court by the Applicant without counsel-, (See Memorandum); not in discovery.

In addition to being barred by the statute of limitations and procedurally barred, Petitioner's claims in Ground Two should be dismissed because they are without merit. These claims are essentially the same claims raised by Petitioner in Ground Two of his first habeas petition. Thus,

for the reasons stated in response to Ground Two of the first habeas petition, Respondent submits the claims in this Ground Two should be denied and dismissed.

To the extent Petitioner further argues that the statement made by the solicitor at the plea hearing may have been false, Respondent submits that Petitioner has failed to show that he is entitled to relief upon that claim. Petitioner never presented any evidence to support this claim in state court.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). 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 (1972) (quoted in Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006)). A claim along these lines requires a showing of the falsity and materiality of testimony and the prosecutor's knowledge of its falsity. See also Basden, 290 F.3d at 614. Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when "'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

> However, "mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." Id. Rather, "the alleged perjured testimony must bear a direct relationship to the defendant's guilt or innocence." Id. Finally, when a defendant alleges that the prosecution used perjured testimony, we must inquire into whether the defendant had adequate opportunity to expose the alleged perjury on cross-examination.

Simental v. Matrisciano, 363 F.3d 607, 615 (7th Cir.2004) (quoting United States v. Saadeh, 61 F.3d 510, 523 (7th Cir.1995).

Petitioner presented no evidence to support his assertion that the statement made by the solicitor was not true. "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). "Absent clear and convincing evidence to the contrary, [petitioner] is bound by the representations made during his plea colloquy." Beck v. Angelone, 261 F.3d 377, 396 (4th Cir.2001)(internal quotations and citations omitted). A defendant who has entered a valid guilty plea has admitted his guilt and cannot challenge the sufficiency of the evidence presented as a factual basis for his guilty plea. United States v. Willis, 992 F.2d 489, 490-91 (4th Cir.1993). Petitioner stated at the plea hearing that the solicitor's representation that he had admitted his guilt in the DSS Family Court proceedings was true. (App. 12). Petitioner presented no clear and convincing evidence at the PCR hearing the statements were not true. At best, Petitioner indicated he did not recall what he said at the DSS proceedings. (App. 77). Thus, Petitioner could not meet his burden of showing the statement made by the solicitor at the plea hearing was false. As a result, this claim should be denied and dismissed.

Ground Three: The PCR Judge erred in granting relief based upon "one issue" of I.A.C., (See Memorandum), Abuse of descretion.

In addition to being procedurally barred and barred by the statute of limitations, Petitioner's claims in Ground Three are without merit. Petitioner fails to show that a state court made an unreasonable determination of the facts in addressing these claims. Further, Petitioner fails to show that a state court unreasonably applied federal law to these claims. Since Petitioner has not

established that he is entitled to federal habeas relief upon these claims, Ground Three should be denied and dismissed.

A. Ineffective assistance of counsel for failing to (pled under influence of psychotropic drugs).

For the reasons stated in Section B in response to Petitioner's claims in Ground Three in the first habeas petition, Respondent submits this claim for relief should be denied and dismissed.

B. Ineffective assistance of counsel for failing to request mandatory psychological evaluation

This claim is without merit. Petitioner failed to present any evidence at the post-conviction relief hearing that established plea counsel represented Petitioner in the Family Court action. There was no order from the plea court that required Petitioner to submit to a psychological evaluation. The treatment plans Petitioner attached to his petitions clearly reflect a Family Court instruction that Petitioner was responsible for contacting the doctor and setting an appointment for a psychological evaluation. As noted Section B in response to Ground Three of the first habeas petition, plea counsel indicated that he had no basis for thinking that Petitioner suffered from any psychiatric problems. Thus, Petitioner did not establish counsel was deficient in this regard. Furthermore, Petitioner has not established he was prejudiced. He did not present the results of any psychological evaluation at his PCR hearing. While he presented documentation for medication he was prescribed, those records indicated that no diagnosis was specified in Petitioner's case. Petitioner did not establish what the results of a psychological evaluation would have been. Thus, Petitioner could not establish that he would not have pled guilty but for counsel's failure to seek a psychological evaluation in Petitioner's case. See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); see Savino v. Murray, 82 F.3d 593 (4th Cir. 1996) (rejecting habeas claim that

attorneys should have pursued intoxication defense where petitioner offered no proof his alleged cocaine usage made him incapable of intent or deliberation); see also Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

C. Ineffective assistance of counsel for failing to present SLED results to Petitioner before advising about guilty plea.

Respondent submits this claim overlaps with Petitioner's second claim in Ground Four of the first habeas petition. In this claim, it appears Petitioner argues plea counsel failed to advise him about the SLED results, which did not connect Petitioner to the tested materials. This is part of Petitioner's claim in the second claim in Ground Four of the first habeas petition, in which he claims counsel was ineffective for not advising him of the lack of evidence against him. Thus, for the reasons stated in response to the second claim in Ground Four of the first habeas petition, Respondent submits this claim for relief should be denied and dismissed.

D. Ineffective assistance of counsel for failing to negotiate plea offer with State for "a cap" on "active time."

Respondent submits this claim is the same claim raised by Petitioner in his third claim in Ground Three of the first habeas petition. Thus, for the reasons stated in response to the third claim in Ground Three of that petition, Respondent submits this claim for relief should be denied and dismissed.

E. Ineffective assistance of counsel for failing to advise about right to file a direct appeal.

In the discussion in the memorandum filed in connection with this Ground, Petitioner asserts plea counsel was ineffective for not consulting with him about filing a direct appeal to his guilty plea. Respondent submits that for the reasons stated in response to Section D to Ground Three of the first habeas petition, this claim for relief should be denied and dismissed.

IX. CONCLUSION

Each and every allegation contained within the Petition which was not previously either expressly admitted, qualified, or explained is hereby denied.

WHEREFORE, having made Return, Respondent submits there is no genuine issue of material fact and that the State is entitled to prevail as a matter of law. Thus, Respondent respectfully requests that this Court grant its motion for summary judgment and dismiss the action.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
ID No. 10199
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

January 28, 2011

By: s/ Alphonso Simon Jr.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Terrence Dimingo Terry, #307935, Petitioner, vs. Mr. Leroy Cartledge, Warden of McCormick Correctional Institution, Respondent.	Civil Action No. 6:10-2006-JFA-KFM **REPORT OF MAGISTRATE JUDGE**

The petitioner, a state prisoner proceeding *pro se*, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review posttrial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND OF THE CASE

The 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. The 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). The petitioner was represented by Ernest Hamilton (App. 1-16). The State was represented by Assistant Solicitor John Newkirk. On March 8, 2005, the petitioner waived his right to a trial by a jury and pled guilty to all of the charges. The Honorable Edward W. Miller, Circuit Court Judge, sentenced the petitioner to 20 years confinement on the Criminal

Sexual Conduct with a Minor conviction, and 15 years confinement for each of the Lewd Act with a Minor convictions, all to be served concurrently (App. 13). There was no direct appeal.

PCR Action

The petitioner filed an Application for Post-Conviction Relief on November 11, 2005 (2005-CP-23-7327), alleging prosecutorial misconduct, ineffective assistance of counsel, and lack of subject matter jurisdiction (App. 17-24). Specifically, the petitioner asserted that the prosecutor failed to "disclose a valid DNA analysis report or certified chain of custody"; defense counsel was ineffective because he failed to advise him of right to a direct appeal and failed to investigate into the petitioner's case; and the court lacked subject matter jurisdiction "because of the evidence presented to the grand jury", and the failure to provide petitioner with a "preliminary hearing, violating state and federal constitutional rights, due process, and equal protection under the law" (App. 19). The State filed its Return on June 6, 2006 (App. 25-28). Through PCR counsel Susannah C. Ross, the petitioner subsequently filed an Amended Application on February 5, 2007 (App. 29-30). In the Amended Application, the petitioner asserted there was a violation of due process guarantees of the State and U.S. Constitutions in that the petitioner's plea was not knowingly, voluntarily, and intelligently made (App. 29). Specifically, he argued that the record of his guilty plea showed that he was not made aware of the nature and crucial elements of the charge against him. He alleged this was especially problematic because he was under the influence of prescribed mental health medications that affected his ability to comprehend what he was doing (App. 29-30). He further alleged that the judge failed to inform him of his right to appeal (App. 30).

A hearing was held on March 1, 2007 before the Honorable Michael G. Nettles, Circuit Court Judge (App. 31-108). The petitioner was present, and he was

represented by Ms. Ross. Assistant Attorney General Karen C. Ratigan represented the State. The PCR court filed its Order on April 11, 2007 (App. 109-16).

In its Order, the PCR court noted the petitioner 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, by failing to submit a pair of underpants and shorts in evidence for forensic testing, and by stating during the guilty plea that the petitioner admitted guilt in family court when the alleged admission was only as to the finding of sexual abuse, not sexual battery, and that the admission had not been provided in discovery (App. 110-11).

The PCR court found that the allegations of prosecutorial misconduct were without merit. The petitioner submitted as an exhibit the SLED lab report for the rape kit analysis that was dated March 2, 2005 (App. 111). It showed no sperm or semen was found and was neither exculpatory nor incriminating. No evidence was presented as to whether the solicitor had received the report prior to the guilty plea, which took place on March 8, 2005. However, the report was present in the solicitor's file over one year later when the file was subpoenaed by the petitioner. The petitioner and Mr. Hamilton testified that they did not know of the report at the time of the guilty plea. The court found that while a *Brady* violation is one type of prosecutorial misconduct that does not require a showing of bad faith, the evidence presented by the petitioner 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*, 514 S.E.2d 320 (S.C. 1999) (App. 111).

The petitioner 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.

The PCR court found that because the petitioner 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 (App. 111). The court further noted that 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 (1988); *State v. Mabe*, 412 S.E.2d 386 (S.C. 1991); *State v. Jackson*, 396 S.E.2d 101 (S.C. 1990) (App. 111-12).

The transcript of the petitioner's guilty plea stated in the recitation of facts, "The defendant admitted guilt in the DSS family court proceedings." (R. p. 12, l. 17) (App. 112). According to the petitioner's testimony, he was not represented by counsel at the DSS proceedings and any admission was only the general admission of an agreement with the family court's finding of sexual abuse, not an admission of guilt of sexual battery, which the petitioner expressly denied. The petitioner submitted a family court order contained in the file subpoenaed from the solicitor that said that the petitioner 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. The PCR court found that this did not entail prosecutorial misconduct.

The petitioner 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 petitioner 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 petitioner 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 petitioner appeared without counsel; (3) failure to present mitigating evidence at the petitioner's guilty plea by not mentioning the petitioner's 12-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 petitioner providing only a cursory overview of the charges without reviewing collateral consequences, his right to appeal, or explaining the meaning of sexual battery (App. 112-13).

The PCR court found that these allegations were without merit with the exception of the allegation that defendant was not advised as to the meaning of sexual battery (App. 113). The petitioner 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*, 552 S.E.2d 727 (S.C. 2001) *rev 'd on other grounds* (App. 113-14). The petitioner 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 (App. 114). Plea counsel testified that he met with the petitioner 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 petitioner, saying that lewd act and criminal sexual conduct with a minor are basically the same thing, messing with children. The PCR court found that the plea counsel's testimony demonstrated a lack of knowledge of the nature of the crimes for which he represented the petitioner (App. 114). Based upon the testimony of trial counsel and the petitioner, the PCR court found that the plea attorney 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. Considering the entire record including the guilty

plea transcript, the PCR court found that the error was not cured by the colloquy during the guilty plea.

The PCR court further found that 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 (App. 114). The petitioner's plea counsel did not do this. Upon hearing the testimony and reviewing the transcript of the plea, the PCR court found that the petitioner had shown prejudice, as had he known the definition of sexual battery, he would not have pled guilty and would have insisted on going to trial (App. 115).

The petitioner further argued 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. The PCR court disagreed and found that the indictments contained 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*, S.E.2d 494 (2005). Further, the PCR court found the petitioner presented 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 (2001) (App. 115).

The PCR court granted the petitioner's motion for post-conviction relief based on ineffective assistance of counsel (App. 116). The convictions were reversed and remanded for a new trial, and the petitioner was to be released to the custody of the Greenville County Detention Center where his original bond would be reinstated.

On April 24, 2007, the State filed its Motion to Alter or Amend the Final Order (App. 117-9). The petitioner also filed a *pro se* Motion for Reconsideration. The PCR court filed its Order Denying Rule 59(e) Motion to Alter or Amend the Final Order on July 6, 2007

(App. 120-21). The PCR court was not persuaded to alter or amend the judgment (App. 120). The PCR court further found that oral argument would not aid in the reconsideration of the original judgment and that the previous order fully comported with the requirements of Rule 52(a) SCRCP.

PCR Appeal

The State timely filed a Notice of Appeal on July 12, 2007. On appeal, the petitioner was represented by Robert M. Pachak, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense. The State perfected its appeal with the filing of a Petition for Writ of Certiorari. In the Petition, the State raised two arguments. First, the State argued the PCR judge erred in finding the petitioner met his burden of proving ineffective assistance of counsel. Second, the PCR judge erred in finding any ineffective assistance of counsel was not cured by the plea colloquy. The petitioner filed a Return to the Petition for Writ of Certiorari, asserting there was evidence to support the PCR judge's findings that plea counsel was ineffective in failing to explain the meaning of sexual battery prior to his guilty plea. The petitioner did not file a Notice of Appeal or raise any separate issues in the PCR Appeal.

In an Order filed November 6, 2008, the South Carolina Supreme Court granted the Petition for Writ of Certiorari. The court also ordered the parties to proceed to serve and file the appendix and briefs as provided by Rule 227(j), SCACR. On November 19, 2008, the State filed its Final Brief of Petitioner, raising the same issues raised in the Petition for Writ of Certiorari. The petitioner filed a Final Brief of Respondent, asserting the same argument as in the Return to the Petition for Writ of Certiorari.

In a published Opinion filed July 13, 2009, the South Carolina Supreme Court reversed the PCR court's Order. *Terry v. State*, 680 S.E.2d 277 (S.C. 2009). In the opinion, the South Carolina Supreme Court distinguished the definitions for "sexual battery" and "sexual abuse." *Id.* at 283. In the instant case, plea counsel testified at the PCR hearing

that he believed the terms "sexual battery" and "sexual abuse" were the same. *Id.* Because plea counsel did not differentiate between the two terms or correctly explain them to the petitioner, there was evidence to support the PCR judge's decision that plea counsel's performance was deficient. *Id.* Given plea counsel did not comprehend this distinction and did not inform petitioner of a crucial element of the offense of CSC with a minor, first degree, the Supreme Court agreed with the PCR judge that counsel's representation fell below an objective standard of reasonableness. *Id.*

The Supreme Court found, however, that plea counsel's deficient performance was cured by the plea colloquy even though there was no specific discussion of the term "sexual battery." *Terry*, 680 S.E.2d at 283. The PCR judge found that any allegations regarding the petitioner's competency were not meritorious. *Id.* In light of this decision, the PCR judge implicitly found that the petitioner had the requisite mental capacity to comprehend the plea proceeding. *Id.* At the plea proceeding, the judge read the indictments, and the petitioner 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." *Id.* After the petitioner affirmatively stated that he understood the charges and admitted his guilt, the solicitor gave a detailed factual basis for the charges. *Id.* In the factual recitation, the solicitor identified conduct that constituted the elements of first-degree CSC with a minor. *Id.* Specifically, the solicitor conveyed that the petitioner had penetrated the nine-year-old victim's vagina with his finger and her anus with his penis. *Id.* Both of these acts clearly meet the definition of a "sexual battery." *Id.* The petitioner admitted that the solicitor's statement of facts was true. *Id.* Therefore, the Supreme Court found that the petitioner knowingly and voluntarily entered a plea as to the charge of CSC with a minor, first degree. *Id.* 283-84 (citing *Roddy v. State*, 528 S.E.2d 418, 421 (2000)(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)).

In view of the Supreme Court's decision, it further concluded the PCR judge erred in granting the petitioner a new trial for the two counts of lewd act upon a child. *Terry*, 680 S.E.2d at 284. Given a "sexual battery" is not an element of lewd act upon a child and that the petitioner 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." *Id.* Accordingly, the Supreme Court found there was no evidence to support the PCR judge's decision to grant the petitioner relief on those two convictions. *Id.* Accordingly, the decision of the PCR judge was reversed. *Id.* The Remittitur was issued on July 29, 2009.

FEDERAL HABEAS PETITION[1]

First Petition

Ground One: Prosecutorial Misconduct - Violation of Rule 5-Brady/Rules 5 and 6 - SCRCrimP. Withholding of SLED results. (See Memorandum)

Supporting Facts:

1. County Sheriffs Dept. retrieved from hospital "1 rape 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/discovery "itemized cover sheet" shows no SLED results (exhibit P-6)

[1]The petitioner filed three separate petitions. By order dated September 20,2010, all three petitions were combined as one. These are the grounds raised in each petition.

Ground Two: Prosecutorial Misconduct - Use of alleged admission by Applicant from Family Court; (See Memorandum); without appointed counsel

Supporting Facts:

1. Applicant attended a Family Court hearing on October 12, 2004 without appointed counsel. (See Transcript -(PCR) p. 87, l. 12-25; 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, l 17).

Ground Three: Ineffective Assistance of Counsel - Issues 2., 1., and 4. - (Please see PCR Order)(See also Memorandum Argument III)

Supporting Facts:

1. Failure to investigate - met with Applicant once (the day of the plea - 10 minutes) (Plea Transcript - p. 84, l. 9-11; p. 50, l. 25; p. 51, l. 1-9) - No Brady request.

2. Failure to address the Fact of my two court appearances under psychotropic medications (Family and G.S.). (Plea Trans. -p. 54, l. 17-24; p. 56, l. 15-20; p. 59, l. 8-12; p. 59, l. 21-25; pgs. 60-62, l. 1-25). (See exhibits)(See exhibits)

3. Failure to negotiate plea offer(s), esp. 1-18-05! (Trans.-p. 97, l. 15-25; p. 98, l. 1-19)

Ground Four: Ineffective Assistance of Counsel - Issues 3. and 5. (Please see PCR Order)(See also Memorandum Argument III)

Supporting facts:

1. Failure to present mitigating evidence, ie - there was "never" a psychological exam performed in this case, despite "mandatory requirement and "two court order mandates." (Plea Trans.-p. 85, l. 23-25; p. 86, l. 1-25; p. 87, l. 1-8). (See exhibit(s)).

2. Failure to adequately advise the Applicant, ie - counsel advised guilty plea despite lack of evidence. (Trans.-p. 38, l. 3-15).

Second Petition

Ground One: Prosecutorial Misconduct at the Certiorari Level - deliberate obstruction in the true preparation of the Record on Appeal (Appendix)

Supporting Facts:

1. During the course of the PCR hearing I entered (9) nine exhibits into the Court records. The PCR judge - in turn - entered "two document," (the plea offers), as well. (See exhibit); (See also, PCR Transcript - pgs. 97-98, l. 15-19).

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).

Ground Two: Ineffective Appellate Counsel - (See Memorandum) - Failure to provide no more than a "less than perfunctory" representation/investigation.

Supporting Facts:

From our very first communique it was established that we had "opposing views" concerning presenting the misconduct (PCR) issue as "highly meritorious" in certiorari. Me -for, him -against. This view was escalated further, counsel refused to pursue stipulation - 3. In the PCR 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 States' inaccurate "case statement.

Ground Three: Misinterpretation of the Record on Appeal (Appendix) resulting in "reversal" of the PCR Order granting relief. (See Memorandum)

Supporting Facts: Discrepancies are per page No. 5 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 witheld[sic] from the "record on appeal."
* This would be (PCR exhibit P-8)!

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.

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 were 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. Pro se representation denied by Chief Justice (See exhibit)

Third Petition

Ground One: 14th Amendment due process violation of Brady. "No Relief" at PCR failure to disclose DNA (Sled results) or toxicology report.

Supporting facts:

1. Greenville Co. Sheriff's Investigator prepared 2 "Property Control and Custody Reports" for the Rape Kit Forwarded and returned from SLED.

2. Copy of "results" also forwarded (cc:) - to Solicitor (dated March 2, 2005).

3. "Itemized" discovery list dated 1-18-05-shows P, and, 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 destroyed 3 months after plea. (except toxicology results). Facts 1-3 argued at PCR. Judge ruled issue of DNA results "unmeritorious" for relief.

Ground Two: Misconduct/abuse of discretion/use of "alleged admission" from Family Court by the Applicant without counsel-, (See Memorandum); not in discovery.

Supporting facts:

1. Applicant attended a Family Court hearing on October 12, 2004, without appointed counsel. (See, PCR 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. (PCR 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. PCR Judge ruled issue "unmeritorious"

Ground Three: The PCR Judge erred in granting relief based upon "one issue" of I.A.C., (See Memorandum), Abuse of descretion.

Supporting facts: At the PCR 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 "manditory[sic] psychological evaluation. (Court ordered!) C.) Failed to present SLED 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 PCR Judge found "no ineffective counsel" or Prosecutorial Misconduct

On December 10, 2010, the respondent filed a return and motion for summary judgment. By order filed December 10, 2010, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the petitioner was advised of the summary judgment dismissal procedure and the possible consequences if he failed to adequately respond to the motion. On January 28, 2011, the respondent filed an amended return and memorandum of law in support of summary judgment. Another *Roseboro* order was issued on January 28, 2011. The petitioner filed his opposition to the motion for summary judgment on March 10, 2011, and the respondent filed a reply on March 31, 2011.

APPLICABLE LAW

Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Title 28, United States Code, Section 2244(d), provides:

(1) A 1-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 –

> (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 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.

ANALYSIS

The respondent first argues[2] that the petition is untimely under the one-year statutory deadline set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). This court agrees. The one-year time period runs from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). However, "[t]he time during which a properly filed application for State post-conviction or collateral relief with respect to the pertinent judgment or claim that is pending shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2). State collateral review tolls the one-year statute of limitations under § 2244(d)(1)(A) for properly filed pleadings, *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), but it does not establish a right to file within one year after completion of collateral review. *Harris v. Hutchinson*, 209 F.3d 325, 328 (4th Cir. 2000). Further, the tolling period for state collateral review does not include the time for filing a petition for certiorari in the United States Supreme Court. 28 U.S.C. § 2244(d)(2); *Lawrence v. Florida*, 549 U.S. 327, 331-36 (2007) ("Read naturally, the text of the statute must mean that the statute of limitations is tolled only while state courts review the application. ... [A]llowing the statute of limitations to be tolled by certiorari petitions would provide incentives for state prisoners to file certiorari petitions as a delay tactic. By filing a petition for certiorari, the prisoner would push back § 2254's deadline while we resolved the petition for certiorari. This tolling rule would provide an incentive for prisoners to file certiorari petitions – regardless of the merit of the claims asserted – so that they receive additional time to file their habeas applications").

---

[2]As this court recommends that the petition be dismissed as untimely, the respondent's remaining arguments will not be addressed.

Here, the petitioner's state court convictions became final on March 18, 2005, which was ten days following his guilty plea on March 8, 2005. *See* Rule 203(b)(2), SCACR (must file notice of appeal within ten days of conviction). The petitioner then filed his state PCR action (2005-CP-23-7327) on November 11, 2005, at which time 237 days of untolled time had elapsed. The statute of limitations was tolled pursuant to 28 U.S.C. § 2244(d)(2) until July 29, 2009, when the South Carolina Supreme Court issued the remittitur after reversing the decision of the PCR judge. Accordingly, the statute of limitations expired 128 days later, on December 4, 2009.

As the petitioner is a prisoner, he should have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266, 270-71 (1988), which held that a prisoner's pleading is filed at the moment of delivery to prison authorities for forwarding to the District Court. The petitioner delivered his § 2254 petition to prison authorities for mailing to the court on July 28, 2010, the date stamped on the back of the envelope containing his petition (doc. 1-3). Thus, the petitioner exceeded the statute of limitations by 236 days.

The Fourth Circuit Court of Appeals has held that the AEDPA statute of limitations is subject to equitable tolling. *See Harris*, 209 F.3d 325. "To be entitled to equitable tolling, [the petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Lawrence*, 549 U.S. at 336. In *Harris*, the Fourth Circuit Court of Appeals described the analysis of a claim of equitable tolling as follows:

> "As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999). The doctrine has been applied in "two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time." *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir.1996) (citation omitted). But any invocation of equity to relieve the strict application of a

> statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where--due to circumstances external to the party's own conduct--it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

209 F.3d at 330. The court went on to find:

> Harris argues that equitable considerations justify tolling in his case because the missed deadline was the result of an innocent misreading of the statutory provision by his counsel. While we agree that the mistake by Harris' counsel appears to have been innocent, we cannot say that the lawyer's mistake in interpreting a statutory provision constitutes that "extraordinary circumstance" external to Harris that would justify equitable tolling. *See Taliani*, 189 F.3d at 598 (holding that a lawyer's miscalculation of a limitations period is not a valid basis for equitable tolling); *see also Sandvik*, 177 F.3d at 1272 (refusing to toll the limitations period where the prisoner's delay was assertedly the result of a lawyer's decision to mail the petition by ordinary mail rather than to use some form of expedited delivery); *Fisher*, 174 F.3d at 714-15 (refusing to toll limitation where access to legal materials that would have given notice of the limitations period was delayed); *Miller v. Marr*, 141 F.3d at 978 (same); *Gilbert v. Secretary of Health and Human Services*, 51 F.3d 254, 257 (Fed. Cir.1995) (holding that a lawyer's mistake is not a valid basis for equitable tolling); *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir.1991) (refusing to apply equitable tolling where the delay in filing was the result of a plaintiff's unfamiliarity with the legal process or his lack of legal representation).

Id. at 330-31.

Here, the petitioner has failed to show that he was prevented from timely filing by some kind of wrongful conduct on the part of the State of South Carolina or by extraordinary circumstances that were beyond his control. In the response in opposition to the motion for summary judgment, the petitioner appears to assert he is entitled to equitable tolling because he was denied "his right to a *pro se* petition for rehearing in certiorari" (pet.

resp. m.s.j. at 20). However, as argued by the respondent, this claim is without merit. The petitioner was not entitled to file a *pro se* petition for rehearing in his PCR appeal. He was represented by counsel in the PCR appeal, and South Carolina courts do not allow hybrid representation. *See Foster v. State*, 379 S.E.2d 907 (S.C. 1989); *Jones v. State*, 558 S.E.2d 517 (S.C. 2002). The petitioner has failed to show any reason for his delay in filing the instant federal petition, much less one justifying equitable tolling of the limitations period. Based upon the foregoing, the petition was not timely filed, and it is barred by Section 2244(d)(1).

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, it is recommended that the respondent's motion for summary judgment (doc. 41) be granted. *See Rouse v. Lee*, 339 F.3d 238, 257 (4th Cir. 2003) (affirming dismissal of petition filed one day late), *cert. denied*, 541 U.S. 905 (2004).

June 16, 2011
Greenville, South Carolina

s/ Kevin F. McDonald
United States Magistrate Judge

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
300 East Washington St, Room 239
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Terrence Dimingo Terry,	)	C/A No. 6:10-2006-JFA-KFM
	)	
Petitioner,	)	
	)	
v.	)	ORDER TO STAY
	)	
Leroy Cartledge, Warden of McCormick Correctional Institution,	)	
	)	
Respondent.	)	
	)	

The *pro se* petitioner, Terrence Dimingo Terry, is an inmate with the South Carolina Department of Corrections. He brings this petition under 28 U.S.C. § 2254 challenging his 2005 state court convictions.

The Magistrate Judge assigned to this action[1] has prepared a Report and Recommendation which sets forth in detail the relevant facts and standards of law on this matter, and which the court incorporates without a full recitation.

The parties were advised of their right to file objections to the Report and Recommendation which was entered on the docket on July 10, 2011. The petitioner filed a 75 page objection memorandum which the court has carefully reviewed and will address herein.

[1] The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the Report to which specific objection is made and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

PROCEDURAL HISTORY

Petitioner was indicted in February 2005 in the Greenville County Court of General Sessions for two counts of lewd act upon a child and criminal sexual conduct with a minor. He pled guilty to all of the charges and was sentenced to 60 years and 30 years to run concurrently.

The petitioner did not file a direct appeal of his conviction. He did file an application for Post Conviction Relief (PCR) which the PCR judge granted on one of petitioner's claim of ineffective assistance of counsel. After an evidentiary hearing, the PCR judge found that plea counsel was ineffective for failing to advise petitioner regarding the meaning of "sexual battery" and that plea counsel's error was not cured by the plea colloquy. The PCR judge found petitioner's remaining allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction to be without merit. The PCR court reversed and remanded the petitioner's case for a new trial.

The State appealed the PCR court's decision contending that the court erred in finding that petitioner met his burden of proving ineffective assistance of counsel. The Supreme Court of South Carolina granted the petition for writ of certiorari. In a published opinion filed July 13, 2009,[2] the Supreme Court reversed the PCR court, finding that counsel's misunderstanding of the distinction between "sexual battery" and "sexual abuse" resulted in deficient performance so that counsel's representation fell below an objective standard of reasonableness. The Supreme Court also found, however, that counsel's deficient

[2] *See Terry v. State*, 680 S.E.2d 277 (S.C. 2009).

performance was cured by the plea colloquy even though there was no specific discussion by the plea judge of the term "sexual battery." Thus, the Court found that the charges were not affected by plea counsel's deficient performance in this regard.

The South Carolina Supreme Court also found that the petitioner had knowingly and voluntarily entered into a plea as to the charge of CSC with a minor because the petitioner admitted that the solicitor's statements of fact were true. The Supreme Court further concluded that the PCR judge erred in granting petitioner a new trial for the two counts of lewd act upon a child. Ultimately, the decision of the PCR judge was reversed and the South Carolina Supreme Court's remittitur was issued on July 29, 2009.

The Federal Habeas Petitions

On August 4, 2010, the petitioner filed three civil actions in this court. Each action was commenced with a § 2254 petition, and each contained various grounds of error. Those grounds are briefly summarized as follows:

Petition 1

(1) Prosecutorial Misconduct: violation of Rule 5 and *Brady*; violation of Rule 6; withholding of SLED results (involving the SLED DNA testing of the rape kit and clothing of the victim);

(2) Prosecutorial Misconduct: use of alleged admission by defendant from family court without appointed counsel;

(3) Ineffective Assistance of Counsel: issues 1, 2, and 4 of PCR order (relating to counsel's failure to investigate or meet with the defendant sufficiently; failure to address the defendant's court appearances while under the influence of psychotroptic drugs; failure to negotiate plea offers);

(4) Ineffective Assistance of Counsel: issues 3 and 5 of PCR order (relating to failure to present mitigating evidence or obtain a psychological examination; failure to advise the defendant about pleading guilty despite lack of evidence).

Petition II

(1) Prosecutorial Misconduct at the certiorari level: deliberate obstruction of the record on appeal (relating to the State's preparation of the appendix and retention of the exhibits with the Clerk);

(2) Ineffective Assistance of Appellate Counsel: failure to provide proper representation and investigation;

(3) Misinterpretations of the Record on Appeal; discrepancies in the record resulting in reversal of the PCR order granting relief; and

(4) Due Process Violation; denial of right to present case under *pro se* status.

Petition III

(1) Fourteenth Amendment Due Procession Violation of Brady (relating to inability to obtain relief at PCR regarding the failure to disclose the DNA SLED results or toxicology report);

(2) Misconduct/Abuse of Discretion (relating to alleged admission in family court without counsel)

(3) PCR Court Error: PCR judge erred in granting relief on only one ground of ineffective assistance of counsel.

The court consolidated the three habeas actions into the present one and instructed the Clerk to append the second and third petitions to the original petition filed in this case. Thereafter, the respondent moved for summary judgment and later filed an amended memorandum in support.

In his motion for summary judgment, the respondent first suggests that the record does not support a finding of exhaustion, but that there may be an available remedy for some of petitioner's claims. The respondent further notes:

There was no direct appeal in this case. Petitioner did file an Application for Post-Conviction Relief. In his APCR, Petitioner arguably raised the claims now raised in Grounds One, Two, Three, and Four. The PCR Court could find Petitioner cannot meet the requirements for Austin review of the first habeas petition, and the Grounds raised in Grounds One, Two, and Three of the third habeas petition. The PCR Court granted relief on a claim Petitioner does not raise in this habeas action, but denied relief upon these claims. The State appealed. Petitioner did not file a cross-appeal. On appeal, the South Carolina Supreme Court reversed the PCR Court's Order. During the appeal, Petitioner did file a motion to proceed pro se with the South Carolina Supreme Court, thus arguably raising the claim he now raises in Ground Four of the second habeas petition. The South Carolina Supreme Court denied the motion.

Respondent submits Petitioner may have an available state remedy to seek relief upon the claims he now raises in his first and third habeas petitions. Petitioner asserts in Grounds Two and Four of the second habeas petition that he requested PCR appellate counsel challenge the denial of relief upon his other PCR claims. He may be able to seek additional post-conviction relief and secure a belated PCR appeal on these claims. *See Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). "Under *Austin*, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal." *Odom v. State*, 337 S.C. 256, 259-260, 523 S.E.2d 753, 755 (1999) (further noting the 1 year statute of limitations contained in S.C. Code Ann. § 17-27-45(A) does not apply to *Austin* filings). It is unclear from the record in this case whether Petitioner is entitled to relief upon *Austin*. As of the date of this filing, Petitioner has not filed a post-conviction relief action seeking appellate review of the denied claims pursuant to *Austin v. State*. Since Petitioner may still seek appellate review of his PCR claims via a PCR action filed pursuant to *Austin*, Petitioner has not exhausted all available state remedies for these claims. Since Petitioner did not properly exhaust these claims in state court, and he could seek appellate review in state court upon many of the claims raised in the first and third habeas petitions, Respondent submits these petitions are unexhausted. Thus, this habeas action contains both exhausted and unexhausted claims. Respondent submits it should therefore be dismissed to allow for state court review of the unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 520–22, 102 S.Ct. 1198 (1982).

(ECF No. 52 at 16).

The respondent then contends that the petition should be dismissed because all of petitioner's claims are untimely and are barred by the statute of limitations.

It appears that petitioner has filed a "mixed" petition, that is, some of petitioner's claims are exhausted and some are unexhausted. Therefore, this court must determine whether to dismiss the petition without prejudice under *Rose v. Lundy*, 455 U.S. 509, 520–22 (1982); stay the case while the petitioner exhausts his remedies under *Rhines v. Weber*, 544 U.S. 269 (2005); allow the petitioner to amend his complaint and remove the unexhausted claims; or deny the petition on the merits of the claims, notwithstanding the petitioner's failure to exhaust all of his remedies.

The matter is further complicated by the fact that the petition was filed after the one year limitations period set by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244(d)(1). The first requirement of the AEDPA is that the petitioner must exhaust his state court remedies, thus affording the state habeas court a full and fair opportunity to resolve the claims on the merits. This is not a jurisdictional requirement, rather it is a procedural rule based in comity.

Here, the State/respondent has suggested in its motion for summary judgment that the petitioner may have unexhausted claims and may have an available state remedy to seek relief upon some of the claims he now raises in his first and third habeas petitions. Therefore, he may be able to seek additional post conviction relief and secure a belated PCR appeal on these claims under *Austin v. State*, 305 S.C. 453 (1991). The respondent submits that it is unclear from the record whether he is entitled to relief under *Austin*, but the option

to seek the relief is available.

It appears to this court that there is the potential for the petitioner to present an issue on which an unresolved question of fact or of state law might have an important bearing on this court's decision. Without a complete exhaustion of the claims, however, this court cannot properly review the state court's final decisions to ensure that they conform with the standards under which this court must review a habeas petition.

In *Rhines v. Weber*, the Supreme Court recognized the one-year limitations period could create a problem because when a petitioner brings a "mixed" petition to the federal court, he runs the risk of losing his opportunity for any federal review of his unexhausted claims because petitioners cannot control when the district courts will resolve the exhaustion question, thus potentially rendering numerous petitions time-barred when re-filed in federal court. In *Rhines*, the Supreme Court held that district courts have the discretion to employ, in limited circumstances, "stay and abeyance" procedures to hold the § 2254 petition in abeyance while the petitioner exhausts his claims.

The Supreme Court found the "stay and abeyance" route to be appropriate if:

(1) the petitioner had good cause for his failure to exhaust his claims;

(2) the unexhausted claims are not plainly meritless; and

(3) there is no indication that the petitioner engaged in abusive litigation practices or intentional delay.

Id. at 277–78.

If this court were to find that a stay is inappropriate and dismiss the mixed petition, this could impair the petitioner's right to obtain federal relief. Therefore, it appears the best course is to stay the action and hold it in abeyance while the petitioner exhausts his unexhausted claims.

In deciding whether to stay the habeas petition, which this court has discretion to do in limited circumstances, the court finds that here that the petition is mixed containing both exhausted and unexhausted claims. The petitioner contends he has good cause for his failure to exhaust his claims because the South Carolina Supreme Court denied his right to file appear *pro se* at the onset of certiorari appeal and denied his efforts to perfect and submit a pro se petition for rehearing. Had this been allowed, it might have extended the petitioner's tolling period. This is the impediment petitioner contends gives him cause for not exhausting any unexhausted claims earlier.

Next, the unexhausted claims are not plainly meritless, although this court makes no finding or suggestion as to their merit. Finally, the petitioner has diligently pursued his remedies in state court and federal court.

Finding that the petitioner meets the threshold finding set out in *Rhines*, the court will stay this action while the petitioner exhausts his state remedies on those claims the respondent has suggested may be available before the state court.

This court must then ensure that it uses its discretion in compliance with the AEDPA's purpose of reducing delays in the execution of state and federal sentences, and to streamline federal habeas proceedings to encourage the petitioner to exhaust all his claims in state court

before coming to federal court. In this instance, the court finds that the interest in the petitioner obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of his federal habeas petition.

Therefore, the petitioner must proceed, within 30 days of the date of this order, to commence an action to exhaust those unexhausted claims outlined in the respondent's motion for summary judgment. He shall then notify this court within 60 days of the date of this order of the status of his state proceedings and file a copy with this court of the state petition or appeal that he will be filing with the South Carolina Courts.

When the proceedings have concluded in state court so that all of petitioner's claims are exhausted, the petitioner shall immediately file an amended petition in this court and serve a copy upon the respondent. The petitioner shall carefully and legibly identify only those claims he wishes to proceed with in this court which have been exhausted and only those which directly relate to the claims which are now stayed. In other words, the petitioner may not assert any new claims other than those he has previously identified in this present petition. At such time, the respondent may move for summary judgment.

In the meantime, the court will dismiss the respondent's pending motion for summary judgment (ECF No. 41) without prejudice and with leave to refile after the petitioner has exhausted his state claims and after the petitioner files an amended petition. The Report and Recommendation will also be held in abeyance pending the plaintiff's exhaustion of certain claims.

CONCLUSION

For the foregoing reasons, it is ordered that the petitioner immediately commence a proceeding in state court to exhaust the unexhausted claims. The remainder of this action is stayed pending exhaustion and as set out in this order.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

September 30, 2011
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

650

FORM 5

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Greenville)

~~04-2005-CP-23-7327~~

Mr. Terrence Dimingo Terry, 307935)
Full name and prison numbe. (if any) of Applicant.) 2012-CP-23-01297

v.) APPLICATION FOR

State of South Carolina) POST-CONVICTION RELIEF
Respondent) (Pursuant To Austin v. State)

INSTRUCTIONS - 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-General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   (a) 2005-GS-23-1157 & -1158-(lewd act w/minor) 2-counts
   (b) 2005-GS-23-1274-(CSC w/minor) 1-count
   (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
   (a) 3/8/05-Fifteen (15) years-concurrent
   (b) 3/8/05-Twenty (20) years-concurrent

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ✓

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

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

8. If you answered "yes" to (7), list:

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

i. Greenville County Court of Common Pleas (PCR)

ii. South Carolina Supreme Court (Certiorari)

iii. United States District Court (Habeas Corpus) (S.C.)

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

i. Reverse and Remand for a new trial (IAC)

ii. Reversed PCR ruling

iii. Stay and Abeyance of habeas ruling

(c) the date of each such result:

i. March 26, 2007

ii. July 13, 2009

iii. September 30, 2011

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

i. "Final Order" (attached)

ii. "Published Opinion" (attached)

iii. "Order To Stay" (attached)

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

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

652

(a) Prosecutorial Misconduct - (General Sissions) (Certiorari)

(b) Ineffective "trial" and "appellate" counsel - (G.S.) (Certiorari)

(c) Due Process violation - (PCR) (Certiorari)

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

(a) See attached memorandum of law in support w/exhibits

(b) " " " " " " " " / "

(c) " " " " " " " " / "

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

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(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 "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Same as question 8.(a)(i)

ii. " " " 8.(a)(ii)

iii. " " " 8.(a)(iii)

iv.

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

i. Greenville County Court of Common Pleas

ii. South Carolina Supreme Court

iii. United States District Court

iv.

(c) the disposition thereof:

i. Reversed and Remanded

ii. Reversed

iii. Stayed and Abeyed

Revised 3/2003

iv. _____

(d) the date of each such disposition:

i. March 26, 2007

ii. July 13, 2009

iii. September 30, 2011

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. See attached

ii. See attached

iii. See attached

iv. _____

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?

Yes

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

(a) which grounds have been presented:

i. 10(a.) Prosecutorial Misconduct and 10(b.) IAC - Plea hearing

ii. 10(b.) Ineffective Appellate Counsel - Certiorari

iii. 10(c.) Due Process Violation - G.S. ; Certiorari ; PCR

(b) the proceedings in which each ground was raised:

i. Post-Conviction and Habeas Corpus (State & Federal)

ii. Habeas Corpus - (State and Federal)

iii. Post-conviction and Habeas Corpus (State & Federal)

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:

(a) ____

(b) ____

(c) ____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? ____

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

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

(a) the name and address of each attorney who represented you:

i. Mr. Ernie Hamilton - 311 Mills Ave. - Greenville, S.C. 29605

ii. Ms. Susannah Ross - 2435 E. North St. - Greenville, S.C. 29615-1442

iii. Mr. Robert M. Pachak - 1330 Lady St. - Columbia, S.C. 29201-3332

(b) the proceedings at which each such attorney represented you:

i. Plea and sentencing hearing - (General Sessions)

ii. PCR hearing - (Court of Common Pleas)

iii. PCR Appeal/Certiorari - (South Carolina Supreme Court)

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

Final resolution of alleged unexhausted claims - reconsideration ruling[1].

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

No

1. See also "conclusion" of Memorandum!

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, T.D.T., 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.

Mr. Timmy D. Tisby

SWORN to and subscribed before me this 13 day of February, 2012

J Franklin (L.S.)
Notary Public

My Commission Expires: 12.16.2019

Revised 3/2003

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

I, T.D.T., 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.

Mr. Terrence D. Terry
Applicant

SWORN or affirmed to and subscribed before me this 13 day of February, 2012.

J C Franklin
Notary Public

My Commission Expires: 12.16.2017

State of South Carolina
County of Greenville
Terrance D. Terry, 307935
Applicant
v.
State of South Carolina
Respondant

In The Court of Common Pleas
Case No.-2005-CP-23-7327

Memorandum Of Law In Support Of PCR Application - Pursuant To Austin v. State

Comes now, the above-named applicant in this PCR matter with his Memorandum Of Law In Support Of A PCR application - Pursuant To Austin v. State, and would respectfully show unto this Honorable Court:

This case is remanded back to this Court to exhaust "any remaining" state relief. And/Or, resolve any unexhausted claims before returning the matter(s) to the United States District Court - District of South Carolina.

Pursuant to the enclosed application and supporting documentation [1] the applicant has since pursued:

a.) A PCR hearing - held on March 1, 2007.
b.) A Writ of Certiorari - with the South Carolina Supreme Court
c.) A Petition For Habeas Corpus - with the United States District Court. District of South Carolina.

Allegations

The applicant requested post-conviction relief for the following reasons: [2]

I. Prosecutorial Misconduct
   a. Violation of Brady and Rule 5 SCRCrimP
   b. Failure to test and destruction of evidence
   c. Use of uncounseled "admission" (alleged) 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

Procedural History - Next Page

1. Rulings and this Memorandum.
2. And still requests.

Procedural History

The February 2005, term of the Greenville County Grand Jury indicted the Defendant for two (2) counts of lewd act upon a child (2005-GP-23-1157, -1158) and first-degree criminal sexual conduct (CSC) with a minor (2005-GS-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 5, 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 G. 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 judgement pursuant to Rule 59(e). In the Defendants case the 59(e) 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 recieve a "clock-stamped" Filed copy of his 59(e) 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 Comply - citing same circumstances agdinst P CR counsel.

/ Argument I - PCR Application (Austin) Question (10(a.))

Did the solicitor commit misconduct by withholding SLED material widence from discovery?

Prosecutions constitutional duty to disclose Favorable widence is governed by materiality standard and not limited to situations where defendant has requested the Favorable widence. U.S. v. Augus, 427 U.S. 97, 107-11 (1976).

The Brady disclosure rule requires the prosecution to provide any evidence in the prosecutions possession that may be favorable to the accused and material to either guilt or punishment. State v. Kennerly, 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. cc:). 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."[1] On September 8, 2005, the Defendant received the results.

As reiterated in Argument III, p. 12, trial counsel testified on PCR 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. Kathleson 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 2005, eight (8) months after the Defendant's PCR 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....."

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 existance, as evidence, is "undisputable." (Note: On each report heading is a checked box marked "GS evidence)." (See exhibit(s) 6-7). 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[2] 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, there was 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 SCRCrimP 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 SCRCrimP 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 solici-

for as evidence in chief at trial...."
The Defendant requests, is that mandate that superceded 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. Augus, 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 semen sample acquired 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 sperm sample taken from rape victim because the defendant was totally deprived of the opportunity to test sample and thus 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 PCR 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".[1]

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

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 - PCR Application (Austin) Question (10(a))

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).

Cont'd - two years and eight months after the plea. And eight months after the PCR 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 PCR.

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, 944 F. 2d 1241 (7th Cir. 1993).

On October 12, 2004, the Defendant attended a Family Court hearing in Granville County, from the Granville 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.[1]

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 S. 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 PCR excerpts denote the fact that, not only did the Treatment Plan bear any relevance as a confession in PCR - per the PCR Judges 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

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 recapitulation of facts was duly bound by the Solicitor to produce as discoverable material.

The Defendant suggest that the "order to produce" is Rule 5, Brady, under the "mandates of due process" within the Fourteenth 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 count sheet" 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-6 (discovery)).

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.

11.

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. Sanders, 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 Seay provided to me of what was in her file regarding Family Court.
> A. That's what I got.[2]
> Q. Okay. And basically that does'nt show a confession, but it does say in full agreement with treatment plan?

1. Q- The Defendant's PCR counsel, at the PCR.
2. A- The Defendant's trial counsel, at the PCR.

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 PCR counsel, at PCR.
2. A. The Defendant himself, at PCR.

affecting credibility of that witness justifies a new trial.
Giglio 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 Giglio, intended for use by the solicitor, for the State, against his own self? Minus disclosurable proof of his own credibility?
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. Kinnerly, 331 S.C. 442, 452 503 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 F3d 231 (2nd Cir. 2002).

The Defendant submits that in the instant case, the accusation was an alleged, across-the-board, admission statement of incrimination, Not in discovery. And as such, nothing more than air. That cannot be an accuser.

Did trial counsel's failure to investigate cause the the Applicant to be "mis-advised" into entering a guilty plea? Ground / Argument III PCR Application Question (10(b.))

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.[1]

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 at

[1] 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 recieve and review the "treatment plans" in the State's discovery package from the Family Court hearings. PCR 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) recieved 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., 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. 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 advantages - 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 presented as not the Applicant exhibits for the Record on Appeal, but rather, the Court's exhibit (C-1) presented 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-Olivera v. I.N.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. - General Sessions.

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

App. p. 84.

By counsel's own admission, he did recieve 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" forsee 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, (cop or otherwise) App. p. 85, lines 10-21, that there was no consciousness of multifacetedly 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 offer or properly advise plea options in violation of Strickland, supra, 466 U.S. at 697 (1984) the PCR 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.[1] And then ruled - by general decree - with no explanation in his final Order that counsel's ineffectiveness on this issue was "unmeritorious," against the Defendant's allegations.

Clearly, defense counsels 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 PCR:

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

---

1. Please note, that the Plea offers was entered by the Court! Exhibit C-1, PCR. 22.

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 Weathers 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 crim- 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 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: Weathers 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. Jeffries, 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 allegance to the Defendant bears several incongruities: i.e.: PCR 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 "last of the meritorious issues after five years, and three levels of appeal.

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 doctors 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 when 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....[1]
>
> Q. So you didn't make that distinction?
>
> A. I didn't make that distinction

1. "missing with children"

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

A. It's all the same, "missing with children."[1]

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 understand! That 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

1. 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.

1. It would be discovered by the Defendant after the PCR hearing, the existance 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

Did 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 conversation, 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 Petitioner Finally submits, that clearly taking into consideration the aforementioned disclosures in these testimonies and admissions, there can be no question of the Facts that show the substantial constitutional violations under the 14th Amendment "due process statutes," at the General Sessions level.

Here, Ends The General Sessions Segment Of This Brief.

--

[redacted]

Ground / Argument 4. – PCR Application (Austin) Question (10(c.))

Was it-due process violation where the PCR 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. Augurs, 427 U.S. 97, 49 LEd 2d 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:[1]

> Q. And those clothes was 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-

1. A.

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 (33.)).

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 objec-

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. Allright. Move to -- mark this as Plaintiff's Exhibit 5; (All. Ex. (illegible))

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 come 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.[1]

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

---

1. Petitioner's PCR counsel, - Q. 40.

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 tendered. Or, in any way, minutely discussed.

The Defendant submits that "both pages" of the results "unequivocally 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. Douthitt 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. Klauser, 282 F3d 633 (9th Cir. 2002).

During the closing "delineations" at the PCR hearing there was the following colloquy between the PCR Judge and the the Defendant's PCR counsel:

> The Court: I'm curious about why the SLED report was not--[1], 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 2004.

1. -- in the discovery package?

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 3/2 105 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 3, 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, or the alleged victim.

The Assistant Attorney General clearly defined misconduct for the PCR Court:

> Mr. Corrigan: 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 al-

low the Defendant misconduct relief:

Absence of evidence in criminal case is a valid basis for reasonable doubt.
US v. Batista, 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, I think only someone would plea when there's no evidence that vindicates. No I would not have.

App. pg 53, lines 4-9, and as such, Prosecutorial Misconduct, 45.

end abuse of discretion.

A prisoner need not prove he would have been aquitted in order to demonstrate materiality, for the purpose of a Brady claim.

Burton v. Dormire, 295 F3d 839 (8th Cir. 2002).

Ground / Argument II PCR Application (Austin) Question (10 c.)

Was it due process violation-where the PCR 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. Tort, 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 ant testified:

> Q. Now, supposedly you somehow confessed 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 admitting to sexual battery?
> A. I made no admissions in Family Court, Susannah. 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, again from researches, I have come to learn

that 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. 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 record on Appeal can there be found any documention of a confession, or in fact, any Family Court evidence, whatsoever.

When the reliability of a given witness may well be determinative of guilt or innocence, non disclosure of evidence affecting credibility of that witness justifies a new trial.
Giglio v. US, 405 U.S 150, 31 LEd 2d 104 92 S Ct 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. US, 425 US 391 409 (1976).

In Crane v. Sowders, 889 F2d 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 of the PSR by the Assistant Attorney General, the Defendant testified:

> Q. And you're stating today, Mr. Terry, that you never admitted your guilt to DJS?

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. Mills, 207 F3d 988 (7th Cir. 2000).

The Defendant 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 PCR hearing as an exhibit, they were never registered, as such. Thus, omitting the only "Family Court documents that would have been authenticatively 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 PCR Judge denied the request.

App. pg. 68, lines 12-15.

And in so doing, eliminated any right to inference, ref-

ence, or reflection to the subject matter of Family Court criteria by the prosecution. Not only at the PCR 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.
Estelle v. Smith, 451 US 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 US 479 (1951); Marchetti v. US, 390 US 39, 53 (1968).

And yet, both the PCR "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 PCR Motions, and Appellate (Certiorari) petitions and briefs.

In the PCR Final Order the Judge addressed (merely) the issue of the "admission" by reflecting to the "recitation

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's 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."....

Giglio 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. I. E., Brady!

"Structual 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.

Quintero v. Bell, 256 F3d 404 (6th Cir. 2001); Sheufelt v. Alaska, 228 F3d 1068 (9th Cir. 2000).

Harmless plain error does not exist, all plain errors are harmful.

US v. Innamorati, 996 F2d 456 (1st Cir. 1993).

[redacted]

Ground / Argument-I- PCR Application (Austin) Question (10(a.) and (e.))

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 G. 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].

---

1. Each exhibit submitted by the Applicant met with no opposition from the State. With the exception of the Family Court Order!

In addition, after all PCR counsel examinations had been conducted, the Defendant's PCR counsel on "closing declination" of the Applicant's allegations sought to enter two additional exhibits, i.e. - <u>the Defendant's plea offers from the Solicitor's office</u> prior to the Defendant's General Sessions appearance:

Upon which time, the PCR 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[1]: I object that her case is closed. I mean, if you want

1. 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 cop.

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 exhibit(s) 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). (Exhibit 9)

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. Braithwaite, 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 where 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 transference.

While prosecutors may strike hard blows, they are not at liberty to strike foul ones.

Berger 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 PCR 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 then on 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 PCR 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 this request entered into the record, to have it where every-

1. This testimony is attend 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 submittance 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 pertinate "case law" citings, 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 PCR 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 evidentiel 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.[1]

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.

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.

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 when 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 recieved - would have become "Brady" evidence requiring transmittal to the Solicitor. A circumstance that, in fact, did take place.

64.

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); Miller v. Angliker, 848 F.2d 1312, 1321-22 (2nd Cir. 1988).

The Defendant testified under Direct-examination in PCR:

> 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 PCR - 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 reguards 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 (acquired 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.[1]

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 C-2, page 2 / cc:) Six days before hearing. The Defendant raised this fact in both his Memorandum of Law and 59(e) Motion. The Defendant's plea hearing was March 8, 2005.

act "in conlusion" 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 PCR by the attorney general with the exception of stating that violation of Brady is greyable 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 powdery 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.[1]

The most devistating consequence of witholding 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 SCR Crim, now added distinguished 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[1] PCR 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[1] taken to the hospital and a rape kit done, as there was here. And also, should know and known from the discovery[2] 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 was the chain of custody / Property Control Sheets for the rape kit and the clothing. 3. and missing with children (SLED PCR 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. It 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.[1] 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 review that property and evidence.

The Court: Plaintiff's Exhibit 7 into evidence without objection.

App. pg. 88-89, lines 23-25.

Exhibit P-6 - <u>The State's Cover Sheet.</u>

Ms. Ross: I'm showing the Attorney General a

1. The Copies marked "ORIGINAL" show transference to and from SLED. 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.[1]

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 cop.

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: Perphrenazine, Amitriptyline, tranquilizers!

App. pg. 59-60, lines 24-3
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 position -- I would be adverse to sit here and say that I was

1. No contact was attempted even after Mr. Hamilton recieved the documentation from Family Court, in October of 2004.
2. Miles v. Stainer, 108 F.3d 1109 (9th Cir. 1997).

absolutely 100 per cent incompetent as I was in that courtroom.[1] What I am saying is that I was not at an 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 incriminating words...'

Ms. Ross: And there was no confession presented 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. 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.

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 aforementioned 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. Fuller, 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 'prerquisite' that the Defendant complete certain mental health criterias consumate 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 PCR that:

Ms. Ratigan: Weathers 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.

Peguero 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 PCR 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 years.

Ms. Ross: So after recieving 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. ernst after, (deletions above --, are "sic bahim" throughout the entire transposing of the transcripts in the Appendix), and as such, the most logical inference words are mine. 4. or 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 likelyhood that the necessity of a direct appeal would have become non-existant.

The District Court in a thoughtful discussion, held that Failure to communicate a plea bargain offer would deny a defendant [Carlso] his Sixth and Fourteenth amendment right's.... 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 Carlso 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 PCR 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 PCR, 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 appeal. 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 - PCR Application (Austin) Question (10.a.))

Was Appellate Defense Counsel "ineffective" in representation of the Defendant on Certiorari?

In Evitts v. Lucey; 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.

Wainwright v. Torna, 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 11.)

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 12.)

1. Both the Defendant's 59(e) 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."

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(e) Motion, as well as, the Motion To Comply.

The Defendant's Pro Se 59(e) Motion was submitted to the PCR Court on April 25, 2007, - 8 days after receiving the Order. (See exhibit 13.). 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 14. & 15.)

Immediately after counsel's notification, the Defendant made contact by phone with appellate counsel to make known his (Defendant's) two eminent concerns, those being the recognition of the post-trial motions".... and the "third stipulated" 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(e).
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 "endorsed support!"[1].

C. According to appellate counsel: Due to your persistance 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 PCR 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 16.) and was denied - without explanation - on June 2, 2008. (See exhibit 17.).

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 PCR and Certiorari levels "individual letters" concerning "intervention and aquisition" of the numerous "Motions and Transitional Petitions" from the PCR to S.C. Supreme Courts, in copy.[1] Dated April 2, 2008. Appellate counsel was also notified by the Clerk of the S.C. Supreme Court of the Defendant's delima 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 PCR counsel was emphatically convinced that any PCR post-trial actions on the Defendant's behalf were the responsibility of his appellate Defense. 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 PCR level, as well as, minus his First exhibit on PCR and Certiorari.

---

1. i.e., The State's "59(e), Proposed Order of Dismissal, and Petition For Writ." The Defendant's "PCR Memorandum of Law, Motion To Comply." 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 APCR.

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 of the Habeas Corpus level he has yet to acquire the post-trial Motions in the Record on Appeal, and worse still, none of the eleven exhibits that were-or rather- became "evidence for Federal review" by their PCR submittance.*

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) off the Attorney General. ( ). An equivalent of failure to investigate.

Appellate counsel need not advance every argument regardless of merit urged by the Appellate, 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 desires to expidite his responsibility termination did not even so much as scrutinize the Petitioners dispositive 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 pervasive, an applicant may be exempted from proving actual prejudice.
Frost v. State, 298 S.C. 54, 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 prose petition, (since he chose not to endorse anything else!: Not the post-trial motions, not the PCR exhibits being withheld, not the plea offers, and definitely not the DNA or Toxicology results being withheld by both solicitors at the PCR and certiorari levels of appeal, or the undiscoverable alleged confession from Family Court).
If counsel entirely fails to subject the prosecutions 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. Cronic, 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

* With the exception of the issue that the PCR Judge recused the Defendant's case upon. But this was done with what adds up to be a 1½ page rebuttal against the State's 2 issue, 7 page Petition. 2. Against the 13 page Opinion.

readdress 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. (See exhibit "18.").

All [redacted] Ground / Argument III - S.C. Supreme Court

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 Court Opinion, per page:

Page(1), paragraph (3) - "Subsequently, a Family Court" proceeding brought by the Dept. of Social Services was conduct-

[redacted] Assistant Attorney General - Karen C. Ratigan as the Petitioner in Certiorari. [redacted] Pages of the Opinion numbered by the Defendant. Same for paragraph numberings.

ed wherin Respondent admitted to the allegations. As a result, a treatment plan was put into effect to address Respondent's conduct. Need pg. 38

(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 PCR 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 recent 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 Solicitors file. Yet.... Page(6) paragraph(2) states: "In terms of the contents of his file, plea Counsel testified that he had-(not copied)-the discovery package" provided by the Solicitor's office.● ( ), which shows no request to copy anything. (Please See Also, Argument I, pages 20 thru 21, and pages 4 thru 5).

● 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 been-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, "Will 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 squarely. 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 Mallory 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 when, 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.
PCR Transcript, page 92, lines 16-21.

If, in fact, this statement were worthy of true consideration the Defendant would respectfully in regards to a "Ver bathim" excerpt- direct the court to the case of North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

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.

App. pages 68-69, lines 22-16.

Excerpt submitted under penalty of perjury, both then and now, as a truth despite numerous adversarial repetitive testimonies to the contrary.

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 victims 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 aquired?
B. Despite never having the privilege of "negotiating the cap" presented to defense counsel along with the discovery package provided by the State, 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 PCR judge stated that counsel "demonstrated a lack of knowledge of the nature of the crimes for which

---

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 , 2005. 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.

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 himself, i.e. the Plea Office and SLED results. Making the Plea Office 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"

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 revising PCR relief based upon the trial judges colloquy as a "cure-all" for any other discrepancies surrounding the plea hearing. And the PCR 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 PCR. Due observatory Note 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 "authenticatively 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 "due 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. Dormire, 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 - PCR Application (Austin) Question (10 (c.))

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, 45 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 return, 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 defendants 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 litigants' pleadings are to be construed liberally and held to less stringent standards than the formal pleadings drafted by lawyers.

Gray v. MacDougal, 454 US 364, 70 L.Ed2d 551, 102 S Ct 700 (1982).

Haines v. Kerner, 404 US 519, 30 L Ed2d 652 92 S Ct (1972).

The Petitioner submits that, prior to the forwarding of the Petition to the Court, in an effort to address the "withheld PCR exhibits", several letters were forwarded to the various individuals involved - (to include the Chief Justice) - with the Petitioners 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 "PCR" liberally Hahn 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 562, 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 informations, i.e., his Pro 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 , 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?

Conclusion

Defendant Terry respectfully moves upon this Court to set aside his conviction and sentence for reconsideration on the lewd act charges, and vacate his sentence on the charge of Criminal Sexual Conduct. And/or any other relief within the jurisdiction and discretions of this Honorable Court.

"Structural errors" call into question the very accuracy and reliability of the trial process, and are amenable to harmless error analysis, but require automatic reversal. Sherriff v. Alaska, 228 F3d 1088 (9th Cir. 2000).
1. not

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
Petitioner
(Pro Se)

Sworn To and Before Me, 2017
this 14 day of February, 2017 (94)
L.S.
Notary Public of South Carolina
My Commission Expires: 12.16.2019

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2012-CP-23-1297
COUNTY OF GREENVILLE)	
)	
Terrence Dimingo Terry,)	
S.C.D.C. No. 307935,)	
)	
Applicant,)	
)	**RETURN AND PARTIAL MOTION**
)	**TO DISMISS**
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

In response to the post-conviction relief (PCR) application filed February 20, 2012, 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 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, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant 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. The Applicant did not appeal.

First PCR Application

The Applicant filed a PCR application on November 11, 2005 (2005-CP-23-7327). The

Applicant raised the following issues in his PCR application:[1]

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.

An evidentiary hearing was convened on March 1, 2007 at the Greenville County Courthouse. Susannah C. Ross, Esquire represented the Applicant. The Honorable Michael G. Nettles granted the Applicant a new trial on all three charges in an order dated March 26, 2007.

The State filed a notice of appeal and subsequent petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court granted the petition and both parties submitted briefs. The Applicant was represented by Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense. By opinion dated July 13, 2009, the Supreme Court reversed Judge Nettles. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009).

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (6:10-200-JFA-KFM). The Respondent submitted a motion for summary judgment on December 10, 2010. The Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated June 16, 2011. The Honorable Joseph F. Anderson, Jr., United States District Court Judge, issued an order to stay the matter dated September 30, 2011. Judge Anderson noted

[1] In a subsequent amendment to the PCR application, counsel for the Applicant argued he was not made aware of the "nature and crucial elements of the charge [sic] against him."

that, as the Applicant did not file a notice of appeal after the PCR order was issued in his case, he may have some unexhausted State remedies. Judge Anderson stayed the federal matter in order to allow the Applicant to exhaust this State remedy.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the prior PCR records.

II.

In his application for post-conviction relief (and supporting memorandum), the Applicant alleges he is being held in custody unlawfully for the following reasons:[2]

1. 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.
2. Ineffective assistance of plea 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.
3. Ineffective assistance of PCR appellate counsel:
   a. Failure to raise post-trial motions.
   b. Failure to petition for appeal bond.
   c. Failure to ensure adequate appellate record.
4. Due process violation.
5. Subject matter jurisdiction:
   a. Invalid arrest warrants and indictments.
   b. No preliminary hearing.

[2] In light of the pleadings and orders in the stayed federal court proceeding – as well as the Applicant's notation in the caption of his PCR application that it was pursuant to Austin v. State – the State also construes there to be an allegation that PCR counsel should have filed a notice of appeal of the order from his first PCR application.

III.

Though the State filed an appeal from the grant of post-conviction relief after the Applicant's first PCR hearing, it appears the Applicant is now alleging his PCR counsel should have also filed a notice of appeal. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. The Respondent lacks sufficient information to admit or deny this allegation. Therefore, the Respondent requests an evidentiary hearing solely on this ground for relief. 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.

As to any and all other issues, the Respondent submits they should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant pled guilty to the offenses he challenges in this Application on March 8, 2005. The Applicant was therefore required to file his application before March 8, 2006. This Application was filed on February 20, 2012, which was more than five (5) years after the

statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

As to any and all other issues, the Respondent submits they should be dismissed because the current application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392,

394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief application, the Respondent moves for a summary dismissal of the application because it is successive.

VI.

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

VII.

WHEREFORE, having made its Return, the Respondent requests that: (1) counsel be appointed to represent the Applicant solely on the belated appeal issue and (2) all other issues be dismissed as having been alleged after the expiration of the one-year statute of limitations and because they were raised in a successive PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

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

By: _____
Attorneys for Respondent

August 10, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

TERRANCE TERRY, PLAINTIFF, -VS- STATE OF SOUTH CAROLINA, DEFENDANT.	2012-CP-23-01297 DECEMBER 17, 2013 TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

BRIAN JOHNSON, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

KAREN RATIGAN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

1

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Terrance Terry Johnson Ratigan	19	41		
Susannah Ross Ratigan Johnson	43	46		
				PAGE
Certificate of Reporter				56

PLAINTIFF'S/ EXHIBITS

NO	DESCRIPTION	ID	EV
P-1	Letter from Susannah Ross to Terrance Terry dated 4/12/07	25	25
P-2	Letter from Karen Ratigan to Paul Wickensimer dated 4/26/07	28	28
P-3	Letter from Susannah Ross to Terrance Terry dated 4/10/08	33	33
P-4	Letter from Terrance Terry to Susannah Ross dated 11/18/07	38	38
P-5	Letter from Terrance Terry to Karen Ratigan dated 3/27/07	39	39

DEFENDANT'S EXHIBITS

	(NONE)		

COURT'S EXHIBITS

	(NONE)		

DECEMBER 17, 2013

(WHEREUPON, court convened with all parties present and the following proceedings were had.)

THE COURT: All right. Ms. Ratigan.

MS. RATIGAN: Thank you, Your Honor. May it please the court. This is the case of Terrance Terry versus the State of South Carolina. The docket number is 2012-CP-23-1297. The state has filed a return of partial motion to dismiss in the matter. Mr. Terry was indicted for two counts of lewd act and one count of first degree CSC with a minor. He pled guilty March 8th of 2005 before Judge Miller. He received concurrent sentences of fifteen years for each count of lewd act and twenty years for first degree CSC with a minor. He did not file an appeal. He filed a PCR application in 2005. He was represented on that application by Ms. Ross. The hearing was held March 1st of 2007 in this courthouse before Judge Nettles. Judge Nettles granted Mr. Terry a new trial on all three of these charges in an order dated March 26th of 2007.

The state filed a notice of appeal and a petition for writ of certiorari at the Supreme Court. The Supreme Court granted that petition. Both parties submitted briefs. Mr. Terry was represented by Bob Pachak of appellate defense on the appeal.

And in a published opinion dated July 13th, 2009, the Supreme Court reversed Judge Nettles, reinstating the convictions and sentences. Again, that was Terry versus State, 383 S.C. 361.

Mr. Terry then filed a petition for writ of habeas corpus in the United States District Court of South Carolina. The respondent submitted a return -- pardon me -- a motion for summary judgment. The magistrate, Judge McDonald, issued a report and recommendation to grant the motion for summary judgment. The district court judge, however, Judge Joe Anderson, issued an order to stay the matter dated December -- pardon me -- September 30th of 2011. He noted that as the applicant did not file a notice of appeal after the PCR order in this case, he may have not exhausted that state remedy, so Judge Anderson stayed the federal matter in order to allow Mr. Terry to exhaust that state remedy.

Your Honor, all this procedural history is contained in the state's return of partial motion to dismiss. Furthermore, the orders and opinions referenced regarding the first PCR case and the federal decisions are also in your judge's packet.

The state would argue we're here today on a very limited purpose. The purpose is the partial motion to dismiss. You can see from his current PCR application,

he is alleging ineffective assistance of plea counsel and prosecutorial misconduct. We would argue these issues are untimely. They should have already been addressed in the first PCR issues, and they would be successive at this point.

He's also alleging ineffective assistance of PCR appellate counsel. And it's also clear -- I put in footnote number two in my return, that it was also clear inferrentially that he was arguing ineffective assistance of PCR counsel. We would argue, the only issue that survives the statute of limitations in this case is a very limited issue. It's basically an Austin review. Mr. Terry is alleging that after Judge Nettles issued the order in this case, in which he denied some issues and granted some issues in that first PCR, that while the state filed a notice of appeal, he's alleging Ms. Ross should have also filed a cross-appeal to address the issues that he lost on at the PCR hearing.

So the state's position would be that everything but the limited issue of whether or not Ms. Ross should have filed a notice of appeal from the first PCR should be dismissed as untimely and successive.

THE COURT: Mr. Johnson.

MR. JOHNSON: Thank you, Your Honor. I'm here on behalf of Mr. Terry. Before we move forward, I just

want to clear something up. It seems that Mr. Terry may have made a request to the administrative judge, Judge Hill, to proceed without counsel. It's my understanding that if we wish to proceed as we currently are, I just want to put it on the record that he did, in fact, ask to proceed pro se at one point during this. I don't know if he filed a motion, but I just wanted to clarify that for the record, Your Honor.

THE COURT: You're satisfied with Mr. Johnson's representation of you now, Mr. Terry?

MR. TERRY: Yes, Your Honor. I would like to, if I may, I would like to, if at all possible, have ---

MR. JOHNSON: Stand up when you address the judge.

MR. TERRY: Yes, sir. Please forgive me.

THE COURT: It's all right. Yes, sir.

MR. TERRY: Yes, sir. We've had a chance to talk downstairs and if all goes in accordance with what we've agreed to, I would say, yes, Your Honor, I'm going to entrust my circumstances to him if I could have the ability, if I can reserve the right to speak if I feel, respectfully approach the court if I hear something is going amiss.

THE COURT: Well, you can -- certainly, we'll cross that bridge if and when we come to it, Mr. Terry,

okay?

MR. TERRY: Okay. Fine, sir. The answer to your question is yes, Your Honor.

THE COURT: Okay. Thank you. All right. What about the, Mr. Johnson, the allegations as to trial counsel?

MR. JOHNSON: Yes, sir, Your Honor. First of all, I'll note that it sounds like the attorney general's recitation of the facts was pretty much correct. I do notice that Mr. Terry would assert that as far as the allegations that trial counsel -- there was a period of time after which -- after the initial order that actually granted him relief for a PCR, there's a period of time when there were motions filed by both Ms. Ratigan and Mr. Terry. Mr. Terry filed as pro se. But motions are to amend the sentence -- motions to reconsider, essentially, Your Honor.

Mr. Terry, at that point in time, was essentially attempting to preserve the record for the issues that he did not prevail on. As such, when the issue that he prevailed on was overruled, he -- at that point in time there was no appeal filed and no motion to reconsider filed at first to preserve that record and it's Mr. Terry's assertion that he would like to do that. And that's the basis for the Austin appeal, Your Honor.

THE COURT: So we're proceeding on the appellate counsel, basically, Ms. Ross's failure to file for an appeal on the ruling of Judge Nettles?

MR. JOHNSON: Yes, sir, Your Honor. And I do know Mr. Terry, and I think this is something that you're probably going to have to rule on now. In his application, he has asserted allegations against Mr. Pachak, which is appellate counsel. He's also alleging ineffective assistance of counsel against him, as well, in his application. And I think you'll find the issues there was that it's almost related to Ms. Ross in that Ms. Ross had told Mr. Terry that that was now his counsel and so he asked Mr. Pachak to do certain things, including file the appeal issues. And then there's some other things with regards to the actual appendix of the Supreme Court that Mr. Pachak did -- that Mr. Terry alleges Mr. Pachak did not do to ensure that was correct.

So I do believe you need to rule whether or not we are able to proceed on that matter against Mr. Pachak, as well, Your Honor. And I do believe Ms. Ratigan addressed it briefly, but I do think we need to rule on that before we move forward with Ms. Ross.

MS. RATIGAN: Your Honor, the state's reply to that would be, obviously, as I stated earlier,

ineffective assistance of counsel complaints regarding the plea are untimely and successive. And the state's position would also be that ineffective assistance of counsel claims regarding the PCR appellate counsel are not cognizable. There's actually no case law to go forward on a state PCR claim against appellate counsel. The proper remedy for that is in federal court, not state court. There's really no mechanism to file a PCR on PCR appellate counsel. And I'm unaware -- I mean, if Mr. Johnson could provide me with case law, but I'm unaware of any case law that says -- doesn't say cognizable issue in a PCR.

THE COURT: Are you aware of any cases, Mr. Johnson? I've certainly never seen any.

MR. JOHNSON: No, sir, Your Honor. However, I don't know that there's case law that says one way or another. Maybe this is a -- I suppose this is possibly a new issue before the court.

THE COURT: He certainly did need to be notified to be here to testify as to his procedures if ...

MR. JOHNSON: And that opportunity, Your Honor, Mr. Terry would assert the opportunity to move forward with Ms. Ross and then if Your Honor would rule in his favor as far as allowing the application against

Mr. Pachak, he would request that you essentially separate the issues and allow us to move forward on that at a different time.

MS. RATIGAN: We object to any kind of bifurcation of the case. This is a very extremely straightforward, very narrow limited issue PCR of whether first PCR counsel should have filed an appeal. Mr. Terry has provided no case law or authority to support his contention that he should be allowed to go forward on the issue of PCR appellate counsel. Again, there's no case law to support that. That is historically addressed in the federal habeas corpus arena, because at that point the entire record is before the federal court.

And he does have his action that has been stayed in federal court. We would argue that absent any kind of showing of this being a cognizable claim, that the only issue that should be ruled on is whether or not Ms. Ross should have filed the notice of appeal after the first PCR case.

MR. JOHNSON: And Your Honor, if I may, this is one of those situations where Mr. Terry would like to address the court.

THE COURT: All right. Mr. Terry, I'll briefly hear from you.

MR. JOHNSON: Stand up.

MR. TERRY: Thank you, sir. First off, with the -- to address the partial return. As Ms. Ratigan has stipulated, I am back now on the Austin appeal. I have done some reading and research on the stigmatisms (verbatim) of Austin. And my understanding was that Austin is to address -- it was my understanding that to address Austin circumstances, it is also related -- in relationship to procedural defects -- related procedural defects. And as such, what I am attempting to bring back to the court is -- comes under the auspices of what Mr. Alfonso Simon submitted to the habeas judge where he stipulated the grounds that were supposed to be brought down -- brought back down in this circumstance. As far as where the appellate portion of this situation are concerned, my contingencies are -- were, again, against Ms. Ross within the filing of the post-trial motions and my 59(e) and my motion to comply. And the complication -- the second complication came in wherein as I was not available -- where I was not able to incorporate Ms. Ross's assistance, I found myself compelled to have to try to rectify the circumstances through Mr. Pachak. However, as soon as we were immediately able to have a communica (verbatim), it was distinguished and discerned that we wanted to go in two separate and different

directions.

Lastly, the third stipulation in this problem -- in this circumstance is with the actual preparation of the record on appeal, which is to my understanding was prepared by the state; i.e. Ms. Ratigan. The circumstances being where in the PCR of 2007 there were -- due to Ms. Ross, there were nine exhibits presented in my behalf. Consequently, again, as receiving relief, I became the respondent and as such I had no say in the preparation of the appendix. However, when the appendix was prepared and presented to myself, the nine exhibits -- the nine extenuating exhibits that were placed in by myself -- by Ms. Ross and myself, were left out of the record. Consequently, and in accordance with the appellate Rule 210, if I may, where it is stipulated -- where the Supreme Court stipulates that they will not consider any issue that are not presented in the record of appeal. I considered nine exhibits extenuating issues, extenuating grounds, supported documentation that should have been brought before the court. This did not take place. I brought this to Mr. Pachak's attention, at which point he came to the understanding that I was forced -- I felt myself compelled to move forward to petition for self-representation, which I did. But I was denied the right to do so by Her Honor

Jean Toal. And at that point, of course, this created all the circumstances that we're here for today.

Moving to the habeas level, again, my understanding for being here, obviously enough, Your Honor, I am not bar certified, but I was simply trying to go by the stipulations that were placed upon me from being at the habeas level. It was Mr. Simon -- and again, in his behest to have these issues addressed -- the particular issues he presented to the United States District Judge, who in turn said, well, this is all right, this is what we will have Mr. Terry come back down to this court level to address. I'm totally confused as to how Ms. Ratigan can assert that I am being successive, particularly with the appellate issues, as I could not raise the appellate issues until such time as I had the PCR in order to proceed through the circuit level.

And my last contingency, Your Honor, is this is -- my understanding that if, in fact, this hearing will go on that one particular issue, I believe it is imperative, on my part, to have the record readdress it and have the appellate record corrected so that when it does go to that, if you so deem it to give me the relief to have the record go forward to the Supreme Court, that they'll have an appropriate record to review.

Excuse me, Your Honor, and also after Ms. Ratigan

addresses you, she said she does not -- she's not aware of any stipulations where you can bring up appellate counsel in accords with the Strickland. I would assert, Your Honor, that the precedence of Strickland as it applies where it is said that ineffective appellate counsel -- or rather the ineffective assistance of counsel may also be applied to appellate counsel. So my precedence in this case with my appellate counsel issues are under the auspices of Strickland versus Washington. And where appellate counsel was -- where Mr. Pachak failed to champion my cause once it was established that Ms. Ross felt that she no longer was required to do so.

THE COURT: Yes, ma'am, Ms. Ratigan.

MS. RATIGAN: Your Honor, it's clear Mr. Terry fancies himself to be a legal scholar, but what he's asking you to do, there's no groundwork to do things like correct the record on appeal. I filed an appendix in this case. If Mr. Pachak had noticed there were things in that appendix that were lacking, he could have filed a motion to supplement the appendix, and he did not do so. But again, challenging the record on appeal, challenging the way it was put together, challenging PCR appellate counsel; these are all issues to be addressed in federal court, not state court.

And again, Mr. Terry citing Strickland to try to

tell this court you can do this under appellate counsel, that's a direct appeal. There's a very big difference between, as Your Honor know, a trial on appeal and the collateral issues. He has put forth no evidence or case law or anything today to suggest that he should be able to go forward on these issues against Mr. Pachak.

Furthermore, again, he's trying to instruct the court about what Austin says. Your Honor can clearly read Austin. The purpose of Austin is to address issues that were not prior -- were not previously addressed. And that's the purpose of an Austin review, would be if Your Honor granted a belated -- pardon me -- an Austin review, the purpose of that would be for PCR appellate counsel to raise all the issues that would have been raised if Ms. Ross had filed a notice of appeal in that case. It's not to reopen the record under Austin and go back through every single issue that could and should be raised.

These issues are all contemplated by the recent Supreme Court case of Martinez versus Kelly in which the Federal Courts have said, you can raise issues of ineffective assistance of PCR counsel in federal court. This is not federal court.

Your Honor, earlier this year in the case of Kelly versus State, Justice Toal issued an order saying

Martinez versus Kelly is not a state issue, it is -- not Martinez versus Kelly. Martinez is not a state issue; it is a federal issue.

So again, we're arguing -- we're here on the limited purpose of Austin. And Mr. Terry is free to raise the majority of the issues he's trying to go forward on today in federal court, but we should be here today just on that Austin issue.

THE COURT: Well, I haven't had the benefit of time to review the file as far as the stay in federal court. We've got everybody here today to hear the issue on counsel at the PCR hearing. We're going to proceed that way. I'll certainly be glad, Mr. Johnson, if you want to submit any legal brief about the other; you suggested that I bifurcate it as to whether or not the habeas corpus that's been stayed is the proper avenue to talk about appellate counsel and have the benefit there. But ...

MR. JOHNSON: Your Honor, considering my client's, I guess, extensive research on the subject, I think he's probably going to want to also prepare a brief on his own. With permission of the court, may he also be allowed to submit a brief to the court?

MS. RATIGAN: I would object to that, Your Honor. This is hybrid representation. It's clear, if

you look through the record, Mr. Terry tries to operate his own case through counsel. That is not the purpose of the rule.

THE COURT: We've got to have one voice speaking. He's chosen you to be his spokesman, Mr. Johnson.

MR. JOHNSON: Yes, sir.

THE COURT: You can submit that. Certainly you and your client can collaborate anyway you wish to, but it's going to have to be you as the officer of the court.

MR. JOHNSON: Yes, sir, Your Honor.

THE COURT: If you find anything -- and the state might very well offer the remedy, if the relief is granted here.

MR. JOHNSON: Yes, sir, Your Honor.

THE COURT: All right. Let's proceed with the one issue that we have before us today, and that is the failure, if any, to appeal Judge Nettles' ruling.

MR. JOHNSON: Yes, sir, Your Honor. Applicant calls Terrance Terry to the stand.

Your Honor, the applicant has prepared a document to assist him with his testimony. He's just pulling out that document at this time.

THE COURT: All right.

THE CLERK: Mr. Terry, please step around to the witness booth. Place your left hand on the bible and raise your right hand. Left hand on the bible, best you can. I'm sorry.

You do solemnly swear or affirm that the testimony you're about to give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: That is absolutely correct.

THE CLERK: Thank you. Please state your full name for the record.

THE WITNESS: My name is Terrance Terry.

THE CLERK: Thank you. You may be seated.

TERRANCE TERRY,

HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Okay. Mr. Terry, first of all to kind of cut to the chase, do you believe that you've been denied an opportunity to seek appellate review on the issues that we're about to present here today?

A. I'm sorry.

Q. Do you believe that you've been denied the opportunity to receive appellate review on the issues that we are about to present here today?

A. Yes, I do.

Q. Now, let's go back through a bit of procedure. In March 26th of 2007, Judge Nettles issued an order in your original PCR application; is that correct?

A. That is correct.

Q. Can you please portray to the court what is your understanding of what his ruling was; both in your favor or not in your favor?

A. All right. First off, to my understanding of reading the order ---

Q. Excuse me, Mr. Terry. Can you speak louder?

A. Certainly. Certainly. My first -- first off, my first understanding of the order was stated on the last page where it's stipulated that I was to be -- that my case was reversed and remanded for a new trial and that I was to be released to the custody of the Greenville County Detention Center where my original bond was to be reinstated. My second understanding with the order was that with the ineffective counsel issue that I would -- that Mr. Hamilton was found ineffective for failing to explain to me the difference between a criminal sexual act and a lewd act. My second -- additional understanding was that, as far as my prosecutorial issues were concerned with the SLED report, it was stated that I failed to meet certain criteria that would allege that my misconduct issues were sound. An

additional understanding was with the addressing of the plea offers that were introduced by the state and the discovery -- as well as the discovery documentation that was presented to Mr. Hamilton and that he failed, that he failed to properly pursue in the form of an investigation to be of assistance to myself and to present, as Ms. Ross stated, mitigating circumstances and appropriate litigations that would have refuted some of the charges that I was being brought -- that were being brought against me. In addition to the -- and finally, with the order in the beginning, it was my -- as I read the order, I did denote that with the plea offer circumstances this was never -- this was not addressed in his final order.

Q. Okay. Now, we'll rewind a little bit and then we'll move forward. So you were granted a PCR on which ground?

A. Ineffective assistance of counsel, failure to instruct in the difference between a criminal sexual conduct circumstance with a minor first degree and a lewd act.

Q. And it is your understanding that the other grounds that you just previously testified to were denied?

A. That is also correct.

Q. Now, you just stated that the judge failed to address one of your potential issues, or one of the issues that you raised at trial level; is that correct?
A. That is also correct. What he failed to address was the -- if I may -- what he failed to address was the fact of the presentation of the plea offers which were never brought to my attention by Mr. Hamilton -- forgive me -- presented by Ms. Bryna Seay -- I hope I'm saying that correctly -- by Ms. Bryna Seay to Mr. Hamilton in reference to certain plea negotiations that they would have been willing to enter into. It should also be stipulated, Mr. Johnson, I think that even as we started off here, we seem to be addressing only one particular issue, and that was the criminal sexual conduct. However, again, where the plea offers come into play is there would -- there could have been, there could have been circumstances wherein something could have been done about something -- a plea could have been entered for the lewd act. However, again, but the charges were not separated. They were not addressed separately appropriately enough.
Q. Now, in an effort to remedy this issue, did you try to file any motions or anything with the court?
A. Yes, sir. As a matter of fact, I did. I did, in fact, forward to the court my own, my own produced 59(e)

motion which -- on April the 25th, which I did receive a return copy -- a return file copy from the clerk of court addressing these issues. Regrettably, at that time, I had left out the understanding of the circumstance where the plea offers were concerned. But each of the other issues were addressed.

MR. JOHNSON: Now, first of all, Your Honor, I believe these documents that we're referring to are part of the record.

THE COURT: Yes, sir.

MR. JOHNSON: Thank you, Your Honor.

Q. Now, did the state respond to your motion?

A. As a matter of fact, they did. As a matter of fact, the state did, again, under the representation of Ms. Ratigan, it was forwarded to the court, again, 59(e), which I have to interpret was forwarded to Ms. Ratigan, and she in turn did a return to my submission and objection -- an objection motion to my submission of the 59(e). If you will, the great complications here apparently stem from the fact that no one had assumed that I even knew what a 59(e) motion was or that I would have any cause to utilize one.

Q. And you say that because you had prevailed on the other issue?

A. That is also correct. I say that in that what I

was attempting to do at that point was to have the additional issues preserved, as I understood it, preserved for appellate review, understanding that this case was moving forward to the Supreme Court.

Q. Now, you filed -- I believe you filed this motion on April the 25th or was it the 26th, of 2007?

A. My 59(e) motion was filed on April the 25th, which was, again, as I came to understood, one day prior to Ms. Ratigan's filing her 59(e) motion, which she happened to have filed to Ms. Ross and not to myself.

Q. Okay. Now you say that -- the comment you just made. What's the significance of her serving the document to Ms. Ross rather than you?

A. Well, to my perception of it, it is inferred that obviously if one such elects to submit a post-trial motion that it is the -- that it would be the responsibility of appellant -- forgive me -- of PCR counsel, defense counsel, to retain representation in order to fulfill that obligation, if you will.

Q. To clarify you mean trial counsel and applicant counsel, not defense counsel?

A. What I mean is with my wanting to submit a 59(e), had anyone been aware that I wanted to do so, it is my understanding and belief that it would have been the responsibility of my PCR defense counsel to retain

representation long enough for me to do so. But again, as rapidly as the circumstance took place with -- as soon as I received the final order, my 59 was prepared. But again, no one was anticipating that I would want to have such a document forwarded in the record.

Q. Now, why did you believe that -- at the point in time that you filed the 59(e) that Ms. Ross no longer represented you?

A. This was due to a letter that I received from Ms. Ross accompanying the final order.

Q. Go ahead.

A. Stating that, quote, I will be closing my file on your case and that the office of appellate defense will be acting in your behalf from this point forward.

Q. Mr. Terry, is this that letter that you're referring to?

A. Yes, sir, it is.

MR. JOHNSON: I'd like to have this marked as Applicant's Exhibit Number 1.

MS. RATIGAN: I have no objection, Your Honor.

THE COURT: Without objection Exhibit 1 is admitted into evidence.

(WHEREUPON, Plaintiff Exhibit Number 1 was marked and admitted into evidence.)

Q. And so if you'll please publish the contents of

the letter for the court.

A. This is a letter from Ms. Susannah Ross addressed to myself.

Q. What's the date?

A. Dated April the 12th of 2007, one day after the filing of the order granting my PCR relief. And it states as follows: 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 interests in the appeal. Sincerely, Ms. Ross -- Susannah Ross.

Q. Now, the -- did the fact that Ms. Ross no longer -- well, it's asserted that she no longer represented you and that you wanted to file this motion to reconsider. Did that become an issue?

A. As a matter of fact, it did. Upon my filing of the 59(e) -- forgive me. Upon the serving of my 59(e) on the court on April the 25th, the state, again, under Ms. Ratigan, was quite rapid to respond. In fact, in a matter of seventy-two hours with a motion to deny me the right to file this 59(e) alleging, as she stated earlier, hybrid representation that I was trying to

initiate a movement that was not -- that I was not authorized to do, seeing as how I was represented by counsel. This same motion that Ms. Ratigan forwarded to me that I received on April the 26th was stipulated to Judge Nettles that Ms. Ross was still appointed as counsel. Also, as an exhibit I have the envelope that I received Ms. Ratigan's motion to deny dated April the 26th, addressed to Ms. Susannah Ross.

MR. JOHNSON: Now, Your Honor, I also believe all these documents are a part of the record as well, and I will not move to submit them.

Q. Mr. Terry, what was the results of your motion and Ms. Ratigan's motion in return? What was the order -- what was the result of those motions?

A. From that point there, Judge Nettles issued an order denying both motions, both my 59(e) motion and Ms. Ratigan's 59(e) motion, and ruling that the case would stand as he stipulated in his order. But I would, if at all possible, Mr. Johnson, I would -- I do not -- I am not aware of the fact that Ms. Ratigan's motion is in the record from the 24th. Or the envelopes that stipulate -- that show that Ms. Ratigan did in fact address Ms. Ross and not the office of appellate defense. I believe that's a part of the record.

MR. JOHNSON: Your Honor, I would have this

marked as Applicant's Exhibit Number 2.

MS. RATIGAN: I have no objection, Your Honor.

THE COURT: Without objection it may be admitted.

(WHEREUPON, Plaintiff Exhibit Number 2 was marked and admitted into evidence.)

Q. At what point in time did you become in contact with appellate counsel?

A. If I'm not mistaken, you have the letter there, but I'm going to -- I received the first notification from them -- without that document I can't say, sir.

Q. Would the document refresh your recollection?

A. Yes, it most certainly would. I first received notification from the office of appellate defense four months after the filing of the -- of Judge Nettles' final order.

Q. Now, up until this point, you've done a pro se filing with regards to the motion to alter an amended sentence?

A. That's correct.

Q. Excuse me. The decision from the judge?

A. That's correct.

Q. And there was an order denying both your and Ms. Ratigan's motion; is that correct?

A. That is also correct.

Q. Do you recall the reasons set forth in the order denying your request for relief, specifically?
A. As a matter of fact, I do. If you'll note, if you'll note on the second page, Judge Nettles ---
Q. Would this document refresh your recollection?
A. Yes, it would, sir. On page two it denoted with a footnote from Judge Nettles which reads: In addition, the applicant's motion to reconsider pursuant to 59 -- to Rule 59(e) SCRCP is ineffective and void because the applicant is currently represented by counsel. And then they cite Rule 11(a) of the South Carolina Rules of Criminal Procedure, as well as Jones versus State.
Q. So it's your portrayal to the court that at least in part or as you may assert, in whole, your motion was denied because of Ms. Ross's failure to assist you with this matter?
A. That is also correct. And furthermore with this particular, with this particular document, when it came to me it was -- it, too, also had a courtesy -- I'm not sure what cc means, Your Honor, but I think it's courtesy copy. And if I'm understanding correctly, it came with an inference that a courtesy copy was forwarded to Ms. Ross; i.e. Judge Nettles also inferred -- it was Judge Nettle's understanding, as well, that Ms. Ross was still counsel of record.

Q. Now, did Ms. Ratigan, in her return and her motion, did she also serve -- who did she serve?

A. With Ms. Ratigan's first motion to -- 59(e) motion, she also, in fact, served Ms. Susannah Ross. However, with her response -- with her motion -- objection motion to my filing my 59(e), at that particular point, she chose to address both Ms. Ross and myself.

Q. Now, at the point in time where your motion and Ms. Ratigan's motion was denied, was it your intent at that point in time to -- did you wish for those issues to be appealed?

A. Yes, sir. As a matter of fact I did. Though, again, the two that we had mentioned, one being the circumstance of the prosecutorial misconduct issue, as well as the additional ineffective counsel grounds that I believe should have been ruled upon -- should have been addressed concerning Mr. Hamilton, as well as the particular circumstance wherein Judge Nettles, of his own accord, after a brief colloquy with Ms. Ratigan, wherein at the end of the hearing it was -- Ms. Ross had wanted to introduce the plea offers and Ms. Ratigan strenuously objected to Judge Nettles and Judge Nettles elected to, in fact, enter those two exhibits, citing that this is actually discovery. He elected to enter

these two exhibits as his own court exhibits. And I found it quite -- after receiving his final order, I found it somewhat astounding that he would, in turn, turn around and elect to say, well, these issues -- that this was not a meritorious issue, the fact that these plea offers were never brought to my attention.

Q. Now, at some point after the original, the original order from Judge Nettles, you did express your concern or your intention for the 59(e) motion to Ms. Ross; didn't you?

A. That is also correct. At that particular time, as Ms. Ratigan put it, with my trying to think that I am somewhat of a good litigant, I had elected to contact the office of the clerk for the South Carolina Supreme Court to inform them of, in fact, the complications that I was going through with trying to have these -- have an appropriate record of appeal prepared, as well as, you know, retain the exhibits that were placed in the record ---

MS. RATIGAN: Your Honor, this is not relevant to the issue of whether or not Ms. Ross should have filed a notice of appeal. He's attempting to raise these issues again that are not cognizable. We're here just on a limited issue. He hasn't even gotten to it yet. We've been here for a while and he hasn't even

gotten to the issue yet of whether or not he asked Ms. Ross to file an appeal and she did or did not do so.

THE COURT: All right. If we can -- what you feel you need to tell me about Ms. Ross's errors, I'll be glad to listen to, Mr. Terry, if we could focus on that. And if there's other matters you feel are relating to her, I'll be glad to hear those.

MR. TERRY: All right. Your Honor, I'll try to do that, sir.

Q. All right. Mr. Terry, what I'm approaching you with now is another letter from Ms. Ross. Do you recognize it?

A. Yes, sir, I do.

Q. What does that letter discuss?

A. This is, this is dated April the 10th of 2008. This is a year after we have had all -- have had the initial PCR hearing. It addresses -- specifically it says that I know that you thought your prosecutorial misconduct issue was important, but Judge Nettles ruled against you on that issue. In regards to the July 23rd, 2000 letter -- 2007 letter from the South Carolina court where you wrote what counsel -- and what I wrote -- and what that was in reference to was I was -- since both Ms. -- since Ms. Ratigan and Judge Nettles were under the impression that I was still under Ms. Ross ---

Q. Mr. Terry, let's be clear. Are you reading the letter or are you now testifying?
A. I am -- both.
Q. Well, I need you to do one or the other.
A. All right, sir. I'll go back to the letter then --
Q. Yes, sir.
A. --- if I may.
Q. Yes, sir.
Q. And I'll read the last sentence if I may and it starts: In regards to the July 23rd letter from the Supreme Court where you wrote what counsel, the fact that appellate defense is copied and not me indicated that as I told you in my letter, appellate defense represented you after the final order from Judge Nettles.
Q. All right.

MR. JOHNSON: Your Honor, I'd like to have this marked as Applicant's Exhibit 3.

MS. RATIGAN: No objection, Your Honor.

THE COURT: Without objection, Exhibit 3 is admitted.

(WHEREUPON, Plaintiff Exhibit Number 3 was marked and admitted into evidence.)

Q. Now, Mr. Terry, what's the significance of that

letter in your understanding?

A. All right. Again, due to the -- after finding out that my 59 was going to be rejected, I, in fact, sought another avenue to have it addressed, which was through the office of disciplinary counsel. And they, in turn, contacted Ms. Ross, who in turn contacted me with that letter to let me know that she was still -- that I am still without the proper understanding that she was supposed to address my post-trial motions.

Q. And when you say post-trial motions, are you just talking about your 59(e) or are you also speaking in reference to an appeal?

A. I'm speaking to both, but there's a third issue in between -- during the course of the time waiting for Judge Nettles to rule on our 59(e)'s, I also submitted a motion to comply in accordance with the South Carolina Rules of Criminal Procedure, and I had written to him concerning that, as well, which I did not, I did not hear back from. And in refernece to the appellate part of the circumstance, as from not hearing from Ms. Ross after so many people had attempted to contact her, I felt shunned, if you will, and as a result I appealed to Mr. Pachak to -- again, to champion these issues that I felt were being neglected.

Q. What was the result of your contacting Mr. Pachak?

A. Mr. Pachak felt it was simply -- the only relevant concern was the issue that Mr. -- I'm sorry, please forgive me -- was the issue that Judge Nettles ruled upon that granted me relief from the PCR.

MR. JOHNSON: Now, Judge, at this time I do believe it's related, although obviously Mr. Pachak is not here, but what I think -- what I'm asking the court to do is allow testimony on his request to Mr. Pachak to take action as well, considering they wouldn't allow him to go pro se and he wasn't allowed to deal with Ms. Ross. And I'm just asking if I may elicit testimony on that matter. I don't know if, per your prior ruling of the court, if that's something we can do here today.

THE COURT: So basically he wants to say that he asked appellate counsel to pursue issues raised on his 59(e) motion?

MR. JOHNSON: He asked them to pursue a whole lot of different things, but, yes, that's one of them, Your Honor.

THE COURT: I'll allow -- I think that's stipulated to.

MS. RATIGAN: Just for the record, this is, again, not relevant. He is yet to even testify he ever asked Ms. Ross to file an appeal for him, which is the issue we're here on today. So we'll just argue it's not

relevant.

MR. JOHNSON: Well, Your Honor, okay, ---

THE COURT: I agree. If it relates anyway to Ms. Ross, I'll be glad to hear from him.

Q. Mr. -- well, before we move forward, Mr. Terry, let's be clear. What was the purpose of the 59(b)?

A. To preserve the issues that were -- first, to ask Judge Nettles to reconsider the rulings that he gave on the issues that were contained in the order, as well as to bring to the court's attention the issues that he neglected to rule up, such -- i.e., the plea offers.

Q. And this was, this was being done by an effort -- done by you in an effort to preserve the record for appeal; is that correct?

A. Exactly right, as well as to present an appropriate record for the Supreme Court to review.

Q. Okay. Now, did you ever directly ask Ms. Ross either by letter or otherwise to file an appeal otherwise on your behalf?

A. As a matter of fact, I did, during the course -- once I received, once I received Ms. Ratigan's motion to deny, I prepared several letters addressed to several individuals of the court, which included both Ms. Ratigan and Ms. Ross, as well as Judge Nettles, as well as Mr. Daniel Shearouse, the clerk of court, as well, as

Her Honor herself, Jean Toal, to address these issues of what was wrong with the record of appeal being the exclusion of the exhibits that were placed in the PCR as well as the rulings that took place.

Q. I'm approaching you with a document. Can you identify it?

A. Yes, sir. As a matter of fact, it is, again, it's a letter addressed to and sent to Ms. Susannah Ross addressing the issue, addressing the issue of wanting to have her retained to address these issues of the post-trial motions.

Q. Now, the post-trial motions and the appeal or just the post-trial motions?

A. The post-trial, the post-trial -- at this point it would have been the post-trial motions. Well, actually, no, again, it is both, because again the complication came in with what was being submitted to the record on appeal. Ms. Ratigan elected not to place these exhibits in as a part of the record for the court's review.

Q. Now, ---

MR. JOHNSON: Your Honor, this is an exhibit. I believe it's Exhibit ---

THE COURT: Has the last one been admitted into evidence or not? The letter to Ms. Ross?

MR. JOHNSON: I have the letter.

THE COURT: That's what you're ---

MR. JOHNSON: Yes, sir, Your Honor.

THE COURT: Any objection to Exhibit 4?

MS. RATIGAN: No, Your Honor.

THE COURT: Okay. Without objection it may be admitted.

(WHEREUPON, Plaintiff Exhibit Number 4 was marked and admitted into evidence.)

A. This letter is also dated to Ms. Ratigan, addressing the same issue, the same circumstances with the -- with Ms. Ross's representation at that time.

MR. JOHNSON: Your Honor, I'd like to offer this letter dated March 27, 2007 into evidence at this time.

MS. RATIGAN: Your Honor, I'd object to that. I'm not certain that is -- that the date of that has not been altered. In the first sentence of that letter he refers to having received something from Ms. Ross dated April 12th, 2007, which actually postdates this letter, so we would argue it hasn't been authenticated or a foundation laid at -- either the date is wrong or it's been altered.

THE COURT: That's the letter from Mr. Terry to ---

MR. JOHNSON: To Ms. Ross. Your Honor, I

believe Mr. Terry will assert that's a scrivener's error as far as the date is concerned.

MR. TERRY: That is also correct.

THE COURT: I'll allow it over objection.

Q. Mr. Terry, -- hold on a second.

MR. JOHNSON: Did you mark it? It's another one. It looks the same. It's a different one.

(WHEREUPON, Plaintiff Exhibit Number 5 was marked and admitted into evidence.)

THE COURT: That's another letter to Ms. Ross?

MR. JOHNSON: Yes, sir.

Q. All right. Mr. Terry, I'm going to direct your attention to what's listed as Plaintiff's Exhibit Number 5. Okay?

A. All right.

Q. Now, please portray to the court what's requested in that document, including if you asked for your post trial motions to be addressed and if you eluded to or specifically requested an appeal in this matter?

A. All right. Again, this is -- this letter is addressed to Ms. Ratigan stipulating, stipulating the fact that I had notified her as far as the circumstances where me and Ms. -- where Ms. Ross and myself were concerned that Ms. Ross had felt that her termination -- her representation -- forgive me -- was no longer

necessary. In addition, due to the fact that Ms. Ratigan saw fit to provide me with a copy of her August the 26th motion to deny my 59(e), I also brought it to her attention through inquiry as to why she would not have thought it relevant to provide me with a copy of her April the 24th motion to -- 59(e) motion to Judge Nettles. As it were, that I would also be notified.

Q. Now, with regards to Exhibit 4. Can you get that, please?

A. Yes, sir, I have it.

Q. Can you please portray to the court the significance of that letter?

A. This was -- again, this was intended to notify Ms. Ross of the complication -- of the problems I was experiencing with trying to file these post-trial motions, very simply stated that I was still trying to file these -- have these post-trial motions filed and addressed before the issue went before the South Carolina Supreme Court.

Q. Mr. Terry, at this point in time in direct testimony is there anything else that you think the court should known with regards to these procedures and the appeal issue?

A. Yes. As a matter of fact, there is. And I'll try to make it brief. Your Honor, again, with -- while

we're focusing on Ms. Ross here, again, if one -- this is the only opportunity, as I foresee it, that I would have. Once this record goes forward to the Supreme Court, I will not have the ability to challenge the inadequacies of the record of appeal that was prepared in 2007 that was presented to the Supreme Court for review. There are countless errors in the -- even in the opinion itself, which appear to be due to circumstances that these exhibits would have clarified and portrayed. And I'll leave it at that, sir.

THE COURT: Thank you.

MR. JOHNSON: Your Honor, based on the allegations of Ms. Ross, I have no further questions for this witness at this time.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MS. RATIGAN:

Q. On what date did you ask Ms. Ross to file a notice of appeal?

A. Ms. Ratigan, I was not able to ask Ms. Ross to file a notice of appeal because by the time this had come to pass the time had expired, the ten day time limit had expired. I did not, in fact, make an effort to ask her to do so, because, again, the time limit had expired.

Q. Ten days is for a 59(e)?
A. That is also correct.
Q. So you did not have a chance to ask her to either file a 59(e) or to file a notice of appeal?
A. As far as the notice of appeal, Ms. Ross filed a notice of appeal, Ms. Ratigan. The concerns here are not in -- are not with the filing -- not with Ms. Ross's filing an appeal. The concern ---
Q. Sir, that's not what I'm asking you.
A. All right. Please clarify it.
Q. What I'm asking you is what date did you ask her to file an appeal? You never asked her; is that your answer?
A. That is correct. No, I never asked her to file an appeal.
Q. That's all I have, Your Honor.
THE COURT: Any redirect?
MR. JOHNSON: No, sir, Your Honor.
THE COURT: All right. Thank you, sir. You may step down, Mr. Terry.
You may call your next witness, Mr. Johnson.
MR. JOHNSON: Your Honor, the applicant rests.
THE COURT: Anything from the state?
MS. RATIGAN: Yes, Your Honor. We would call Ms. Ross.

THE CLERK: Ms. Ross, please place your left hand on the bible and raise your right hand.

You do solemnly swear or affirm that the testimony you're about to give in this case will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. You may be seated. Please state your full name for the record.

THE WITNESS: Susannah Conyers Ross.

SUSANNAH CONYERS ROSS,

HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. RATIGAN:

Q. Ms. Ross, do you recall representing Mr. Terry in his first PCR hearing?

A. I do.

Q. And did he ever ask you to file a 59(e)?

A. Not in a timely way. I have no letter asking for -- to file a 59(e) or an appeal.

Q. Did you believe you had grounds for a meritorious 59(e)?

A. No. And I explained that all when he grieved me and I had to give a copy of my entire file to prove that I had given him everything I said I had given him. I explained that whenever I see it's important to file a

59(e) to preserve the record, I do so. Whenever I feel an appeal is necessary to preserve the record, I do so. In Mr. Terry's case, I thought it was a miracle that under cross examination Ernie Hamilton, his plea attorney, could not define sexual battery and did not properly define that. And that was the basis of the ineffective assistance of counsel claim. As to Mr. Terry's other allegations, there was one about after-discovered evidence, a SLED report, saying that no evidence was found on panties where it had been said by the defendant that they had been washed or alleged they had been washed. I did not think that was a great enough issue to preserve it would be necessary or anything that would ever get him relief later on. He also had mental health allegation. I got all his mental health records. I confirmed with the doctor. Went over the medications he was on and the issue of whether those medications would have interfered with his ability to plea in a knowing and voluntary way. The doctor said, no, they would not. That is why I did not call an expert witness to testify as to that effect, because I knew that that was not giving Mr. Terry the outcome that he wanted if it went against his allegations. So, no, I didn't see any merit in a 59(e) motion. One think I did try to do with Judge Nettles is I felt the sexual

battery issue applied only to the CSC charge, not the lewd act. And I was concerned with him putting all of them together with the ineffective assistance, that there would be a greater likelihood that the Supreme Court would reverse. Therefore, I prepared two orders. One with just the CSC and then another with all three charges. Because I was really making a real effort to be able to send up a case that would have the least likely of reversal as possible. I certainly, in hindsight, of Mr. Terry's things, I certainly don't think appealing and raising Cain about an order that grants you relief is a good way to set the record. And I didn't think that the issues that, in fact, Judge Nettles ruled against him were meritorious.

Q. And so your testimony is he never either orally or in writing asked you to file an appeal?

A. No. Well, after the fact I get grieved and letters complaining about me and that's when all this started. But as far as a timely request for an appeal, no.

Q. And you do not believe the issues he did not prevail on were meritorious?

A. No.

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

THE COURT: You may cross examine the witness.

MR. JOHNSON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Ms. Ross, you just discussed the -- basically the reconsideration motion with regards to my client?

A. Uh-huh (affirmative).

Q. Now, you were indeed served with copies of the return in Ms. Ratigan's motion; is that correct?

A. Yes. At some point. They are in my file.

Q. Okay. Did you discuss -- once you received these, I suppose at that point in time you would have been aware that Mr. Terry had filed this motion?

A. Yes. I'm just trying to think when I received them. I'm not sure when I actually received them, so I'm looking through the file. But at some point I do believe that is in there.

Q. Now, at that point in time did you discuss the motions, the motions or the subject matter therein with Mr. Terry?

A. I don't think so. I don't have any notes saying that I did.

Q. Now, would you agree that a motion to reconsider or a motion to alter or amend is one way to preserve the record if you believe that you -- that something was not addressed at the trial level?

A. Right. But that goes on -- I would have filed a 59(e) motion if I had a belief that all the issues that were brought up for PCR were addressed by the judge. The judge specifically denied all those issues. He sent me an email showing me or telling me what to put in the order that I drafted. He specifically denied all issues and addressed all issues. So I did not feel a 59(e) motion was necessary. And you're not supposed to file one just because you say I don't like what the judge said. A 59(e) motion is to say there was an error, Judge, I'm bringing your attention to it.

Q. But at some point you were at least served with copies of what Mr. Terry and Ms. Ratigan had filed with regards to the 59(e) he filed pro se?

A. Yes. At some point I did receive something, something on that fact, and I'm looking through the file.

Q. Now, would you agree that at that point in time you were aware that Mr. Terry was unsatisfied with the results of the issues that he -- Judge Nettles failed to grant him relief on?

A. Yes. I guess so. I don't know what he was thinking.

Q. Now, would the, would the -- would filing a motion to reconsider or a motion to alter or amend, would that

stay the time for appeal or would that not?
A. It would.
Q. It would. And you would have, if I'm correct, thirty days from the date that that issue was decided to file an appeal; is that true?
A. Right.
Q. And in between the time that you received service of these motions and the order denying both Ms. Ratigan's and Mr. Terry's motion, did you speak with Mr. Terry?
A. I don't have any record of it in the file. So I received that. It was ordered -- I just have the order in here. I don't have the envelope, so I don't know when I was served with this. But the order is signed. It says the 2nd of July, 2007. I received no letters from Mr. Terry after this time until I got the grievance about a year later.
Q. Now, with respect to the letters that are in evidence, in fact, you did inform him that you no longer represented him on this case; is that true?
A. Uh-huh (affirmative). Yes, I did send him that letter when he was granted relief in his PCR.
Q. Now, in addition I believe you also state that appellate defense would handle his case from then on, from then on; is that true?

A. Right.
Q. Would it not -- if he had won the appeal, would it not have been your responsibility to file that appeal?
A. Yes, it would have been. And I think if he had asked me for an appeal, I would have advised him against it, but I would have attended to it. I will add that the 59(e) motion that he made pro se was addressed. There's no reason he couldn't have filed an appeal pro se and that would be addressed as well. That would be maybe a different issue if he made some efforts to file his own appeal. But it's not as if the fact that he filed a pro se motion that it was just thrown in the trash, because Judge Nettles addressed the merits of that case. As a side footnote he said, and by the way, it's pro se so it doesn't count. But he did address that motion.
Q. But anyhow, during that period of time you didn't, you didn't contact Mr. Terry in order to discuss either the 59(e) or any other concern that he might have with regards to the -- any post-trial motions or the appeal of this case?
A. I don't remember. I don't have anything noted in the file.
MR. JOHNSON: One second, please, Your Honor.
Q. Ms. Ross, I believe with regards to the hearing -

- the trial portion of this stage, there were some issues with regards to plea offers; is that true?

A. I don't recall, but I'm sure there was. I had -- looking through my notes, I had something about a lack of negotiation, there was no request for a cap or anything like that.

Q. Are you aware of whether that issue was addressed in Judge Nettles' original order?

A. I don't think it was. But he did say, any and all -- I think I generally put in orders, at his request, that any and all issues not specifically raised herein are denied.

Q. Okay. Now, with regard to Supreme Court, if the issue was not specifically raised in the order with regards to the Judge's ruling, do you think that would have been addressed?

A. Yes. But I also think if the Supreme Court didn't think ineffective assistance was shown by a lawyer who couldn't define sexual battery, I'm sure he's not going -- they're not going to think that it was ineffective not to go over the plea offers. That was a much weaker issue. I'd also say the whole issue of discussing plea offers is when someone loses a plea offer. It's not like Mr. Terry went to trial and got life and was not told about his plea offer. He pled guilty in front of

the judge and admitted to all those things. So it truly is not much of an issue.

Q. But Mr. Terry, that was an issue he raised in his original application?

A. Uh-huh (affirmative).

Q. And it was your -- I guess your professional discretion not to have that issue addressed at that point in time?

A. To write it in -- specifically in the order?

Q. Yes, ma'am.

A. Yes. I guess I felt that it would come under the any and all because the order was fairly long.

MR. JOHNSON: Your Honor, I have no further questions for this witness at this time.

THE COURT: Any redirect?

MS. RATIGAN: No, Your Honor. And the state would rest. We ask that Ms. Ross be allowed to be excused.

THE COURT: Any objection that Ms. Ross be excused?

MR. JOHNSON: I have no objection to that.

Your Honor, I would, at the appropriate time, ask if you would be prepared to hear -- to allow my client to give argument to this case?

THE COURT: Mr. Terry, is there something you

want to say to me about the case? I'll be glad to hear from you briefly, even though obviously you have a lawyer representing you, but I'll bend the rules briefly.

MR. TERRY: I'm most grateful, Your Honor.

First off, we seem to have come to a misunderstanding concerning the filing of an appeal. An appeal was file, an appeal was filed in my case. This was not the problem. This has never been the problem from the onset of these circumstances. The problem was with, again, the post-trial motions.

Additionally, with the plea offer circumstances, if I may, there's a precedential case, Moyer versus King, that clearly states that ineffective assistance of counsel, that it is in fact ineffective assistance of counsel for a defendant not to be informed of plea circumstances. And I believe -- of which I believe is a highly relevant issue that should have been brought to Judge Nettles' attention, again, under the circumstance, seeing as how he thought that the plea offer should have been brought and he went to the trouble to overrule Ms. Ratigan's objection to the plea offer being brought into the record. Surely that had to have some significance, Your Honor.

And as far as everyone saying that Ms. Ratigan

argued that these issues were to be brought to the -- argued in the habeas court, I am currently in the habeas court. These issues have been argued. Additionally, Ms. Ratigan also stated that I did not enter any type of documentation into this record to argue the appellate issues. There is a -- as I asked you at the beginning, if you'll recall, Your Honor, I asked have you had a chance to review the record. There is a one hundred and one page memorandum in support of this Austin application that's been submitted for your perusal, sir. And I don't understand how Ms. Ratigan can say that I have not made any effort to make known these stimulations clarified.

Thank you.

THE COURT: Thank you, sir. As I understand you, Mr. Terry, you're saying that Rule 59 or lack thereof is the issue. An appeal was filed, you said; right?

MR. TERRY: Yes, sir, that is correct, Your Honor.

THE COURT: Okay. So lack of activity during the Rule 59 motion that you feel was the problem?

MR. TERRY: Yes, sir, the activity with the 59(e) motion and, again, due to the fact that the case did get transferred to -- with the appeal being filed,

that the case got transferred to the South Carolina Supreme Court. My greater concerns were with the presentation of an appropriate appendix for record on appeal.

THE COURT: All right. Thank you.

MS. RATIGAN: Your Honor, to clarify one thing, he did not file a notice of appeal. The state filed a notice of appeal.

THE COURT: Right.

MS. RATIGAN: There was no cross-appeal in this case.

THE COURT: Right. He said there was an appeal filed, so that got him there. Okay. Thank you very much. I'll review the file and try to issue an order in the next couple of weeks.

MR. JOHNSON: Thank you, Your Honor.

[END OF REQUESTED TRANSCRIPT OF RECORD]

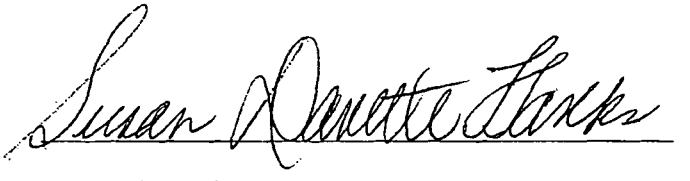
CERTIFICATE OF REPORTER

I, the undersigned Danette P. Hanks, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 17th day of December, 2013.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

August 26, 2014



Circuit Court Reporter

Habeas-Exhibit-[redacted]

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

(Amended) Exhibit - 4
Austin

HENRY MCMASTER
ATTORNEY GENERAL

April 26, 2007

The Honorable Paul B. Wickensimer
Clerk of Court, Greenville County
305 East North Street; Room 224
Greenville SC 29601-2121

Re: **Terrence Dimingo Terry, 307935 v. State of South Carolina**
2005-CP-23-7327

Dear Mr. Wickensimer:

Enclosed please find the original Return to Motion to Alter or Amend the Order of Dismissal of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Karen C. Ratigan
Assistant Attorney General

/jacc
Enclosure

cc: Honorable Michael G. Nettles
Susannah C. Ross, Esquire ← Still counsel of Record?
Terrence Dimingo Terry, 307935 ↖ Hon, I'm served!

PLAINTIFF'S EXHIBIT 2 12-1-09

ROSS & ENDERLIN, PA
ATTORNEYS AT LAW

In Court Exhibit-1(a.)

April 10, 2008

Mr. Terrence Terry #307935
McCormick Correctional Inst.
386 Redemption Way
McCormick, SC 29899

- Although the Applicant filed a 59(e) Motion To Alter or Amend (pro se), Respondent did as well - dated 4-24-07! Please note to "what counsel" Respondent also gave copy!

Dear Mr. Terry:

Enclosed are original copies of your file which you requested in your grievance along with the package you sent me. I ask you to look at the memorandum from Judge Nettles where he explains what he wants in the Order. The final Order in your PCR reflected the Judge's findings. I know you thought the prosecutorial misconduct issue was important, Judge Nettles ruled against you on that issue. In regards to the July 23, 2007 letter from the Supreme Court where you wrote "WHAT COUNSEL", the fact Appellate Defense is copied not me indicated that, as I told you in my letter, Appellate Defense represented you after the final Order from Judge Nettles. 1.

* Please see also, Austin Exhibit (Amended)-2.

Sincerely,

Susannah Ross
Attorney at Law

enclosure

PLAINTIFF'S EXHIBIT 3 12-12-07

1. It is the responsibility of "PCR Counsel" to file any "post" "PCR Motions" with the Clerk of Common Pleas Court! Specifically, 59(e) Motions To Alter or amend the Final Order. Humbert v. State, 345 S.C. 332, 548 S.E. 2d 862 (2000).

2435 E. NORTH ST. #222• GREENVILLE/SC • 29615-1442
PHONE: (864) 242-0029 • E-MAIL: SUSANNAH.ROSS@SCBAR.ORG

Mr. Terrence D. Tuten, 307935
McCormick Correctional Institution / F2-A-256
386 Redemption Way
McCormick, S.C. 29899

November 18, 2007

Susanna Ross
2435 E. North St., #222
Greenville, S.C. 29615

Case No: 2005-CP-23-7327

Re: Rule 407 Professional Conduct
SCRC: Rules 1.2-1.4

Ms. Ross,

On April 17, 2007, six (6) days after the Filing of the Final Order from my PCR Hearing of March 1, 2007 I received from you a "letter of intent" to terminate your representation, along with a copy of the order. Obviously, you assumed that I would accept the order as presented, as (in certain posts) you made no offer to entertain a response.

At our very First meeting, the First document For defense purposes that I produced for you (newly discovered) was the "DNA Forensics Report" From Sled. At the second of three times we met at the courthouse-(prior each time to a continuance), (also where you, for a second time, asked For a copy that should have been in discovery)- I adamantly made it

clear that:
A. Withholding the report in General Sessions and PCR discovery (by both solicitors) constituted violation of Rules 5 and 6 of the SCRCrimP, and as well; Brady v. Maryland!
B. Sustaining this "Major Allegation" would provide the means for Vacating the conviction and sentence For the rape charge, under Prosecutorial Misconduct, and in conjunction with my other allegations, having my case dismissed.
And yet, the Final Order-(prepared and submitted by you without any solicitation for review, leaving me NO SAY! clearly states (categorically) that this issue was "Without Merit", thus, my desire to submit the 59(e) Motion!
It became quite distressfully clear after your communique of April 10, 2006 (enclosed) that our definitions and objectives For "relief" in my case were going to be "sorely contrasting". You deemed me, making a (pro se) submission citing: Jones v. State: "Tails (myself), don't wag dogs (yourself)", in a certiorari situation.
I now, and then, deem(ed) you, denying me a constitutional right, in a PCR situation, validated by question 11. a, b, and c, of the PCR application, as well as the instruction page, and section V.; of the state's return, to the application.

I also now call to your remembrance the Further substantiating proof, being the opening 10-15 "colloquy between Judge Watts, and myself, at my PCR Hearing of March 1, 2007, where the Judge verbally ordered you to File "my Amended Brief" (10-15 pages). That was left with you on March 1, 2007 (to ensure compliance). Not "your Amended Brief" (2 pages) (submitted February 5, 2007).

I Lastly, in this vein, call your attention to the enclosed letter from the Greenville County Clerk of Court (dated July 23, 2007), stipulations underlined.

I ask you, where is "my brief? Why was it not Filed? Citing: Rule 407; 1.3-Diligence-SCRP; Rule 207(a) 3. thru 7-Grounds for Discipline. Kirks v. Lucy; Supra (note 51)

I Further propose the Fact that, with after your being notified by All Concerned Parties of my actions to redress the Final Order through post-trial motions, since my recieving your letter of April 17, 2007, you did / have not contact(ed) me, (out of continued professional obligation?) to date, to address my concerns or point out my errors?

I admittedly bring this allegation of your actions, or more precisely stated, non-actions, as an additional substantiation of your "abandonement", and deliber-

of "prejudicial" intentions to have NO FURTHER AFFILIATION with either myself, or my case, at a "CRITICAL STAGE". Citing: Rule 4.4(a)-SCRCrimP; Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), and Rule 7(a) Sections 3, 5, 6, and 7, SCRCrimP.

In accordance with the law, I believe myself entitled to recieve from you:

A. The Documentation citing the "exact date" your obligation of representation terminated?

B. My Amended Application Brief. (10-15 pages) citing: Matter of Haddock, 321, (S.E.2d 601).

2. A copy of the defense file you prepared for my case.

"Client's File belongs to client, and should be given to client at request".

In accordance with our professional history, and the aforesaid, I am more than reasonably sure that I will recieve no response, Directly.

However, perhaps indirectly ....?

Sworn To and Before Me
this 18th day of Nov. 2007.
Debra Jean Hibson L.S.
Notary Public of S.C.
My commission expires: 1 Dec. 2007

To You, Submitted
s/ Terrence D. Terry
Terrence D. Terry
Applicant

Certificate of Service

I, the undersigned would hereby certify that duplicate copies of each "Letter of Inquisition", and "Verification Document" has been forwarded to all concerned parties listed below, postage prepaid, by U.S. Mail, addressed as follows:

S.C. Supreme Court
Att. Jean H. Toal - Chief Justice
P.O. Box 11330
Columbia, S.C. 29211

Hon. Daniel E. Shearouse
Clerk of the S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Mr. Robert M. Pachak
Appellate Defender
1330 Lady Street, Suite #401
Columbia S.C. 29201-3332

Hon. Michael G. Nettles - Judge
Florence City/County Complex - MSC-O
180 N. Irby Street
Florence, S.C. 29501

Hon. Paul B. Wickensimer
Greenville County Clerk of Court
305 East North Street
Greenville, S.C. 29601

Ms. Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia S.C. 29211

Susannah C. Ross
2435 E. North St., Suite #222
Greenville, S.C. 29615

This 02 day of April, 2008.

Sworn To and Before Me
this 02 day of April, 2008.
Jennifer C. Franklin L.S.
Notary Public For S.C.
My commission expires: 01/31/2010

S/ Mr. Terrance D. Terry
Mr. Terrance D. Terry, #36935
Respondent

832 .

Mr. Terrence D. Terry 307935
McCormick Correctional
Institution / F2-A-256
386 Redemption Way
McCormick, S.C. 29899

March 27, 2007

Karen C. Ratigan
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Case No.- 2005-CP-23-7327

Re: Freedom of Information/Rule 602

Ms. Ratigan,

On April 17, 2007, I recieved a letter from my former PCR defense counsel stating that she was "closing her File" on my case (enclosed), and of which letter, makes the third time that I have presented it to you for consideration and review, as well as all concerned parties in this matter.

The First time I presented this letter to you was as an attachment to my 59(e) Motion To Alter or Amend the "Final Order" of April 11, 2007, to substantiate and justify my reasoning behind my (pro se) submission of the Motion. (submitted on 4-25-07, and filed on 5-2-07)(enclosed).

On April 26, 2007, you forwarded me a copy of your "Return" to my Motion-(59(e)), asking that I be denied the submission, while simultaneously informing my former counsel, (cc:), that, in fact, I was still in need of representation, to further address the court, yet, Felt without it, to do so.

PLAINTIFF'S EXHIBIT 5 12-12-07

For which I extend my thanks. I, in turn, reaffirmed the emphasis of the two aforementioned points by submitting the "Motion To Comply, (where for the second time), my attorney?, was notified). And when both you and I received our "Order Denying Rule 59(e) Motion To Alter or Amend The Final Order- (dated July 6, 2007- 67 days after my 59(e) submission date of March 25, 2007), where for the "third time", as both you and I knew, as well as, she and the court, were made aware of my continued persistant efforts to properly address Judge Nichles' court. Yet, (though still obligated) no effort was made on her part to come to my aid, if no more than to warn me of the possible incurrence / repercussions of "contempt of court".

Notwithstanding, you did / were "quickly responsive" to "counteract", on behalf of my submission. You were also "equally responsive" to see that "I", (first Hand), was informed of your actions by forwarding "ME" a copy of "your" Return. (Unfiled)(enclosed) (You did so in less than 72 hrs., of my submitting the Motion)

I would ask your endulgence at this point to clarify and honor a few questions and requests.

Question-1- If, in fact your "Order of Dismissal" would be a "denial of your Proposed Order of Dismissal, where would the logic lay in my submitting a Motion to contrast your being denied?

Request 1- Would you please forward me a "Filed" copy of your

Proposed Order / Order of Dismissal"? (Both, if they are Not one and the same)?

Question-2- As you deemed it, "Most Relevant" / important, that "I" be personally notified of, and provided with a copy of your "Return" of March 26, 2007, why not so, with your Motion To Reconsider, of March 21, 2007, and your Notice of Appeal / Intent To Appeal, of ??

Request-2- Would you please provide me with, (in addition to request-1) Filed copies of the above cited documents with the same aforementioned expeditiousness when serving me with your return?

The questions are rhetorical, and yet Not! (For GOD!, Ms. Ross, Yourself and I know the answers as to why things have proceeded as they have, as will now, the court.

The requests are not! Citing: Rule 602- Freedom of Information. All that is being done against me, in secret, will be brought to the light.

There will be, NO DISCREPANCIES, in "Certiorari", as to who your True Adversary will be, Hybrid Representation?, or my constitutional rights to documentation of "Record", and "due process".

Having said as much, FOR NOW, I would, Again, request

of you the aforementioned documents.

A last rhetorical question, if you will. What was it, or is it, that made, or is making, so many of the parties involved so adamant in preventing the "Tail" (citing Jones v. State) myself?, from obtaining the documentations that will prove the allegations, and provide the means for my continued "fair bite", and appropriate relief?

I await your response, and would welcome any insight, (if only from your perspective and position), of which resolution, is inevitable. If not now, Soon!

To You, Submitted

S Mr. Terrence D. Terry

Terrence D. Terry # 307935
Applicant/Respondent

Sworn To and Before Me,
this 27 day of March, 2007.

Joyce L Young L.S.
Notary Public of S.C.
My commission expires: 8/28/2011

836

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2012-CP-23-1297
COUNTY OF GREENVILLE)	
)	
Terrence Dimingo Terry,)	
S.C.D.C. No. 307935,)	
)	
Applicant,)	**ORDER OF DISMISSAL**
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 FEB 17 AM 11 34

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 20, 2012. The Respondent submitted a return and partial motion to dismiss dated August 10, 2012. An evidentiary hearing into the matter was convened on December 17, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return and partial motion to dismiss, the prior PCR and PCR appeal records, records from the Applicant's petition for writ of habeas corpus pending in federal court,[1] and the Applicant's Exhibits 1-5.

[1] Specifically, this Court had before it the report and recommendation issued by Judge McDonald on June 16, 2011 and the order staying the matter issued by Judge Anderson on September 30, 2011.

PROCEDURAL HISTORY

The Greenville County Grand Jury indicted the Applicant at the February 2005 term of General Sessions for two 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, Esquire represented the Applicant.

On March 8, 2005, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of fifteen years for each count of lewd act upon a child and twenty years for first-degree CSC with a minor. The Applicant did not appeal.

First PCR Application

The Applicant filed a PCR application on November 11, 2005 (2005-CP-23-7327). The Applicant raised the following issues in his PCR application:[2]

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.

An evidentiary hearing was convened on March 1, 2007 at the Greenville County Courthouse. Susannah C. Ross, Esquire represented the Applicant. The Honorable Michael G. Nettles granted the Applicant a new trial on all charges in an order dated March 26, 2007.

The State filed a notice of appeal and subsequent petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court granted the petition and both parties

[2] In a subsequent amendment to the PCR application, counsel for the Applicant argued the Applicant was not made aware of the "nature and crucial elements of the charge [sic] against him."

submitted briefs. The Applicant was represented by Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense. By opinion dated July 13, 2009, the Supreme Court reversed Judge Nettles. Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009).

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (6:10-200-JFA-KFM). The Respondent submitted a motion for summary judgment on December 10, 2010. The Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated June 16, 2011. The Honorable Joseph F. Anderson, Jr., United States District Court Judge, issued an order to stay the matter dated September 30, 2011. Judge Anderson noted that, as the Applicant did not file a notice of appeal after the PCR order was issued in his case, he may have some unexhausted State remedies. Judge Anderson stayed the federal matter in order to allow the Applicant to exhaust this State remedy.

ALLEGATIONS

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. 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.
2. Ineffective assistance of plea 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.
3. Ineffective assistance of PCR appellate counsel:
   a. Failure to raise post-trial motions.

b. Failure to petition for appeal bond.
c. Failure to ensure adequate appellate record.

4. Due process violation.
5. Subject matter jurisdiction:
   a. Invalid arrest warrants and indictments.
   b. No preliminary hearing.

This Court notes that, in light of the pleadings and orders in the stayed federal court proceeding – as well as the Applicant's notation in the caption of his PCR application that it was pursuant to Austin v. State[3] – there is also an allegation that PCR counsel should have filed a notice of appeal of the order from the Applicant's first PCR application.

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. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Partial Motion to Dismiss

This Court finds that, as regards all issues except for that of a review of appeal issues from the first PCR application (pursuant to Austin), these issues must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

[3] 305 S.C. 453, 409 S.E.2d 395 (1991).

The Applicant pled guilty to the offenses he challenges in this Application on March 8, 2005. The Applicant was therefore required to file his application before March 8, 2006. This Application was filed on February 20, 2012, which was more than five (5) years after the statutory filing period had expired. A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the all issues (except for the Austin claim) must be dismissed as untimely.

This Court finds these issues must also be dismissed because they are successive. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that

"could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id. As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous PCR application, this Court denies any such issues as improper and successive.

Austin Claim

The Applicant stated he filed a pro se Rule 59(e) motion in his first PCR case. The Applicant stated PCR counsel failed to assist him and that he felt "shunned." The Applicant admitted he never asked PCR counsel to file a notice of appeal after he was successful in obtaining relief.

The Applicant's attorney from his first PCR application testified the Applicant never asked her to file a Rule 59(e), SCRCP motion and that there would have been no merit to such a motion. PCR counsel noted she drafted the order pursuant to the judge's instructions, so she did not believe a Rule 59(e) motion was necessary but that she would have filed one if it was necessary to preserve the record. PCR counsel testified she was aware the Applicant had filed a pro se Rule 59(e) motion. PCR counsel testified the Applicant did not ask her to file a notice of appeal. PCR counsel testified that, if the Applicant had asked her file a notice of appeal, she would have done so but advised the issues he could have raised on appeal would not have been meritorious.

This Court finds the Applicant has not met his burden of proving he is entitled to an Austin review of the issues denied in his first PCR application. The Applicant claims PCR

counsel was deficient in failing to file a notice of appeal following the March 2007 order granting his PCR application. Despite obtaining relief based upon plea counsel's failure to define sexual battery, the Applicant contends PCR counsel was deficient in failing to file a notice of appeal to contest the denial of relief based upon undisclosed plea offers, after-discovered evidence, and other grounds. The Applicant filed a pro se Rule 59(e) motion, and the PCR judge denied the Rule 59(e) motions submitted by both the Applicant and the State. At the PCR hearing, the Applicant admitted on cross-examination that he never asked PCR counsel to file an appeal. PCR counsel testified she generally files a Rule 59(e) motion if a legitimate issue should be preserved for appeal, and, in her professional opinion, no grounds existed for filing such a motion in this case. Further, PCR counsel testified the Supreme Court would be substantially more likely to affirm a grant of relief based upon plea counsel's failure to define sexual battery than on other grounds. Thus, PCR counsel made the strategic decision not to appeal as an attempt to minimize the chances of reversal of the Applicant's relief.

This Court finds that, as the Applicant never asked PCR counsel to file a notice of appeal, she is not deficient for not filing the notice. This Court further finds PCR counsel's decision not to file a notice of appeal without the Applicant's request was a legitimate strategic decision for his appeal, and the Applicant has failed to demonstrate this decision fell below prevailing professional norms. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); McLaughlin v. State, 352 S.C. 476, 483-84, 575 S.E.2d 841, 844-45 (2003) (holding that where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel).

CONCLUSION

Based on all the foregoing, this Court finds and concludes this PCR application must be denied and dismissed with prejudice. This Court advises the Applicant that he must file a notice of intent to appeal within thirty days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Respondent's partial motion to dismiss all issues except for the Austin claim is granted.

2. That the Austin claim is denied and dismissed with prejudice.

3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of [illegible], 2014.

G. Edward Welmaker
Presiding Judge
Thirteenth Judicial Circuit

[illegible], South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	CASE NO.: 2012-CP-23-1297
Terrance Domingo Terry,	)	
	)	
v.	)	**MOTION TO ALTER OR AMEND JUDGMENT**
	)	
State of South Carolina,	)	
	)	
Respondent	)	

COMES NOW the applicant, **Terrance Domingo Terry**, by and through his undersigned counsel, and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, respectfully moves this Honorable Court to Reconsider the January 31, 2014, Order dismissing the applicant's application for post-conviction relief.

The following is submitted in support of Mr. Terry's Motion:

1. On February 20, 2012, Mr. Terry filed an application for post-conviction relief;

2. On August 10, 2013, the State submitted a return and partial motion to dismiss.

3. On December 17, 2013, a Hearing was held in the matter.

4. On January 31, 2014, the Honorable G. Edward Welmaker, signed an Order of Dismissal, dismissing Mr. Terry's application for post-conviction relief.

5. From conversations with Mr. Terry, counsel has learned that he wished for a document that he has written, titled "Response to Return and Partial Motion to Dismiss/ and Amended Application w/ Exhibits" be considered in his case.

WHEREFORE, for the foregoing reasons, Mr. Terry prays that this Court:

(1) Order that the final order dismissing Mr. Terry's application for post-conviction relief be re-opened to supplement the record with his Response to the State's Return, or;

(2) Order whatever the Court deems just and proper.

Respectfully submitted,

By: _____
Brian P. Johnson, Esq.
Attorney for Applicant

Date: February 28, 2014

State of South Carolina
County of Greenville
Terrence D. Terry, * 307935
Applicant
v.
State of South Carolina
Respondent

In The Court of Common Pleas
Case No. 2012-CP-23-1297

Response To Return and Partial Motion To Dismiss / and Amended Application w/ Exhibits

In response to the Respondent's Return and Partial Motion To Dismiss, Filed August 10, 2012, the Applicant would show this Honorable Court:

Within the Respondent's Return it is stated (alleged) that the Applicant has only "one valid issue (ground) procedurally available to present to this Court. The Applicant respectfully asserts that this is in error. And that each discrepancy with the Respondent's allegations contained within their Return will - as needs require - be addressed herein. 1.

* There is no (Amended) Exhibit-7.

---

1. Per page and segment of the "enclosed" document.

I. Statement of the Case

The Applicant is incarcerated with the South Carolina Department of Corrections, pursuant to the Granville County Clerk of Court's order of commitment. The Granville County Grand Jury indicted the Applicant at the February 2005, Term of General Sessions for For two (2) counts of lewd act upon a child (2005-GP-23-1157, -1158), and First degree criminal sexual conduct (CSC) with a minor (2005-GS-23-1274). Ernest Hamilton, Esquire represented the Applicant.

On March 8, 2006, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to concurrent term of Fifteen (15) years for each count of lewd act upon a child and Twenty (20) years for First degree CSC with a minor. The Applicant did not appeal. Until

First PCR Application

Now, the Applicant asserts that the Respondent in their recapitulation of the grounds raised and argued at the PCR hearing of March 1, 2007, have left out a total of 11 issues! Or, better!

In support of this fact, the Applicant has, herein, enclosed "page 2 of the Final Order" from the hearing, for "comparable acknowledgement and acceptance."

The omitted issues were/are as follows:[2] (Amended) Exhibit - 12.

---

1. An entire copy of the Final Order has been submitted with the application.

I. Prosecutorial Misconduct

b. "Failure to test and destruction of evidence"
c. "Use of uncounseled alleged "admission", not in discovery"

II - Ineffective Assistance of Counsel

c. "Failure to address mental health issues"
d. "Failure to present mitigating evidence"
e. "Failure to effectively negotiate with the solicitor"

III - Subject Matter Jurisdiction

a. "Invalid arrest warrants and indictments"
b. "No preliminary hearing"

IV - Due Process violation(s)

a. <u>Brady violations - Failure of PCR Court to grant relief.</u>
1. "State withholding dna results and toxicology report"
2. "Improper chain of custody reports"
3. "Destruction of Glad results and clothing (months after plea hearing)"
<u>4. "Failure of defense counsel to request</u> and review Brady materials" / Applicant

2. In addition to counsel's amendment stating trial counsel's failure to make the record of the nature and critical elements of the charge(s) against him, the Applicant also submitted a memorandum of law raising the above issues. (Amended) Exhibit I).

An evidentiary hearing was convened on March 1, 2007, at the Greenville County Courthouse. Susannah C. Ross, Esq. represented the Applicant. The Honorable Michael G. Nettles granted the Applicant a new trial on all three charges in an Order dated March 26, 2007.

Both parties Filed 59(e) Motions To Alter or Amend the Order Granting PCR Relief. Judge Nettles issued a "subsequent Order Denying" both Motions, thus, sustaining the Order Granting Relief, as prayed. (Amend. Exhibit-2)

The State Filed a notice of appeal and subsequent petition for writ of certiorari of the South Carolina Supreme Court. The Supreme Court granted the petition and both parties submitted briefs. The Applicant was represented by Robert M. Pachak, Esq. of the South Carolina Office of Appellate Defense.

The Applicant (then Respondent) also - at that time - petitioned the Court for pro se status during his certiorari review, and was denied! By an opinion dated July 13, 2009, the Supreme Court reversed Judge Nettles. Terry v. State, 383 S. C. 361, 680 S.E. 2d 277 (2009).

The Applicant then requested appellate counsel petition for rehearing, and was denied the opportunity, by this same appellate counsel. Ultimately and simultaneously, eliminating "any means" for a cross-appeal, jeopardizing the Applicant's one (1) year habeas tolling period, and ceding a portion of the "grounds for validation" of the District Judge's Order To Stay. (Austin Exhibit-13) enclosed!

Federal Habeas Corpus

---

1. Although the Applicant's 59(e) Motion was also denied as an "unauthorized pro se Filing," the PCR Judge acknowledged reviewing its contents. PCR counsel however, had already - by her estimation - terminated representation. (Amended) Exhibit-6.

The Applicant Filed a petition For writ of habeas corpus in the United States District Court For the District of South Carolina (6:10-2006-JFA-KFM). The Respondent submitted a motion For summary judgment on December 10, 2010. The Honorable Kevin F. McDonald, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated June 16, 2011. The Honorable Joseph F. Anderson, Jr., United States District Judge Judge issued an "Order To Stay" the matter, dated September 30, 2011.[1]

Here, with the Respondent's "next-to-last" statement, the Applicant asserts that a "major misconstruance" of a fact contained with Judge Anderson Jr.'s Order To Stay, occurs.

First, the Respondent's assertion (condition) reads:

"Judge Anderson noted that, as the Applicant did not file a notice of appeal after the PCR order was issued in his case, he may have some unexhausted remedies." (Page 3 of the Return).

Next, the Applicant's assertion is that the "appropriate condition" of the Judge's notation concerning returning to the lower state court for exhaustion purposes should read:

"Judge Anderson noted that, "Therefore, the Petitioner (Applicant) must proceed, within 30 days of the date of this Order, to commence an action to exhaust those unexhausted claims outlined in the "RESPONDENT'S" motion for summary judgment." He shall then notify this court within 60 days of the date of this ORDER of the status of his state proceedings and file a copy with this court of the state petition or appeal that he will be filing with the South Carolina Courts. (Page 9 of the Order to Stay).

Or even perhaps the "proper condition" would read:

1. ENCLOSED (Amend) Exhibit - 3.

"Judge Anderson, Jr. noted "Here, the State / Respondent has suggested in its motion for summary judgment that the Petitioner (Applicant) may have unexhausted claims and may have an available State remedy to seek relief upon SOME of the claims he now raises in his First and third habeas petitions. Therefore, he may be able to seek "additional post conviction relief and secure a "belated PCR appeal" on these claims under Austin v. State, 305 S.C. 453 (1991). (Page 6 of the Order To Stay).

In other words, in the instant case the Applicant believes it to be "quite paramount" - in the pursuit of proper protocol - that all matters present themselves with the "utmost clarity." Particularly, in light and view of the Fact(s) (and circumstances) that are guiding this case.

In other words, yet again, it was at the "Respondent's" urging that the Applicant presented "a mixed habeas corpus petition." Judge Anderson, Jr. should be "noted" for acknowledging the State's assessment and utilizing the "available proper applicable habeas procedure(s)." And as such, ... "Judge Anderson stayed (unbiasly) the Federal matter, in order to allow the Applicant to exhaust this State remedy." (Return, Pg. 3).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the prior PCR records.[1]

IV.

---

1. And, the Applicant asserts, in the interest(s) of both this PCR matter and this Response, the "relevant habeas attachments" (exhibits). And (~~Amended~~) Exhibits. / 1. - 13.

In his application for post-conviction relief (and supporting memorandum), the Applicant alleges he is being held in custody unlawfully for the following reasons:[2]

Here, having already added the "self-same additional issues (reasons)" to Respondent's listings for the original PCR application on page 3 of this Response, the Applicant adopts the Respondent's listings as presented, under Prosecutorial misconduct, Ineffective assistance of plea counsel, Ineffective assistance of PCR appellate counsel, and subject matter jurisdiction (grounds 1, 2, 3, and 5).

However, as (ground 4)- Due process violation cites no reason(ings) the Applicant adopts the reasons cited on page (3; IV) of this Response. And adds the following issues - cited and supported - in his "original memorandum of law" (PCR exhibit 8). Enclosed; (See also - PCR Transcript); (Amended) Exhibit - I)

b. Brady violations - Prosecutorial Misconduct.

1. Improper Plea negotiations tactics - argued under ineffective plea counsel.

2. Use of alleged admission of guilt from Family Court, without any documented substantiation(s).

c. Ineffective assistance of plea counsel

5. Improper investigation and consultation - with Brady materials, plea negotiations, mental health issues, and the rendering of the plea, itself; proper understanding of crucial elements of charge(s).

2. As this footnote is the "essential element" of the immediately upcoming section III, it will be addressed, therein.

IV - Page 4. of the Return; Pg. 3 - Footnote 2.

Here, the Respondent asserts the "single ground" for the convening of an evidentiary (PCR) hearing. And as such, the Applicant asserts, due to "misconstruance," the Respondent will "totally subvert" the cause and effect of the matter at hand.

As written, the Respondent first asserts ..... "Though the State filed an appeal from the "GRANT" of post-conviction relief after the Applicant's first PCR hearing, it appears the Applicant is now alleging his PCR counsel should have also filed a notice of appeal." Also, this construance is "partially based" upon the caption of the "current PCR application citing (pursuant to Austin v. State. (Pg. 3 - Footnote 2.)

The Applicant asserts that (regrettably) Respondent counsel clearly has not given all the relevant data (documentation) affiliated with this case, the "appropriate scrutinization" that it warrants. Or, so it would seem. This is of especial concern to the Applicant, in that, the current Respondent counsel is the "self-same" individual that he faced in his initial PCR action, and prevailed against, in March of 2007. And (indirectly) as well, on Certiorari to the South Carolina Supreme Court, for the most part.

The Applicant pleads the necessity of this elaboration, in that, with "significant relevance" to the Respondent's above assertion:

A.) As the initial PCR records would / will substantiate, and if Respondent counsel would recall ...., and if the court pleases ....,:

i.) In 2007, after the hearing of March First, the Applicant's alleged controversy" with PCR defense counsel was that, (or rather, with), the Filing and submission of a 59(e) Motion To Alter or Amend the court's Final Order. Where the issue of the Applicant's "assumedly justified submission" (pro se) - citing PCR counsel's "termination of representation (prematurely)"[2] was challenged by "current Respondent counsel" in a "Return To Deny" the Applicant's Filing, citing Jones v. State (hybrid representation). And, the Applicant's exceeding the ten (10) - day time limit to file the 59(e) Motion, pro se or otherwise,[1] citing (arguing) that the "10-day clock" starts when the Applicant's counsel receives the Final Order, not the Applicant, himself. Ultimately, in an Order Denying both 59(e) Motions, the PCR Judge "upheld" Respondent counsel's argument concerning a "hybrid" pro se Filing. (See Austin exhibits (Amended) - 2.

B.) As the Applicant was "unable to prevail" with the PCR court in "pursuing" all of his grounds (issues) for certiorari reviewd through the assertions (circumstances) stated above, and in Footnote 1; below, the Applicant (then) determined to present his agenda on his issues to appellate defense counsel.

C.) who, in turn, determined that the "only agenda" he (counsel) would pursue - in the Applicant's behalf - was the "single issue" upon which the Applicant was granted relief. That again being, ineffective counsel (plea) - Failure to explain "nature and crucial elements of the charges.

---

1. As the Applicant (then) had received PCR relief, (on one issue), no one "perceived or anticipated" his requesting "reconsideration" on the others. (Amended) Exhibit - 4. 9. 2. (Amended) Exhibit - 6.

D.) The Applicant then sought out to present his additional grounds and issues - citing "irreconcilable differences" - as a "pro se" litigant to the South Carolina Supreme Court. And in so doing, attempted to initiate a "cross-appeal." Not an appeal as a "dismissed, PCR case, Respondent. But rather, as a PCR, granted, Petitioner seeking "additional appellate (PCR) relief." (Austin Exhibits - 10 thru 12)

E.) However, the Applicant (then Petitioner) was denied "pro se" status, by the court. While simultaneously denying my "initial attempt" at the cross-appeal. (See, Austin Exhibit-11); (Amended) Exhibit - 5.

F.) And causing my "forced acceptance" of appellate counsel, and his "less-than-perfunctory" representation of my cause. By my estimation. And as such.... It is the Applicant's allegation, with this court.... that.... in part.....:

It was his the Applicant's "appellate counsel" - who, after "due-diligence" - should have also filed (not, a notice of appeal), but rather, (a notice of a cross-appeal)." The Applicant became, the ~~Petitioner~~ in the certiorari matter (or rather) the Respondent. Securing PCR relief. And by all "ordinary rights and understandings", was expected to "content himself with the "degree of relief garnered." Thus, availing himself to the necessity to "answer a notice of appeal", not file one.

And, in the other part....

It was the South Carolina Supreme Court's "denial" of the Applicant's right to a "pro se" submission - as the Respondent - of a "cross-appeal that sets the "partial criteria" for a hearing on the "grounds" submitted in his Austin application. And not the "sole ground" that the

the Respondent misinterprets as the Applicant's allegation. (Amended) Exhibit - 8.
And, in final part with this allegation....
It is/was the Applicant's appellate counsel's denial of his (applicant's) request to "petition for a rehearing" that "literally demolished" the remaining opportunity (ies) of a cross-appeal. Coupled, again, with the court's implemented denial of the Applicant's right to self-representation.[1]
Under section IV of the Return, the next Respondent's assertion(s) read:
"Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a PCR applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application." And, "The Respondent lacks sufficient information to admit or deny this allegation."
To which, the Applicant responds:
Under Austin.... in relevant part, it reads.... "they are "belated" appeals intended to correct procedural defects."
And then asserts, through inquiry,.... As, in the instant case presents itself, with the Applicant defining his "procedural defect" as being "not enough" PCR relief, was/is he not "still entitled" to the rights of a belated appeal, possessing "a limited granting" of his application? Under Austin?
For - the Applicant contends - if he is not entitled to this appeal, as understood and argued by himself, through this Response and entire submission, then further pursuance at this level becomes a "moot cause."
And the Applicant would respectfully request leave to return to the habeas level of his appellate process, at this immediate point."
However, if he is entitled, still, to this belated appeal, then he fur-

---

1. Austin Exhibit - 13. (Amended) - 9.

Ther contends tha the current Respondent counsel should, indeed, have in her possession "sufficient information" to admit to the Applicant's assertions," with bringing this appeal, as being "correctly substantiated, and justified.

By acknowledgement of Respondent counsel's Return to the Applicant's Austin Petition it is established that:

a.) This is not an "ordinary PCR circumstance". But rather, a situation of extenuating factors. In that, (under rare conditions), PCR relief was aquired, then lost. Each issue (ground) raised by the Applicant/Petitioner has been "argued down, as insignificant" by all Respondent counsel's, at "three levels of appeal". And, with this Austin circumstance, four levels.

b.) Yet, at the Applicant's "third (habeas) level," a degree of relief, again, where the issues were ruled "not plainly meritless", "diligently pursued," "though, with unexhausted claims, this was not due to Applicant/Petitioner negligence," and worthy of Federal review out weighing the competing interests in Finality and speedy resolution of this matter of appeal - was aquired, under Rhines v. Weber; 544 U.S. 269 (2005).

c.) Although the Respondent "has not deemed it relevant" to include any of the Applicant's "habeas documentation" in the records - particullarly the District Judge's "Order To Stay" the Applicant's habeas case, to which, Respondent counsel has referred - it is the Applicant's belief that counsel, both, has these in possession, and yet, hold them in reserve.[1] Although why, seems questionable. And then again, not. The Applicant would respectfully reiterate.... that the

1. Please See pg. 21 (back) for ¶12. → a "partial retraction"!

inclusion of the issues documentation - in light of the Applicant's reviewing the Respondent's Return and Partial Motion to Dismiss - will prove crucial to this court's determination of whether cause for a hearing exists. As well as, under what grounds.

d.) Lastly, with this last statement in this section made by the Respondent, the Applicant asserts, through inquiry.... If, in fact and deed, post-conviction relief was granted on the Respondent's sole ground, in the Applicant's favor, would it not be feasable to expect the relief to be in the form of allowing the grounds raised in the "original application and supporting memorandum" to be heard?"

Or, perhaps in other words of inquiry.... If the Respondent in section III requests a hearing on the "admissability" of a review of the application (and its implied grounds), how is it in section Four, the Respondent is moving to have "any and all" other issues (grounds) dismissed?

In short, how does the Respondent propose to do away with the application without doing away with what the application contains? - Or, vice-versa? - Which are the grounds? At least, of the certiorari issue(s)!

II.

As stated above counsel (Respondent) "presumes" to do away with the issues (grounds) raised in the application, through dismissal for statute of limitations (1-year) pursuant to South Carolina Code Ann. § 17-27-45(a). Also, Peloquin v. State, 321

S.C. 468, 469 S.E.2d 606 (1996).

To which, the Applicant asserts.... First....

Again, for the Respondent to move against "any and all other issues," is to move against the application, itself. As, the Applicant perceives, "one is indicative of the other."

Second.... and Further....

"The Supreme Court has carved out an exception to the statute of limitations for when an applicant did not knowingly and voluntarily waive his right to appeal from his PCR application."
Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

As the Applicant has argued, (and continues to do), a "proper scrutinization" of all the "supportive documentation" contained within "Austin submission - i.e. his "memorandum of law and exhibits" from the "previous levels of appeal," thus far - clearly establish that the Applicant, did in fact, make "considerable efforts" to pursue and secure an "appropriate appeal" of his PCR situation. To also include, this Response and its applicable exhibits.

"When considering the State's motion for summary judgment, the PCR court "must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant."
Wilson v. State, 348 S.C. 215, 559 S.E.2d 581, 582 (2002); Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000).

Third....

As "all evidence denotes" within the Applicant's "Austin

---

1. The

application, this appeal is not being brought under Code Ann. § 17-27-45(a), but "Rather" a "belated" appeal. Citing Austin v. State, Id.. And as such, "clearly insinuates" that this action cannot be brought without "an initial PCR application (and subsequent hearing) having "already taken place". Austin-(in relevant part)-states.... "to correct" unjust procedural defects."! (Begin Section V - HERE)!

Lastly, under South Carolina Code Ann. § 17-27-90 (2003), as asserted in the Respondent's Return (in relevant part to this, the Applicant's argument) reads:

...."unless the Court finds a ground for relief asserted which for "sufficient reason" was not asserted or was inadequately raised in the original, supplemental or amended application."

The Applicant asserts (and assesses) that.... Even if this statute were the "sole basis" upon which he could rely, the "sufficient reason" for this "particular" issue would lie under the auspices of "inadequately raised", or Contrari, for the reasoning(s) proposed throughout this Response. And, "inadequately preserved" during PCR!

On the sixth and final page of the Respondent's Motion, citing Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991),... Any new ground raised in a subsequent application is limited to those

1. The Applicant posits "a brief digression".... through an inquiry to the Respondent's tabulations in Section IV.... with his (Applicant's) filing time, which is.... As he (Applicant) did timely file his initial PCR application, would it not have been untenable "to file an application under § 17-27-45(a), simultaneously?

grounds raised that "could not have been raised .... in the previous application." Id.

The Applicant responds (and asserts) that if (in fact) this was his "sole justification" - as the Respondent deems "viable" - for this submission, then the "grounds and issues" raised under "Ineffective assistance of PCR appellate counsel and Due process violation," under (or rather) at the "certiorari level" of his PCR appeal, would fall into the category of allegations that "could not be raised" in the original application. Seeing as how, they had no standing to "come about" until after "the Applicant's case has / had been heard in the Court of Common Pleas.

Thus, their being entered here cannot be challenged as "successive."

IV

The Applicant asserts that "each allegation" contained herein has been "expressly admitted, qualified and explained," with this final "caveat".

As Respondent counsel has to be aware (or should be, with the appropriate scrutinization of the habeas documentation), it was, nor is, the Applicant's "perceptions" or even desire to bring this case "back down" from its "habeas loft." But rather, again, at the "habeas Respondent's" urging, and that of the United States District Judge - Joseph F. Anderson, Jr.'s - "Order To Stay" the habeas proceedings. As exemplified within the Applicant's "Amend-

1. Mr. Alfonzo Simon, Esq.

ed exhibits" for this appeal. And, as also specified in the Respondent's "Motion for Summary Judgment" Excerpt (herein identified as the Applicant's exhibit (Austin) No. 10), where it is variously stated.... (Amended)→

(Cover Page 1 of 72)

.... "Respondent submits the action constitutes a mixed petition because Petitioner (Applicant) may still seek appellate review upon some of his post-conviction claims by using (utilizing) the post-conviction procedures outlined by Austin v. State..."

(Page 28 of 72)(V. EXHAUSTION)

"The record does not support a finding of exhaustion. 28 U.S.C. § 2254(b)(1)."

"Petitioner did file an application for PCR. In his APCR, Petitioner "arguably" raised the claims now raised in Grounds One, Two, Three, and Four of the "First habeas petition," and the Grounds raised in Grounds One, Two, and Three of the "third petition."[1] (Page 29)

"Habeas Respondent then asserts (submits)" "During the appeal, Petitioner "did" file a motion to proceed "pro se" with the South Carolina Supreme Court, thus, "arguably" raising the claim he now raises in Ground four of the second habeas petition." Next, Respon-

---

1. While the Respondent's, "arguably," denotes - "with reservation," the Applicant asserts that "arguably," should denote - "an affirmment that" "each ground (issue) raised" in his APCR and supporting memorandum, were brought before the Court of Common Pleas, extensively, in a three hour PCR hearing."

dent submits...." Petitioner asserts in Grounds Two and Four of the "Second Habeas Petition" that he requested PCR appellate counsel challenge the denial of relief upon his other claims.[1] He may be able to seek additional post-conviction relief and secure a belated PCR appeal on these claims."

Respondent counsel then goes on to cite "Odom v. State, 337 S.C. 256, 259, 260, 523 S.E. 2d 753, 755 (1999)," and distinctly clarify" that an Austin review must be brought forth through a "post-conviction relief action."

Habeas Respondent even denotes that the "1-yr. statute of limitations" is not applicable to an Austin circumstance.

(Page 30 of 72)

Habeas Respondent "lastly" submits...."Thus, this habeas action contains both exhausted and unexhausted claims. Respondent submits therefore that it should be dismissed to allow for state court review of the unexhausted claims." Citing Rose v. Lundy, 455 U.S. 509, 520, 522, 102 S.Ct. 1198 (1982).

Addendum

The Applicant asserts that clearly:

A.) From all contained herein, it is "unequivocally" established that "Habeas Respondent" set the "precedence" for this appeal.

---

[1] Please see "Footnote": Summary Judgment Excpt. (Pg. 24).

As well as, under "what parameters." Not the Applicant.!

B.) The United States District Judge "concurred" with Habeas Respondent and "Stayed" the case under Rhines v. Weber, 544 U.S. 269 (2005).

C.) As this is an action being brought as a "descention" from the "higher court," rather than, an "ascention," it carries with it "extraordinary circumstances"; worthy of all due consideration.

D.) Of which, will reveal that, any contention(s) with its submittance by "current state Respondent" "should (or rather) "should have been" taken up with, both, Habeas Respondent counsel and the United States District Judge (Court), "before" the submittance and preparation of the Return and Partial Motion To Dismiss. And, again, not the Applicant, who, in his "best efforts" to follow the "habeas directive(s)," mistakingly "attempted to bypass the PCR court, by filing Austin First, with, both, the South Carolina Supreme and Appeals Courts." But, was graciously denied admittance, and then "endorsed" to start, here. (See attached Austin exhibits [redacted]- 11.

E.) Also of which, due to its "extraordinary circumstances", the records of the Greenville County Clerk of Court concerning the subject convictions, Department of Corrections, and prior PCR, "do not suffice" in providing the "adequate information(s)" necessary to, either, refute or substantiate current Respondent's allegations. But rather, require "inclusion" of all relevant Certiorari and Habeas records, as well. Aside From (and, to include) those submitted by the Applicant.

IV

WHEREFORE, having made his Response, the Applicant request that:

1.) A hearing be held, based upon the issues (as designated) by, and within Habeas Respondent's "Motion For Summary Judgment-(Except)" and the United States District Judge's "Order To Stay."

2.) It be agreed that a hearing based Respondent counsel's (PCR) "sole issue of the right to a belated appeal," invariably, brings forth the designated issues, anyway, in order for this court to determine the "relevancy of their merit," to support, whether or not, a cross-appeal (then) and a belated appeal (now) would have or would prove prudent and/or beneficial."

3.) Two subsequent PCR hearings (in the interest(s) of "cause and effect")-as the Applicant will pursue and challenge "this Return" is not in the interest of judicial economy. When all relevant matters can be settled, in one sitting. And, as such, again, this Court's agreement.

4.) It be agreed that, with the exception of the "Certiorari issues" that could not be raised until after the PCR hearing- all other issues were clearly established as part of the "timely" PCR proceedings. As well as, introduced in the original allegations.

5.) It be understood that, if the "procedural defects" challenged under Austin - by the Applicant - were "directly PCR related," then an Austin Filing could not even be considered until,

1. Respondent's

VII - Cont'd / Conclusion

AFTER, the PCR hearing run its course. And, that they could not run simultaneously.

6.) This submission not be declared "successive when it has been established and decreed" (mandated?) that a second application is the "appropriate due process measure" for this circumstance.

7.) The Applicant be held "blameless" and "unhindered" with the bringing of this matter. As, he has pursued "due diligence". (AGAIN)!

CONCLUSION

"While prosecutors may strike hard blows, they are not at liberty to strike foul ones."

Berger v. U.S., 295 U.S. 78, 55 S. Ct. 629 (1935)

"Pro se litigant's pleadings are to be construed liberally, and held to less stringent standards than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so, despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements."

McCormick v. City of Chicago, 230 F. 319 (7th Cir. 2000).

Boag v. MacDougal, 454 U.S. 364, 70 L. Ed 2d 551, 102 S. Ct. 700 (1982).

Haines v. Kerner, 404 U.S. 519, 30 L. Ed 2d 652, 92 S. Ct. 594 (1972).

8.) And, For all aforementioned, no dismissal!

Respectfully, Submitted

s/ _____
Attorney For Applicant

21.

s/Mr. Terrance A. Terry
Applicant

Retraction (Partial)

On page 12 of this Response the Applicant asserted that this Respondent counsel included none of the habeas documentation within the "current PCR record."

At the time of this statement, the Applicant was in possession of what would be the "First Return copy" - dated August 10, 2012. Served by Respondent's "legal assistant." Unfiled!

Of which, the Applicant immediately set forth to answer "up to and beyond" pg. 12 of this Response. However, before the Applicant could complete this Response, he was served with a "second "Filed" copy" of this "same Return" - dated August 23, 2012.[1]

Along with the Filed Return was, "inded" a copy of the U.S. District Judge's "Order To Stay" the habeas proceedings. And the Magistrate's Report and Recommendation. And as such, this "partial retraction."

However, as this "Response and Amended Exhibits" stands, it is quite necessary to include more than these "two habeas papers," to provide this Court with the "adequate information" to make a determination on these pretrial motions.

And as the Applicant believes it necessary, as well, he respectfully requests of this Court to review the "additional exhibits in support, from the lower State Courts. In retraction!

* Noting that the S.C. Supreme Court did (once) grant pro se status! (Amend.) - E

1. The Applicant was served on August 27, 2012.

868

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. 2012-CP-23-1297 **RETURN TO MOTION TO ALTER OR AMEND THE ORDER OF DISMISSAL**

Respondent, by and through undersigned counsel, making Return to Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief (PCR) action filed February 20, 2012.

2. An evidentiary hearing was convened on December 17, 2013 at the Greenville County Courthouse.

3. Applicant was present at the hearing and represented by Brian P. Johnson, Esquire. Applicant testified in his own behalf. Also testifying was Applicant's attorney from his first PCR action, Susannah C. Ross, Esquire.

4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order of dismissal dated January 31, 2013 and filed February 17, 2014. This order granted Respondent's partial motion to dismiss and denied Applicant's request for a review of issues from his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

5. Applicant's counsel filed a Motion to Alter or Amend Judgment on February 28,

Copy to Applicant

2014 (which was received by Respondent on March 5, 2014). Applicant's counsel argues he "has learned that [Applicant] wished for a document he has written, titled 'Response to Return and Partial Motion to Dismiss/and Amended Application w/ Exhibits' to be considered in his case." Applicant's counsel requests the matter be reopened for this pro se document to be considered by the court.

6. Respondent submits Applicant's Motion to Alter or Amend Judgment should be denied. Applicant is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reopen the record for submission of a pro se document. Hybrid representation is not allowed. 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). Further, Applicant cannot skirt the hybrid representation issue by submitting documents through his attorney. See Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client).

7. Respondent submits the request to reopen the record should be denied. Applicant had a full and fair opportunity to present any and all evidence during the lengthy hearing on December 17, 2013.

8. Respondent submits the post-conviction relief court fully reviewed and properly ruled upon all issues, that the record should not be reopened, and that the Motion to Alter or Amend should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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

By: _____
Attorneys for Respondent

March 6, 2014

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE TERRENCE DIMINGO TERRY, 307935 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2012-CP-23-1297 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 by depositing same in the United States mail, postage prepaid:

Brian P. Johnson, Esquire
522 North Church Street
Greenville SC 29601

DATED this 6th day of March, 2014.

Judy A. C. Carey, Legal Assistant
For Respondent

872

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP231297

Terrence Dimingo Terry	**State of South Carolina**
PLAINTIFF(S)	**DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☒ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This matter comes before the court on Petitioner's Motion to Alter or Amend the Order of Dismissal pursuant to SCRCP 59(e). Upon a thorough review of Petitioner's motion, Respondent's return, and the record in this case, this court rules that Petitioner's Motion is DENIED due to hybrid representation. Even if the hybrid representation issue did not exist, this court believes all issues raised by Petitioner are encompassed in the Order of Dismissal.

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

3/11/2014

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on 3-25-14, and a copy mailed first class or placed in the appropriate attorney's box on 3-25-14, to attorneys of record or to parties (when appearing pro se) as follows:

Brian P. Johnson, 522 North Church Street, Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Ratigan, PO BOX 11549, Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Court Reporter

Paul B. Wickensimer - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

WITNESSES

BRACKEN /BBrown/S

GCOS

07/10/04

ARREST WARRANT NUMBER

I 466187

ACTION OF GRAND JURY

TRUE BILL

T. Daniel Hamilton

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2005-GS-23-
BSS
001157

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2005

PLEAD GUILTY

THE STATE

VS.

TERRENCE DIMINGO TERRY

(9)

Hamilton.

✓ 2468

Indictment for

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

589

874

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on FEBRUARY 22, 2005 the Grand Jurors of Greenville County present upon their oath:

That TERRENCE DIMINGO TERRY did in Greenville County, on or about the 31st day of May, 2004, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of B.N.M., a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Byrna S. Stacy
SOLICITOR

WITNESSES

BRACKEN / BROWNS

GCSO

07/10/04

ARREST WARRANT NUMBER

I 466191

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2005-GS-23- BSS

The State of South Carolina

001158

County of Greenville

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2005

PLEAD GUILTY

THE STATE

VS.

TERRENCE DIMINGO TERRY

✓ 2468

Indictment for

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

590

876

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on FEBRUARY 22, 2005 the Grand Jurors of Greenville County present upon their oath:

That TERRENCE DIMINGO TERRY did in Greenville County, between the 1st day of June, 2004 and the 25th day of June, 2004, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of M.F.M., a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such child. This is in violation of §16-15-140 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Byrna S. Seay
SOLICITOR

WITNESSES

BRACKEN /BROWN/S

GCOS

07/10/04

ARREST WARRANT NUMBER

I 466186

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2005-GS-23- BSS 001274

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2005

THE STATE

vs.

PLEAD GUILTY

TERRENCE DIMINGO TERRY

Indictment for

0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

VIOLATION § 16-3-655(1)

101

878

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

At a Court of General Sessions, convened on FEBRUARY 22, 2005 the Grand Jurors of Greenville County present upon their oath:

That TERRENCE DIMINGO TERRY did in Greenville County, on or about the 4th day of July, 2004, engage in sexual battery with Minor 1 who was less than eleven years of age. This is in violation of South Carolina Code of Laws Section 16-3-655(1).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Byna S. Leary
SOLICITOR

880

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Terrence Dimingo Terry)
AKA:)
Race: B Sex: M Age: 45)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
Greenville, SC 29605)
DL#: 99999999 SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2005-GS-23- 157
A/W#: I466187
Date of Offense: 05-31-2004
S.C. Code § : 16-15-140
CDR Code #: 2468

☐ **CASE RESTORED**
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: LEWD ACT ON A CHILD
in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:
Bryna S. Seay
Solicitor:

Terrence D. Terry
Defendant

Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 15 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 241 DAYS

SPECIAL CONDITIONS:

☒ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

Paula B. Vickery
Clerk of Court/ Deputy Clerk
Court Reporter: Hunt, Lisa

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE Edwin W. Dennis
Judge Code: 21 1310
Sentence Date: 3/8/05

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Terrence Dimingo Terry)
AKA:)
Race: B Sex: M Age: 45)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
Greenville, SC 29605)
DL#: 999999999 SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2005-GS-23- 1158
A/W#: 1466191
Date of Offense: 06-01-2004
S.C. Code § : 16-15-140
CDR Code #: 2468
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS
TO: LEWD ACT ON A CHILD
in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:
Solicitor: Terrence D Terry Defendant Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 5 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 241 DAYS

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

Clerk of Court/ Deputy Clerk
Court Reporter: [illegible]

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE J. C. Dumas
Judge Code: 21310
Sentence Date: 3/8/05

SCCA/217 (7/2003)

~~882~~

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)
STATE VS.)
Terrence Dimingo Terry)
AKA:)
Race: B Sex: M Age: 45)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
Greenville, SC 29605)
DL#: 9999999 SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
2005-GS-23- 1274
A/W#: I466186
Date of Offense: 07-04-2004
S.C. Code § : 16-03-0655(1)
CDR Code #: 0385

☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: CRIMINAL SEXUAL CONDUCT WITH A MINOR 1ST DEGREE
in violation of § 16-03-0655(1) of the S.C. Code of Laws, bearing CDR Code # 0385
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST:
Bryan S. Gray
Solicitor: /

Terrence D Terry
Defendant

Attorney for Defendant

WHEREFORE, the Defendant is commited to the ☐ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of 20 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 241 DAYS

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharg	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§ 73.3, 1B TP (Law Enforce. Funding)	$25	$ 25
§ 33.7, 1B TP (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

Paul M. Cain
Clerk of Court/ Deputy Clerk
Court Reporter: Hudgens

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP Requires $500 be paid to Clerk during probation.

PRESIDING JUDGE John W. McC
Judge Code: 21 11 310
Sentence Date: 3/8/05

SCCA/217 (7/2003)