

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2014-002270

RECEIVED

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S.C. Supreme Court

KEVIN C. BRADLEY, 339031,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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* This document, fully redacted as per court rules, appears at App. p. 45. It is attached hereto to demonstrate Petitioner’s date of birth and that it was established in documents before the lower court.

QUESTIONS PRESENTED

- I. Did the lower court err in failing to grant Petitioner's Post-Conviction Relief where he met his burden of proof concerning his allegations that Plea Counsel's representation was deficient in that he advised Petitioner to plead guilty without a) advising him of crucial information regarding the alleged Victim in this case, b) without advising Petitioner of the manner in which the Victim's credibility could be impeached at a jury trial and c) without interviewing the Victim?
- II. Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Petitioner clearly met his burden of proof with regard to his allegation that Plea Counsel was ineffective for failing to advise him that a reversal on direct appeal of his convictions and sentences from his jury trial on Indictment No. 2009-GS-45-0249, would not afford him the opportunity to challenge the judgment and sentence he received on Indictment No. 2010-GS-45-30 pursuant to his guilty plea?
- III. Did the lower court err in denying Petitioner Post-Conviction Relief where the record below supports his claim that Plea Counsel was, on the facts of this case, ineffective for failing to preserve his right to a direct appeal?
- IV. Did the lower court err in denying Petitioner's Application for Post-Conviction Relief where Plea Counsel was clearly ineffective for permitting Petitioner to enter a plea of guilty to this charge where Petitioner had openly declared his innocence at the time of this plea?
- V. Did the lower court err in failing to find Plea Counsel's performance deficient where he failed to obtain a clarification from the presiding judge concerning Petitioner's sentences?
- VI. Did the lower court err in failing to grant Petitioner's Application for Post-Conviction Relief where Plea Counsel allowed Petitioner to be coerced into pleading guilty by the threat that the State could seek a life without parole sentence against him if he went to trial on this indictment without discussing with Applicant the possibility of arguing that he would be ineligible with that sentence pursuant to S. C. Code § 17-25-45 where the indictment alleged that this offense happened sometime between October 1, 2006 and October 1, 2007, and the Applicant did not turn eighteen (18) years old until July 17, 2007?
- VII. Did the lower court err in denying Petitioner's Post-Conviction Relief Application where Petitioner proved that Plea Counsel had a significant undisclosed conflict of interest in representing Petitioner where he had previously represented the Victim in this case in multiple legal matters, and had represented another individual charged with sexual battery on the alleged Victim as well?

II.

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Williamsburg County Clerk of Court. The Petitioner was originally indicted for Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2009-GS-45-249. The State subsequently sought an amendment to the original indictment to add a count of First Degree Criminal Sexual Conduct with a Minor involving the same Victim as the original indictment for Second Degree Criminal Sexual Conduct with a Minor. The true billed, amended indictment charging Petitioner with both first degree CSC with a minor and second degree CSC with a minor was true billed by the Grand Jury on January 21, 2010. Petitioner was represented on that indictment by retained counsel, Richard Strobel, Esquire.

Petitioner was also indicted for a separate count of Criminal Sexual Conduct with a Minor Second Degree involving a different Victim in Indictment No. 2010-GS-45-30. Petitioner was represented on that charge by Assistant Public Defender, Legrand Carraway. On January 25, 2010, Petitioner appeared before the Honorable Clifton Newman for a guilty plea proceeding at which he was expected to enter pleas to one count of Criminal Sexual Conduct with a Minor 1st Degree from Amended Indictment No. 2009-GS-45-249 and one count of Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2010-GS-45-30. The State had agreed to dismiss count two of Amended Indictment No. 2009-GS-45-249 which charged Petitioner with Second Degree CSC with a Minor involving the same minor as referenced in Count One of that indictment. At that proceeding, the Petitioner was anticipated to waive Grand Jury presentment on Indictment No. 2010-GS-45-30. That plea proceeding was terminated before the Court accepted Petitioner's pleas after he advised the Court that he did not "*want to give up [his] rights.*" App. Vol. II, p. 244, ll. 1-9. Attorney Carraway, spoke once on the record during this

plea proceeding. App. Vol. II, p. 241, ll. 15 – 18. Likewise, Attorney Strobel spoke out only once during this proceeding and that was when he introduced an affidavit prepared by him in anticipation of the pleas. App. Vol. II, p. 241, ll. 12 – 14.

Petitioner proceeded to trial by jury before the Honorable Clifton Newman on Indictment No. 2009-GS-45-249 later in the same day as the attempted plea proceeding; January 25, 2010. Petitioner was found guilty as charged on both counts of Indictment No. 2009-GS-45-249 and was sentenced by Judge Newman to twenty-five (25) years incarceration for First Degree CSC with a Minor, and twenty (20) years for Second Degree CSC with a Minor. Said sentences were specifically ordered to be served concurrent with each other. No direct appeal from these judgments and sentences was perfected on behalf of Petitioner.

On January 27, 2010, immediately after the Court imposed sentences on both counts of Indictment No. 2009-GS-45-249, Judge Newman reminded Petitioner that he was looking at a mandatory life without parole sentence if he was ultimately convicted on the other pending charge against him. App. Vol. II, p. 246 - p. 247, ll. 4 – 11. Petitioner then asked if he could just go ahead and plead guilty, be sentenced on his other outstanding charge and be sentenced concurrently. While Petitioner stated that he did not want to plead guilty, because he knew he was not guilty of that crime, he indicated a desire to just plead and “get it over with” and receive concurrent sentences. He reminded the Court that he had reached a plea agreement with the State on these charges before his trial. App. Vol. II, p. 247, ll. 12 – 18. At that juncture, Judge Newman informed Petitioner that;

Well, I don't accept guilty pleas from people who are not guilty. I only take guilty pleas from people who are guilty. They have to convince me, just as the Solicitor has to convince the jury that you are guilty in this case, you've got to convince me that you are guilty in that other case before I can accept a guilty plea. We'll give you overnight to think about that.

App. Vol. II, p. 247, ll. 19 – 25.

The following day, January 28, 2010, Petitioner once again appeared before Judge

Newman, at which time he entered a plea of guilty on Indictment No. 2010-GS-45-030 on which he was charged with Second Degree CSC with a Minor. Said indictment had not yet been presented to the Grand Jury. Petitioner waived his right to Grand Jury presentment on the record during this plea proceeding. There were no plea negotiations entered in exchange for Petitioner's plea on that indictment with the exception of the fact that the State agreed to allow Petitioner to plead as though he had no prior convictions. App. p. 3, ll. 21 – 23. He was sentenced by Judge Newman to five (5) years imprisonment for that offense. It was expressly ordered that said sentence be served consecutively to the sentence imposed on Indictment No. 2009-GS-45-249. The record reflects that Judge Newman did not specify whether the five (5) year sentence was to be consecutive to the aggregate term imposed on 2009-GS-45-249 or consecutive to the Twenty (20) year sentence imposed for Second degree Criminal Sexual Conduct with a Minor. App. p. 12, ll. 3–10.

Petitioner originally filed an Application for Post-Conviction Relief on September 29, 2010. The State made Return to said application on September 7, 2011. In said application, docketed at 2010-CP-45-389, Petitioner raised allegations concerning the judgments and sentences imposed against him following his jury trial on Indictment No. 2009-GS-45-0249, as well as allegations addressing the judgment and sentence imposed following his plea of guilty on Indictment No. 2010-GS-45-030. Petitioner subsequently filed an Amended Application on the original application docketed at 2010-CP-45-389 on June 12, 2012. App. pp. 21-26. The only distinction between the original application filed on September 29, 2010 and the Amended Application filed on June 12, 2012 was the addition of corrected information concerning who counsel of record on Indictment No. 2010-GS-45-30 for Criminal Sexual Conduct with a Minor, Second Degree. See, App. p. 19 and App. p. 25a. Pursuant to agreement with the State, Petitioner subsequently filed a separate application separating his claims concerning his guilty plea on Indictment No. 2010-GS-45-030 from the allegations addressing his jury trial. That

Application was docketed at 2013-CP-45-00098, and was filed on February 25, 2013. App. pp. 27-33. On May 21, 2014 Petitioner filed an Amended Application for Post-Conviction Relief on his Application docketed at 2013-CP-45-00098 in which he alleged with specificity his Sixth Amendment claims regarding Indictment No. 2010-GS-45-30 and his plea entered on January 28, 2010. App. pp. 39-43.

An evidentiary hearing was convened in this matter at the Sumter County Courthouse on May 27, 2014. Petitioner was present for this proceeding and was represented by Tara Dawn Shurling, of the Richland County Bar. The Respondent was represented by Daniel Gourley, Assistant Attorney General. On August 6, 2014, Counsel for Petitioner filed a Memorandum in Support of PCR Application in the Form of a Proposed Order. App. pp. 153-206. On August 25, 2014, an Order of Dismissal was filed on this application. Said Order was issued by Judge Cothran on August 19, 2014. Said Order was not received by Counsel for the Petitioner until September 30, 2014. A timely Notice of Appeal was filed on behalf of Petitioner on October 23, 2014. App pp. 236-237.

Petitioner now respectfully asks that the Writ be granted and that he be granted a reversal of the Order of Dismissal and a new trial based upon the arguments and authorities presented herein. In the alternative, he seeks the opportunity to fully brief the issues summarized herein.

In his initial Application for Post-Conviction Relief Petitioner alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim he has raised the following specific allegations in his original application:

1. Plea Counsel failed to provide client effective assistance of counsel prior to and during his plea proceeding. The Petitioner's plea of were coerced by Counsels failure to provide adequate representation. Trial Counsel failed to file a direct appeal for the Petitioner and the Petitioner did not knowingly waive his right to a direct appeal.

2. The Petitioner's plea of guilty was not voluntarily and intelligently entered. The judgment and sentence against the Petitioner were entered in violation of his rights to due process of law and effective assistance of counsel.

In his Second Amended Application for Post-Conviction Relief, filed on May 21, 2014, Petitioner raised the following additional specific allegations:

1. Plea Counsel was ineffective for advising the Petitioner to plea guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct when the results of DNA testing had confirmed that the Petitioner was not the father of a child conceived by the victim.

2. Plea Counsel was ineffective for advising the Petitioner to plea guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct when the victim was not cooperating with the prosecution of the charges against he Petitioner.

3. Plea Counsel was ineffective for neglecting to interview VICTIM concerning these charges where her original accusation against Petitioner, that he had impregnated her, had been proved false by DNA testing.

4. Plea Counsel was ineffective for advising the Petitioner to plea guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct without discussing with him the ways in which the forensic evidence in this case, specifically the DNA test results, could be used to impeach the credibility of the victim's claims against the Petitioner.

5. Plea Counsel was ineffective for permitting his client to enter a plea of guilty to Second Degree Criminal Sexual Conduct on Indictment No. 2010-GS-45-30 where the Petitioner openly declared his innocence at the time of his plea.

6. Plea Counsel was ineffective for advising the Petitioner to plea guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct without explaining to him that if he were to succeed in getting his convictions and sentences from his jury trial overturned on appeal, such a reversal would not afford him the opportunity to challenge the judgment and sentence entered pursuant to his plea on Indictment No. 2010-GS-45-30.

7. The Plea Court erred in accepting the Petitioner's plea of guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct where the Petitioner clearly protested his guilt on the record during the plea proceeding.

8. Plea Counsel was ineffective for failing to preserve the Petitioner's right to a direct appeal from the judgment and sentence entered pursuant to his plea on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct where the Petitioner clearly did not waive his right to such an appeal.

9. Plea Counsel was ineffective for failing to discuss with the Petitioner the potential use of character witnesses to testify in the Petitioner's behalf if he went to trial by jury; specifically Sgt. Robert McClary, Debra Black, Manager at Skyes in Kingstree, South Carolina, Sgt. Staggers, employed with the 1052nd Transportation Company Army National Guard, and Frederick Davis of the Kingstree Police Department.

10. Plea Counsel was ineffective for failing to interview Joshua Edwards as a potential witness for the Petitioner and failing to discuss with the Petitioner the manner in which Joshua Edwards could be used as a defense witness if the Petitioner proceeded to trial by jury where said witness was charged with and convicted for criminal sexual conduct relating to the victim in Petitioner's Indictment No. 2010-GS-45-30; VICTIM

11. Plea Counsel was ineffective for failing to object to a material amendment to Petitioner's indictment without presentation to the Grand Jury and for failing to fully explain to the Petitioner his right to object to such an amendment.

12. Plea Counsel was ineffective for neglecting to obtain clarification from the presiding judge concerning whether it was his intent that the five (5) year sentence imposed on Indictment No. 2010-GS-45-30 be served consecutively to both sentences imposed on 2009-GS-45-0249 or just consecutively to the twenty (20) year sentence imposed for criminal sexual conduct second degree.

13. Plea Counsel was ineffective for advising the Petitioner to enter a plea of guilty on this charge based on the threat that the State could seek a potential life without parole sentence against him were he convicted on this indictment at trial by jury without discussing with the Petitioner the possibility of arguing that he would be ineligible for a life without parole sentence pursuant to S.C.Code Ann. § 17-25-45 where the sexual battery charged in this indictment was alleged to occurred sometime between October 1, 2006 and October 1, 2007 and the Petitioner did not turn eighteen (18) years old until July 17, 2007.

14. Plea Counsel was ineffective for failing to disclose to the Petitioner a potential conflict of interest in representing the Petitioner where Plea Counsel had represented Joshua Edwards on a number of criminal charges including one count of Criminal Sexual Conduct with a Minor involving VICTIM. D., the same minor alleged to be the victim on Indictment No. 2010-GS-45-30.

15. Plea Counsel was ineffective for failing to disclose to the Petitioner a potential conflict of interest in representing the Petitioner where Plea Counsel represented the victim in a number of legal matters.

III.

EVIDENCE BEFORE THE LOWER COURT

In deciding this collateral action the lower court had before it a copy of the pre-trial hearing held on January 25, 2010, the sentencing portion of the trial record dated January 27, 2010, a transcript of the January 28, 2010 guilty plea proceeding, a transcript of the PCR hearing held on May 27, 2014, the exhibits introduced during the PCR proceeding, the Petitioner's records from the South Carolina Department of Corrections and the records of the Williamsburg County Clerk of Court regarding the subject conviction and sentence.

IV.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raised numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). In a Post-Conviction Relief proceedings, the Petitioner has the burden of proof to establish that he is entitled to relief by a preponderance of the evidence. Rule 71.1(e), S.C.R.Civ.P.

In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Petitioner must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme

Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

In the context of a guilty plea, the operative question becomes whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Further, the Petitioner must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. *Porter v. State*, 368 S.C. 378, 629 S.E.2d 353 (2006). A guilty plea, along with the resulting waiver of fundamental constitutional rights, is valid only if made voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) ("For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.").

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that,

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

V.

ARGUMENT

In this case, the Petitioner alleges generally that Plea Counsel failed in multiple regards in his representation of Petitioner prior to and during his guilty plea proceedings. The Petitioner

respectfully submits that the lower court erred in denying him relief where the record below demonstrates that he met his burden of proof concerning multiple errors and omissions of Plea Counsel which acted to deprive him of the ability to enter a knowing and voluntary plea. He asserts that he would not have waived his constitutional right to trial by jury on this charge but for the errors and omissions of Plea Counsel as discussed below. In order to demonstrate both the nature of Counsel's errors and omissions, and the prejudice to the Petitioner arising there from, it is necessary to consider the following summary of portions of the General Sessions records and PCR hearing record.

RELEVANT TESTIMONY

During the sentencing portion of Petitioner's jury trial on a separate charge, Judge Newman made it clear that Petitioner was facing a mandatory life without parole sentence on his remaining charge of Second Degree Criminal Sexual Conduct with a Minor. The day after his conviction by jury on Amended Indictment No. 2009-GS-45-249, January 28, 2010, Petitioner appeared before Judge Newman, and entered a plea of guilty to one count of Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2010-GS-45-30. The charge on that indictment involved a different victim from the complaining witness in Petitioner's jury trial. Although she was not named in Indictment No. 2010-GS-45-30, testimony at Petitioner's PCR hearing involving this plea, clearly establishes that the victim in this case was VICTIM PCR Tr. p. 4, ll. 17-24. At the time of this plea, the Court noted that the State was presenting the charge as if Petitioner had no prior conviction for a most serious offense despite his convictions for two such offenses the previous day. App. p. 3, ll. 21-24. The Court specifically advised Petitioner that, "*if you commit two or more most serious offenses you can be sentenced to life without the possibility of parole.*" App. p. 3, ll. 17-20, (Emphasis added).

Petitioner waived his right to Grand Jury presentment on the charge involved in this PCR action on the record, and admitted on the record to having had sex with a minor he estimated to

be thirteen or fourteen at the time. App. p. 5, l. 12 - p. 7, l. 9.

The record from Petitioner's plea indicates that the Victim from Petitioner's jury trial was actually the source of the information supplied to law enforcement regarding the second alleged victim; VICTIM App. p. 7, ll. 14-23. The prosecutor advised the Court that she had recognized the girl's name from a DJJ case and pulled the community evaluation report from that case and discovered that the girl had a young child and that she had named Petitioner as the father of her baby. The girl's mother was reported as saying she didn't realize how old Petitioner was because, "*he looks just like a kid.*" App.p. 7, l. 21 - p. 8, l. 11. The prosecutor acknowledged that DSS conducted a paternity test which *excluded* Petitioner as the biological father of the girl's child. App. p. 8, ll. 18-23.

During the plea proceeding the State published a letter written by the alleged victim on the morning of the plea. Although she continued to claim Petitioner had sex with her, she said she didn't want anything to do with the situation, and asked that the State drop the charge against Petitioner. App.p. 9, ll. 3-14 and App. p. 151.

It is clear from the plea record that the State assumed the Victim had intercourse with Petitioner around the same time she conceived her child, even though her claim from that time period that Petitioner was her baby's father was scientifically proved to be false. It is apparent that the prosecution chose to believe this girl was mistaken about the paternity of her baby to the exclusion of another plausible explanation; that she lied about having had intercourse with Petitioner to protect the child's real biological father. Neither does it seem that anyone considered the possibility than she continued to assert that she and Petitioner had engaged in sex with each other to avoid getting in trouble for having knowingly made false statements to the police, DSS and the Family Court. App. p. 9, ll. 15-21.

Indictment No. 2010-GS-45-30, alleged that Petitioner committed Second Degree Criminal Sexual Conduct with a Minor between October 1, 2006 and October 1, 2007. The

Petitioner's date of birth is July 17, 1989. Therefore, from October 1, 2006 through July 16, 2007, Petitioner was only 17 years old. That means that for 8 and ½ months of the 12 month time frame covered by this indictment, Petitioner himself was a minor. See, Warrant M-170251 for Petitioner's date of birth. App. p. 45 and Petitioner's Attachment A. In his PCR testimony, Plea Counsel, LaGrand Carraway acknowledged the following:

- He knew the victim and her mother well. App. p. 57, ll. 18-19;
- He had previously represented the alleged victim in this case in multiple matters in Family Court. App. p. 57, l. 21- p. 58, l. 17;
- Although he claimed Petitioner was aware that Plea Counsel knew VICTIM, he did not claim he disclosed his previous representation of her to Petitioner, App. p. 58, l. 24 - p. 59, l. 9. He in fact admitted that he had not done so. App p. 60, l. 24 - p .61, l. 4;
- PCR Counsel requested access to review his file and was told most of it was lost; App p. 60, ll. 6 – 9.
- Plea Counsel agreed to notify PCR Counsel if his file was located. Plea Counsel did not subsequently advise PCR Counsel that the file had been located; however, during the PCR hearing it became apparent he had the file with him in court. App. p.60, ll. 10-20;
- He was provided a copy of the letter from the victim by the Solicitor's Office. App.p.59, ll. 10-13 and p. 60, ll. 21-23;
- VICTIM did tell DSS that Petitioner was the father of her child. App.p. 61, ll. 5-22;
- The charge against Petitioner was brought in the aftermath of VICTIM reporting to the Family Court that Petitioner was the father of her child. App. p. 61, l. 25 - p. 62, l. 3;
- VICTIM's child was born June 8, 2007 which, Plea Counsel asserted, would have put its conception date at approximately October 8, 2006. App. p. 62, l. 12 - p. 63, l. 5;
- Petitioner turned 18 years old on July 17, 2007; See Arrest Warrant No. M-170251; App. p. 45 and Attachment A.¹

¹ Plaintiff has attached a copy of Warrant No. M-170251, as Attachment A, inasmuch as the month and day of his birthday were redacted to comply with Court rules when the Appendix was compiled and printed.

- Plea Counsel had no recollection of participating in the attempted plea hearing on January 25, 2010; App. p. 64, l. 6 - p. 65, l. 14.
- Plea Counsel did not recall being aware that a new charge of First Degree Criminal Sexual Conduct with a Minor had been brought against Petitioner just days before his jury trial on the charges on which Petitioner was represented by Richard Strobel. App. p. 66, ll. 1-16.

During his PCR testimony, Plea Counsel was asked if he had ever represented an individual named Joshua Edwards. He acknowledged that he had represented this person's brother, Ray-Ray, before and stated that he believed he had represented Joshua either as a juvenile or a criminal court matter. App. p. 66, ll. 17-21. Plea Counsel was asked if he recalled sending PCR Counsel a copy of his file documents showing he actually represented Joshua Edwards on a charge of Second Degree Criminal Sexual Conduct with a Minor, and he testified that he did not. Ultimately, this witness identified his signature on a transmittal letter providing PCR Counsel with his file concerning his representation of Joshua Edwards on a charge of Second Degree Criminal Sexual Conduct with a Minor. That letter, along with the documents provided with it, were introduced as *Plaintiff's Exhibit No. 1*; App.p. 54 and App. pp. 145-150. Those records indicate that Joshua Edwards was alleged to have had sex with a minor child over 11 years of age, but less than 14 on April 27, 2006. He pleaded guilty to that charge and was sentenced on July 18, 2006. Pleas Counsel ultimately acknowledged that he represented Joshua Edwards in that case, and that VICTIM, the same Victim alleged in Petitioner's case, was the Victim in Joshua Edward's case. App. p. 69, l. 23- p. 70, l. 14. He admitted that he never told Petitioner about having represented Joshua Edwards and/or VICTIM App.70, p. 18, ll. 15-17.

Plea Counsel recalled being aware that DNA testing had proved Petitioner was not the father of VICTIM's child "*certainly some weeks*" before the date of the plea, and he expressly recalled discussing the test results with Petitioner at the jail. App. p. 70, l. 21- p. 71, l. 9. When asked if he discussed the possibility of using VICTIM's false claim that Petitioner fathered her child to the advantage of the defense if Petitioner went to trial, Plea Counsel claimed he had, but

focused his attention on the fact that VICTIM's mother would also have been a witness who had told DSS that she thought Petitioner was the child's father because he had been coming over to her home visiting VICTIM during the time period when she was believed to have conceived her baby. App. p. 70, l. 10- p. 72, l. 22. Interestingly, Plea Counsel's PCR testimony reflects his opinion that VICTIM was "*a very nice young lady*", and confirms that he told Petitioner that VICTIM was "*not going to come off as a liar to the jury.*" App. p. 71, l. 15-72, l. 25.

Plea Counsel's PCR testimony reflects his belief that VICTIM genuinely "*thought he was the father of that baby.*" His testimony confirms the fact that he apparently never even considered the possibility that this young woman had intentionally lied about the father of her child in order to protect the true biological father of the infant. Neither does his testimony indicate that he gave any consideration to the fact that the Victim in Petitioner's other case, the one which went to trial by jury, was the person who initially pointed the finger at Petitioner with the police concerning VICTIM App. p. 77, ll. 4 – 14.

Plea Counsel admitted that he did not work with Attorney Strobel to try and work out a package deal for Petitioner concerning both sets of charges. Interestingly, he testified that he didn't have any contact with "*Mr. Strobel about this.*" He went so far as to claim that, "*all I knew is that Kevin withdrew his guilty plea and I was not sure, you know, exactly what the defense was.*" App. p. 79, ll. 2 – 10. As previously noted, both Attorney Strobel and Attorney Carraway appear listed as counsel for Petitioner on the cover of the January 25, 2010 plea hearing before Judge Newman. The cover of the transcript reflects that the pleas that were attempted that day were on Indictments No. 2009-GS-45-249 and 2010-GS-45-030. The record of that proceeding reflects that Attorney Carraway was present at that proceeding and responded directly to one question from Judge Newman. App. Vol. II, p.241, ll. 15 – 18.

In his PCR testimony Attorney Carraway testified that he thought Petitioner was looking at a possible maximum sentence of twenty (20) years if he was convicted on this charge of

Second Degree Criminal Sexual Conduct despite the fact that he had been convicted of two most serious counts the previous day. App. p. 79, l. 11 – p. 80, l. 12. He did not recall any conversation about his client being exposed to life without parole pursuant to S.C. Code Ann. §17-25-45, the so-called strike law, if he were convicted of another count of Second Degree Criminal Sexual Conduct with a Minor. App. p. 80, l. 13 – p. 81, l. 16. Plea Counsel was asked about the portion of the trial transcript when Judge Newman advised Petitioner that he would be exposed to a life without parole sentence for a second most serious offense if he were convicted *“on that pending charge.”* App. Vol. II, p. 247, ll. 7–11. Plea Counsel responded by asserting, contrary to the written record of that proceeding, that he wasn’t there when these statements were made in court. App.p. 82, ll. 5 – 7. Next he was questioned about the fact that the transcript of Petitioner’s January 28, 2010 plea indicated that Judge Newman commented on the fact that he could have gotten life without parole on this charge, but for the State’s agreement to accept his plea to this charge *“as if there is no prior conviction.”* App. p. 3, ll. 14–24. Even after reviewing these portions of the record, Plea Counsel insisted that he did not think a life without parole sentence was being held over Petitioner’s head and that a twenty year sentence was what he told him he was facing. App. p. 82, l. 17- p. 83, l. 20. He emphasized that the day of the plea, Judge Newman never said he would have had no role [sic] in deciding whether Petitioner got a sentence of life without parole if he had been convicted at a trial. App. p. 84, ll. 2 – 12.

Plea Counsel acknowledged that Petitioner was alleged to have had sex with VICTIM sometime between October 1, 2006 and October 1, 2007. He further acknowledged that Petitioner’s birth date is July 17, 1989 and thus, that he would not have turned 18 years old until July 17, 2007. He went on to admit that Petitioner did not turn 18 until after VICTIM’s child was born. App. p. 84, l. 15 – p. 85, l. 9. During the PCR hearing, Plea Counsel indicated that he

was not familiar with the United States Supreme Court's holding in *Graham v. Florida*². He went on to confirm that at the time of Petitioner's plea, he was not aware of the pendency of this landmark ruling. App. p. 86, l. 18 – p. 87, l. 25.

Plea Counsel testified that he did not discuss anything about Petitioner's right to a direct appeal on the judgments and sentences handed down at the jury trial on the charges that Attorney Strobel represented him on. Neither did he warn Petitioner that if he were to win a subsequent appeal from the judgments and sentences imposed at his jury trial, that reversal would in no way effect the judgment and sentence he would receive as a result of him waiving grand jury presentment and proceeding with a plea on Indictment No. 2010-GS-45-030. App. p. 95, ll. 7 – 25.

Plea Counsel acknowledged being aware that VICTIM was a reluctant witness and that she had in fact written a letter to the Solicitor's Office asking them to drop Petitioner's charge involving her. He acknowledged that although this letter said she and Petitioner had sex, it did not say when they had engaged in sex with one another. Plea Counsel obviously attached significance to the fact that VICTIM's mother had told the police that Petitioner had been coming over to her home to visit VICTIM during the time period when this girl got pregnant. App. p. 96, l. 1 – p. 97, l. 5. There is nothing before this Court indicating that the mother ever reported having observed any evidence that Petitioner had been intimate with her daughter during this time period or, for that matter, at any other time.

Plea Counsel admitted in his PCR testimony that he never discussed with Petitioner how the fact that VICTIM had falsely accused him of fathering her child might be used to impeach VICTIM if this case went to trial. His responses reflect his personal opinions concerning VICTIM and his belief that she thought she was being truthful when she accused Petitioner of fathering her baby. It is apparent that Plea Counsel never considered the possibility that

² 560 U.S. 48 (2010)

VICTIM was not being truthful when she tried to blame Petitioner for her pregnancy. Likewise, he did not seem to consider that her reluctance to completely exonerate Petitioner might have been born out of fear of getting in trouble for lying to DSS and law enforcement until science proved her accusations to be false. App. p. 97, l. 6 – p. 98, l. 6. He further admitted that he never discussed the possibility with his client that the State might not even prosecute him on the charge involving VICTIM since she clearly was not cooperating with the prosecution. App. p. 97, l. 21 – p. 98, l. 6.

Judge Newman gave Petitioner a sentence of five (5) years consecutive to the sentence imposed following his jury trial on Indictment No. 2009-GS-45-0249 for his plea on Indictment No. 2010-GS-45-030. Indictment No. 2009-GS-45-0249 was a *two count indictment* on which the jury found Petitioner guilty of one count of First Degree CSC with a Minor and one count of Second Degree CSC with a Minor. Petitioner received concurrent sentences of twenty-five (25) and twenty (20) years on those two counts. At his guilty plea proceeding on Indictment No. 2010-GS-45-030, Judge Newman did not specify whether the five (5) year sentence imposed was to be served consecutive to the aggregate term imposed on both counts of Indictment No. 2009-GS-45-0249 or whether it was intended to be consecutive only to the twenty (20) sentence imposed for the Second Degree CSC with a Minor judgment. This distinction could have resulted in a five (5) year difference in Petitioner's total aggregate sentence. Plea Counsel testified that he assumed the Court intended the sentence imposed at the plea to be consecutive to the aggregate twenty-five (25) year sentence imposed on Indictment No. 2009-GS-45-0249 and did not consider seeking clarification on this point. App. p. 91, l. 16 – p. 93, l. 11.

After having his recollection refreshed, Plea Counsel remembered being present when a plea to both indictments fell apart before Judge Newman on January 25, 2010 immediately before Petitioner's jury trial on Indictment No. 2009-GS-45-0249. App. p. 98, l. 21 – 99, l. 13. He admitted that when the plea began to fall apart and it was apparent the plea wasn't going to

go through, it never occurred to him to ask for a brief recess to see if he could work out a modification with the State that would have permitted the plea to go through. App. p. 99, l. 11 – p. 100, l. 9. During cross-examination by the State, *Plea Counsel admitted that Petitioner had never admitted having sex with VICTIM.* He admitted that, based on his knowledge of the alleged Victim, he just assumed *“it did happen...”* and because he *“knew her”*.....he testified that he,

[D]idn't see a reason why she would make it up and say he was the father if she'd never had sex with him or whatever. I know her and I think he knows her or whatever, and I just never had the idea that - - and I never really had the idea too much whether that was - - whether the DNA came back that it would matter that much because I just didn't think she would make that up.

App. p. 104, l. 24 – p. 105, l. 5.

Plea Counsel admitted that the day following Petitioner's conviction at his jury trial he *“was just shell shocked from the day before.”* He further acknowledged that Petitioner *“wasn't familiar with the Court system.”* App. p.105, ll. 17 – 25.

Despite acknowledging that Petitioner had never admitted having had sex with VICTIM, in his PCR testimony, Plea Counsel emphasized the fact that Petitioner had never denied having sex with the girl to him. Further, he went on to state that he felt that the note she wrote the day of the plea indicated that if Petitioner went to trial VICTIM would have testified that *“well, he did have sex.....”* He felt that if they went to trial, *“if they had called her in there and put her on the stand, she would have told the truth.”* App. p. 107, ll. 18 – 24.

Plea Counsel denied that his previous representation of Joshua Edwards had any impact on his duties to Petitioner. His answers to questions concerning this subject reflect a total lack of consideration for the fact that evidence concerning Joshua Edwards might have been used to Petitioner's advantage, depending upon the content of VICTIM's trial testimony, if his case had proceeded to trial. App. p. 110, ll. 6 – 14. Likewise, he asserted that his representation of VICTIM in no way impacted his ability to represent Petitioner to the best of his ability. He

indicated that having represented VICTIM helped him because it enabled him to know that she was “*just a nice person , a very believable*” person who “*wouldn’t have said she had sex with him if she hadn’t.*” During his PCR testimony Plea Counsel actually asked the question, why would she say she had sex with him if she didn’t? App. p. 110, l. 19 – p. 111, l. 5..

Petitioner also presented as a witness, Assistant Solicitor Tyler Bryant Brown, who verified for the record that the unnamed minor victim in Indictment No. 2006-GS-45-199, charging Joshua Lamont Edwards with Second Degree CSC with a Minor, was VICTIM. He further confirmed that counsel of record on that indictment was LeGrand Carraway. App. p. 61, l.13 – p. 114, l. 22.

In his own testimony at his PCR hearing, Petitioner swore to the following:

- His guilty plea attempt on January 25, 2010 fell apart because he did not want to plead to first degree CSC with a Minor on the Indictment on which he was represented by Mr. Strobel, and he did not want to plead guilty to Second degree CSC with a Minor with regard to VICTIM App. p. 115, l. 7 – p. 117, l. 20;
- At the end of his trial he asked if he could go ahead and just plead to his other pending charge because the Judge had just told him if he was convicted he would get life without parole and the judge would have no role in deciding the sentence. App. p.118, ll. 2 – 11;
- He would never have pleaded guilty on the charge involving VICTIM had it not been for the threat of a mandatory life without parole sentence if he was convicted on that charge. App. p. 118, ll. 12 – 15;
- Prior to the day of his PCR hearing, he had never actually seen the letter that Plea Counsel stated was turned over to him before the plea proceeding. App. p. 118, ll. 16 – 19;
- He had previously written Plea Counsel and requested a copy of his discovery materials, but he had never received anything back from Plea Counsel in response to this request. App. p. 118, l. 20 – p. 119, l. 4;
- Plea Counsel never advised him that he had previously represented VICTIM App. p. 119, ll. 5 – 7;
- Plea Counsel never disclosed to him the fact that he had represented another individual also accused of having sexually assaulted VICTIM, Joshua Edwards. App. p. 119, ll. 8 – 10;

- Petitioner testified that he would not have wanted Plea Counsel to represent him had he known that this lawyer had previously represented both VICTIM and Joshua Edwards. He would not, under any circumstances, have waived a potential conflict of interest had he known that his attorney had represented these individuals. App. p. 119, ll. 11 – 20 and App.p. 126, ll. 3 – 11;
- He understood that the Judge had given him a five (5) year sentence that was consecutive to something, but he wasn't sure consecutive to what. Had he known it was possible, he would have wanted Plea Counsel to ask for clarification as to whether that five (5) year term was consecutive to the aggregate twenty-five (25) year term imposed after his jury trial or whether it was meant to be consecutive only as to his twenty (20) year sentence for Second Degree CSC with a Minor; App.p. 121, l. 18 – p. 122, l. 8;
- When his guilty plea broke down on the day of his trial, he would have wanted his attorneys to explore the possibility of a plea that did not involve an admission of guilt on the charge of First Degree CSC with a Minor. App. p. 122, ll. 9 – 17;
- Plea Counsel never discussed Grand Jury Presentment with him prior to his guilty plea proceeding. He was not aware that there was no indictment against him on the charge involving VICTIM until “*right then and there*” during his plea proceeding. What little discussion was on the record during his plea proceeding is all he knew about his rights with regard to the Grand Jury. App. p. 126, ll. 12 – 24;
- Petitioner acknowledged that he made admissions on the record about having engaged in sex with VICTIM, but clearly asserted that those admissions were not truthful. He testified that the only reason he lied to the Court about those admissions, and other matters, was his fear that he would get an automatic life without parole sentence if his guilty plea wasn't accepted by the Court. App. p. 128, l. 11 – p. 129, l. 8; App. p. 131, l. 14 – p. 132, l. 23; App. p. 133, l. 17 – p. 136, l. 9;
- Petitioner asserted that his understanding had been that the State was going to recommend a concurrent sentence if he pleaded guilty. He pointed out that his sentencing sheet in fact reflects that the portion of the form that stated, “*Recommendation by the State*” was originally checked off and that notation was subsequently crossed out and changed. He testified that he did not point this fact out to the Court because he wanted the plea to be over, and felt the need to “*convince the judge*”; as he had been told the night before that he had to do. Confronted with the threat of a life without parole sentence, Petitioner was afraid to say anything that would cause the plea to not be taken by the judge. App. p. 132, ll. 1 – 23; App. p. 132, l. 24 – p. 133, l. 16;
- Petitioner asserted that Plea Counsel should have investigated whether this letter supposedly from VICTIM, which was not produced until the day of his plea, was authentic. App. p. 136, ll. 19 – 25.

QUESTION I

**Allegations 1 and 2, Original PCR Application
Allegations 1 – 4, Second Amended Application
filed on May 21, 2014**

Plea Counsel was ineffective for advising Petitioner to enter a plea of guilty to this charge without advising him, in advance of the plea proceeding, that the Victim was not cooperating with the prosecution and had written a letter asking the State to drop this charge against him. Plea Counsel further failed to provide Petitioner reasonable effective assistance of counsel when he failed to advise Petitioner of the ways in which the defense might use the Victim's original false allegation that he had fathered her child to impeach her credibility if Petitioner proceeded to trial by jury. Plea Counsel was also ineffective for failing to interview the Victim concerning this charge once it was proven through DNA testing that Petitioner was not her child's father.

The record below supports Petitioner's claim that this charge originally arose out of a claim that Petitioner had fathered VICTIM's child. The evidence and testimony before the PCR Court demonstrates that this claim was subsequently proven false and the DSS action against Petitioner for support of VICTIM's child was dismissed after the test results were reported to the Family Court. Plea Counsel has acknowledged that Petitioner never admitted having had sex with this girl until the guilty plea proceeding on January 28, 2010. Likewise, it is apparent that the girl's mother based her support of the girl's original claim on the mere fact that Petitioner had been a guest in her home during the approximate time period when the girl would have conceived her child. There was no testimony before the PCR Court which indicated that the mother was *ever* privy to any evidence of intimate contact between her child and Petitioner.

The evidence adduced during this PCR proceeding indicates that another individual, Joshua Edwards, was charged with Criminal Sexual Conduct with a Minor in connection with this same girl during a time period that apparently predated the conception of her child. This evidence, as well as the DNA test results, clearly established that this young girl was sexually active before Petitioner alleged visitation in the girl's home, and would have potentially provided evidence with which VICTIM could have been impeached depending upon the content of her trial testimony. Certainly the evidence that this young girl tried to blame her pregnancy on Petitioner could have been used by the defense to argue that she had been trying to protect the identity of the true father of her child when she lied to the police and the Family Court, as opposed to her simply not knowing which of several sexual partners had fathered her child. Likewise, Petitioner could have questioned her concerning whether she was "*sticking to her*

story” about having had sex with Petitioner even after the DNA test results were released because she feared getting in trouble for lying about who was the father of her child. In addition, Plea Counsel failed to explore the connection between VICTIM and the Victim in Petitioner’s unrelated case involving Samaria G. despite the fact that the accusation against Petitioner regarding VICTIM originated with Samaria G. *not* VICTIM Plea Counsel’s PCR testimony confirms that he never gave any consideration to the fact that the Victim in Petitioner’s other case, the one which went to trial by jury, was the person who initially pointed the finger at Petitioner with the police concerning VICTIM App. p. 77, ll. 4 – 14.

Plea Counsel was also ineffective for failing to interview VICTIM concerning this charge once the DNA results eliminated any possibility that Petitioner had impregnated her. Plea Counsel, for reasons that will be discussed *infra*, had a relationship with the young girl in question and should have sought the opportunity to interview her. Plea Counsel clearly neglected an opportunity to potentially question this girl concerning her claim that Petitioner had engaged in sex with her once her allegation that he was the father of her child were disproven. This complaining witness was a minor, and Plea Counsel would have arguably needed her mother’s permission to talk to her about Petitioner’s charge. Plea Counsel acknowledged, however that he knew the girl and her mother well, and his testimony suggests that he enjoyed a good relationship with them both. In addition, the indictment in this case alleged that Petitioner had sex with this girl sometime between October 1, 2006 and October 1, 2007. Petitioner turned 18 years old on July 17, 2007. Plea Counsel never questioned this girl about whether she could testify under oath that Petitioner had sex with her before July 17, 2007.

During the PCR hearing held on this application, PCR Counsel indicated that she had unsuccessfully attempted to locate and interview VICTIM as a potential witness for Petitioner’s PCR proceeding. When an address for this girl was discovered on a document produced by Plea Counsel during his PCR testimony, PCR Counsel requested leave of Court to leave the record open for a short time for further evidence to be submitted in the event she was able to locate and interview this witness using that address. The Court was subsequently been advised that PCR Counsel was unsuccessful in locating and interviewing VICTIM While the burden of proof is on Petitioner on collateral review, this Court recognizes that Petitioner, acting through his PCR Counsel, exercised due diligence in trying to locate this witness for his PCR hearing. Despite Petitioner’s inability to produce testimony from VICTIM, it should have been apparent to the PCR Court that Plea Counsel had access to this girl at the time of this plea and did not make any attempt to talk to her about this case.

For all the reasons set forth above, Petitioner respectfully asserts that he met his burden of proof concerning these allegations in the circuit court. He has clearly demonstrated that Plea Counsel was ineffective on these allegations and further, the record establishes that there is a reasonable probability that Petitioner would not have pleaded guilty, but for these errors and omissions of counsel.

QUESTIONS

II and III

**Allegations 1 and 2, Original PCR Application
Allegation 6 and 8, Second Amended Application
filed on May 21, 2014**

Plea Counsel was ineffective for advising the Petitioner to plea guilty on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct without explaining to him that if he were to succeed in getting his convictions and sentences from his jury trial overturned on appeal, such a reversal would not afford him the opportunity to challenge the judgment and sentence entered pursuant to his plea on Indictment No. 2010-GS-45-30. Plea Counsel was ineffective for failing to preserve the Petitioner's right to a direct appeal from the judgment and sentence entered pursuant to his plea on Indictment No. 2010-GS-45-30 to Second Degree Criminal Sexual Conduct where the Petitioner clearly did not waive his right to such an appeal.

At the time of Petitioner's plea on this charge, he had just been convicted by jury the previous day on two unrelated charges. During that proceeding, Petitioner had contested his guilt of the more serious of the two charges he was on trial for. Plea Counsel admitted in his PCR testimony that he never discussed with Petitioner the fact that he had a right to pursue a direct appeal from the judgments and sentences entered during his jury trial. Significantly, he never advised Petitioner that if he won a direct appeal on his judgments and sentences arising from his jury trial, his judgment and sentence from his guilty plea would be unaffected by that reversal and would still stand with full force. Likewise, Plea Counsel clearly did not advise Petitioner of his right to a direct appeal from the judgment and sentences entered in connection with this plea. On the facts of this case, the lower court erred in failing to find that Plea Counsel was ineffective for failing to discuss these matters with Petitioner. It is apparent that Petitioner's plea was entered in response to repeated warning from the lower court that he would be subject to a sentence of life without parole for Second Degree Criminal Sexual Conduct with a Minor, pursuant to S.C. Code Ann. §17-25-45, if he were to be convicted of that offense without the benefit of the plea agreement with the State to consider his plea a first offense.

The landmark decision in *Graham v. Florida*³ was filed on May 17, 2010. For reasons which will be discussed further *infra*, that decision would have been very beneficial to Petitioner and would likely have resulted in him going to trial on the charge in this case. Petitioner's PCR testimony confirms that he would not have pleaded guilty had it not been for the threat that he would receive life without parole for this charge if he went to trial and were convicted of this charge. In light of the fact that Petitioner's plea was not entered until January 28, 2010, there exists a reasonable probability that a direct appeal from the judgment and sentence entered on that date would have still been pending at the time of the high court's ruling in *Graham, supra*, less than four months later. The testimony before the PCR Court indicates that, but for these errors, among several others, Petitioner would not have waived his right to grand jury presentment and to trial by jury. For these reasons, Petitioner is entitled to relief on these grounds as well.

QUESTION

IV

Allegations 1 and 2, Original PCR Application Allegation 5 Second Amended Application filed on May 21, 2014

Plea Counsel was ineffective for permitting his client to enter a plea of guilty to Second Degree Criminal Sexual Conduct on Indictment No. 2010-GS-45-30 where the Petitioner openly declared his innocence of that offense at the time of his plea.

As noted in the testimony summary above, Petitioner repeatedly professed his innocence on the charge involved in this application both during the failed attempt at a plea on January 25, 2010 before his jury trial on Indictment No. 2009-GS-45-249 and immediately following his sentencing at that trial. He consistently indicated that he did not want to waive his right to trial by jury and plea guilty on that charge. Only after being repeatedly warned that the Court would not accept his plea unless he admitted his guilt, and being warned about his exposure to life without parole, did Petitioner finally acquiesce and plead guilty to this charge. In the lower court Plea Counsel admitted that Petitioner never admitted his guilt on this charge to him. Further, this was not a situation where Petitioner had privately confessed his guilt to Plea Counsel. This assertion has the ring of truth where Petitioner admitted being intimate with the victim in his other case and only challenged the age at which the intimacy began. Plea Counsel has admitted

³ 560 U.S. 48, 130 S.Ct. 2011 (filed May 17, 2010)

that Petitioner *never* acknowledged his guilt of this charge to him. It is also clear that Plea Counsel never asked the Court to entertain an *Alford*⁴ plea from Petitioner on this charge. The remarks of Judge Newman on the record following the sentencing at Petitioner's jury trial establish his policy with regard to accepting guilty pleas from defendants who would not acknowledge their guilt. Judge Newman stated,

Well, I don't accept guilty pleas from people who are not guilty. I only take guilty pleas from people who are guilty. They have to convince me, just as the Solicitor has to convince the jury that you are guilty in this case, you've got to convince me that you are guilty in that other case before I can accept a guilty plea. We'll give you overnight to think about that.

App., p. 247, ll. 19 – 25. Further, despite the fact that Petitioner was essentially begging to plea even though he maintained he was innocent, Judge Newman gave no indication that he would entertain an *Alford* plea as distinguished from a guilty plea.⁵ Petitioner asserts that Plea Counsel was ineffective for advising him to plead guilty, and for permitting him to enter a plea of guilty, when he knew Petitioner had steadfastly denied his guilt on that charge in open court the previous day. The totality of the record before the PCR Court simply did not support a finding that Petitioner's plea was knowingly and voluntarily entered.

Guilty pleas effectively waive all non-jurisdictional errors. *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985); *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981). In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980); *State v. Lambert*, 266 S.C. 574, 225 S.E.2d 340 (1976).

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats...misrepresentation... or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business.....

Brady v. United States, 397 U.S. 742, 755 (1970).

On the record before the lower court, it appears that Plea Counsel allowed his client to make an admission of guilt by pleading guilty despite the initial claims of innocence he made in

⁴ *North Carolina v. Alford*, 400 U.S. 25 (1970).

⁵ There is no indication that Plea Counsel was present during Petitioner's colloquy with the bench following his sentencing at his jury trial and therefore, Petitioner can not ask this Court to attribute knowledge of Judge Newman's remarks to Plea Counsel. Petitioner references this exchange for the purpose of demonstrating that any attempt at entering an *Alford* plea on this charge would likely have been fruitless.

response to repeated warnings from the Plea Court that he would get life without parole if convicted of the offense charged. It is equally evident that Plea Counsel did so without adequately investigating the strength of the State's case and without advising Petitioner adequately of methods and evidence which might be utilized at a trial to impeach the credibility of the alleged Victim. Petitioner respectfully asserts that he has meet his burden of proof regarding his claim that he would not have entered his guilty plea in this case had it not been for the ineffective assistance of counsel he received prior to and during his guilty plea proceeding.

QUESTION V

**Allegations 1 and 2, Original PCR Application
Allegation 12 Second Amended Application
filed on May 21, 2014**

Plea Counsel was ineffective for neglecting to obtain clarification from the presiding judge concerning whether it was his intent that the five (5) year sentence imposed on Indictment No. 2010-GS-45-30 be served consecutively to both sentences imposed on 2009-GS-45-0249 or just consecutively to the twenty (20) year sentence imposed for criminal sexual conduct second degree.

Plea Counsel provided Petitioner ineffective assistance of Counsel where he failed to ask the Plea Judge for clarification as to whether the consecutive five (5) year sentence imposed following his plea on Indictment No. 2010-GS-45-30 was intended to be consecutive to the *aggregate* term imposed for both counts on Indictment No. 2009-GS-45-0249, or, whether it was the intent of the Plea Court that the sentence be consecutive only as to the twenty (20) year sentence imposed for Second Degree Criminal Sexual Conduct on that indictment. Plea Counsel's PCR testimony reflects that he merely *assumed* that it was the intent of the Court to make the sentence on the plea consecutive to the aggregate term imposed on Indictment No. 2009-GS-45-0249. In so doing, Plea Counsel totally abandoned his role as an advocate and neglected an opportunity to potentially reduce his client's effective sentence by five (5) years. Petitioner asserts that Plea Counsel was ineffective for failing to request clarification on this

point from the Plea Judge and would respectfully argue that after the passage of so much time it is unrealistic to think the presiding would recall his intent at the time of sentencing.

Petitioner has asserted that the vacation of the judgment and sentence entered as a result of this plea is warranted on other grounds. Therefore, the grant of remand to the Court of General Sessions for clarification of sentence appears pointless. To protect Petitioner's interests in the event the grant of a new trial were to be overturned on appeal, however, Petitioner asks for this Court's alternative ruling that remand for a hearing to clarify the intent of the sentencing judge is warranted and appropriate.

QUESTION VI

**Allegations 1 and 2, Original PCR Application
Allegation 13 Second Amended Application
filed on May 21, 2014**

Plea Counsel was ineffective for advising the Petitioner to enter a plea of guilty on this charge based on the threat that the State could seek a potential life without parole sentence against him were he convicted on this indictment at trial by jury without discussing with the Petitioner the possibility of arguing that he would be ineligible for a life without parole sentence pursuant to S.C.Code Ann. § 17-25-45 where the sexual battery charged in this indictment was alleged to occurred sometime between October 1, 2006 and October 1, 2007 and the Petitioner did not turn eighteen (18) years old until July 17, 2007.

As previously noted, Petitioner's plea was entered on January 28, 2010. While *Graham v. Florida, supra*, was not decided by the U.S. Supreme Court until May 17, 2010, it was argued before the high court on November 9, 2009. Thus, had Plea Counsel, a public defender, kept abreast of important criminal cases in which the United States Supreme Court had granted certiorari, he would have known that the question of whether an individual could be sentenced to life without parole for an offense, other than murder, that he committed while he was a minor, was pending decision by the high court in *Graham*. Had he been aware of that case, he would have known how crucial it was to determine whether the State could prove, beyond a reasonable

doubt, not just that the act alleged occurred but, additionally whether that act occurred after Petitioner turned eighteen on July 17, 2007.

The record indicates that Petitioner waived grand jury presentment on this charge. Thus, his case obviously was not about to go to trial *that day* if he declined to plead immediately following his jury trial. Inasmuch as the State secured an amended indictment against the Petitioner on Indictment No. 2009-GS-45-0249 on Thursday, January 21, 2010, it is apparent that the State would not have been able to indict Petitioner on this charge for at least three weeks after the date of the plea. Therefore, it is not unreasonable to conclude that Plea Counsel might easily have delayed Petitioner's prosecution on this charge until after the Supreme Court's ruling in *Graham*. The record before this Court establishes that Plea Counsel never considered arguing that the State should not be permitted to seek a sentence of life without parole for a crime, other than murder, committed by an individual who was a minor at the time of the crime. He certainly did not discuss this potential line of defense against an LWOP sentence with Petitioner even though, as the records before the PCR Court demonstrate, the threat of such a sentence was the catalyst which ultimately caused him to enter his guilty plea. Petitioner respectfully asserts that the lower court erred in ruling Plea Counsel was not ineffective for failing to consider challenging the threat of a LWOP sentence on this charge based upon the State's inability to prove that the crime occurred when Petitioner was still a minor and for failing to advise Petitioner that such a line of argument might be effectively advanced by the defense if he exercised his right to trial by jury.

QUESTION VII

Allegations 1 and 2, Original PCR Application Allegations 15 and 14, Second Amended Application filed on May 21, 2014

Plea Counsel was ineffective for failing to disclose to the Petitioner, and the Court, a potential conflict of interest in representing the Petitioner where Plea Counsel represented *the victim* in this case in a number of legal matters. In addition, Plea Counsel was ineffective for failing to disclose to the Petitioner, and the Court, a potential conflict of interest in representing the Petitioner where Plea Counsel had represented Joshua Edwards on a number of criminal charges including one count of Criminal Sexual Conduct with a Minor involving VICTIM. D., the same minor alleged to be the victim on Indictment No. 2010-GS-45-30.

The PCR testimony of Plea Counsel establishes that Plea Counsel had represented the Victim, VICTIM, in a number of matters prior to serving as Petitioner's defense attorney in this matter. Given the age of the alleged Victim at the time this charge was brought against Petitioner, it is safe to assume that Plea Counsel had represented her in the fairly recent past. Plea Counsel's PCR testimony indicates that he knew VICTIM and her mother well. App. p. 57, ll. 18-19. As previously noted, his PCR testimony reflects his opinion that VICTIM was "*a very nice young lady.*" He admitted that he told Petitioner that VICTIM was "*not going to come off as a liar to the jury.*" App.p.71, l. 15 - p. 72, l. 25. Plea Counsel's PCR testimony reflects his personal belief that VICTIM sincerely "*thought he was the father of that baby.*"

Plea Counsel's testimony verifies the fact that he apparently never even considered the possibility that his former client, the Victim in Petitioner's case, had intentionally lied about the paternity of her child in order to protect the true biological father of the infant. He admitted that he neither considered, nor discussed with Petitioner, the fact that her previous false allegations of paternity might be used to challenge her credibility if Petitioner went to trial by jury on this charge.

It is well established that in order to prove a Sixth Amendment violation due to a conflict of interest arising from multiple representation, a defendant who did not object at trial, must

demonstrate an actual conflict of interest adversely affected by his attorney's performance. *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001); *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998). In this case, there is no evidence that Petitioner had any knowledge at the time of his plea that his attorney also represented VICTIM. An actual conflict of interest is established when one shows that his attorney owed a duty to a party whose interests were adverse to his own. *Jackson, supra*; *Duncan v. State*, 281 S.C.435, 315 S.E.2d 809 (1984). A party asserting a conflict of interest must show that his counsel actively represented conflicting interests as a constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993).

Petitioner has established through the testimony of Plea Counsel that he represented VICTIM in multiple matters. Although he was less than clear as to the exact nature of the representation, his PCR testimony plainly demonstrates that his representation of this young girl influenced his judgment concerning Petitioner's case. Plea Counsel expressed personal opinions concerning the alleged victim's veracity based upon his knowledge of the girl from having represented her. Counsel admitted that he never even considered obvious avenues for potential impeachment of this alleged Victim if this case went to trial. He not only didn't explain to Petitioner how VICTIM might be impeached at a trial, he admittedly never disclosed the fact that he represented VICTIM. In addition, Plea counsel acknowledged that he never even considered arguing that VICTIM might be maintaining that she had sex with Petitioner, even after her story about being impregnated by him was proven to be false, because she did not want to get in legal trouble herself for having lied to the police, DSS and the Family Court about the paternity of her child. Petitioner has demonstrated that Plea Counsel was acting out of divided loyalty between these two clients. In so doing, he deprived Petitioner of legal advice concerning this viable defense strategy, because his professional loyalty to VICTIM was such that he refused to even

consider the fact that she might be lying; despite the fact that science had proven she lied about Petitioner fathering her child. While it is impossible to know to what degree this factor affected Plea Counsel's judgment on the subject, the very real risk is that he didn't want to get one client into legal trouble by pointing out an obvious motive for her to lie about his other client; the Petitioner.

The records below, as well as Petitioner's PCR testimony, indicate that he did not want to plead guilty to this crime. Only after being repeatedly threatened with a life without parole sentence did the Petitioner yield and plead guilty. Petitioner acknowledges that Courts normally give great weight to admissions of guilt made in the context of a judicial proceeding. He asserts, however, that the facts in this case support Petitioner's assertion that he lied about his guilt in order to "*convince*" the Plea Judge to accept his plea so he could avoid a life without parole sentence. Absent advice from Plea Counsel as to how the alleged Victim's story, as well as the testimony of her mother, could be challenged if he went to trial, Petitioner was left with the understanding that it would be his word against that of a fourteen year old girl, and her mother, if the case went to trial. Petitioner has unambiguously stated that he would not have pleaded guilty to this charge had he been aware of these factors. Under those circumstances Petitioner respectfully argues that the lower court erred in failing to grant him a new trial on the grounds that Plea Counsel had a conflict of interest in representing Petitioner on this charge, that his divided loyalties prejudiced Petitioner's ability to receive adequate legal advice from his attorney and that Petitioner's plea was not knowingly and voluntarily entered with the benefit of effective assistance of counsel.

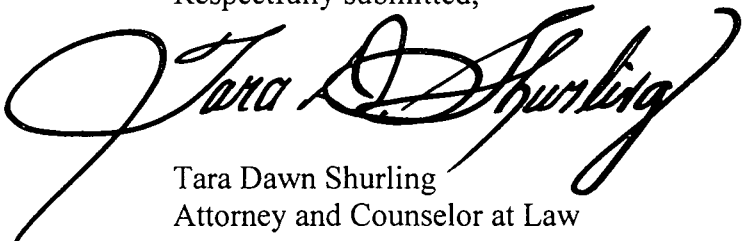
With regard to Petitioner's allegation that Plea Counsel also had a conflict of interest in that he represented Joshua Edwards, another individual who was prosecuted for having had sex with VICTIM when she was less than fourteen years of age, Petitioner asserts that Plea Counsel should have disclosed this representation to Petitioner. He acknowledges, however, that there is

no evidence which establishes that Petitioner was prejudiced by Plea Counsel's previous representation of this individual. He urges this Honorable Court to note however, that Plea Counsel's failure to disclose this potential conflict provides further evidence of Plea Counsel's failure to be fully candid with Petitioner and the Court concerning potential conflicts of interest.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully asserts that he met his burden of proof with regard to his claim that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated prior to and during his guilty plea proceedings. He argues that the lower court erred in failing to grant this Application for Post-Conviction Relief where the record before the PCR Court supports Petitioner's claims that his plea was entered in violation of his right to due process of law inasmuch as his plea was not knowingly and voluntarily entered with the benefit of reasonable professional assistance of counsel. Accordingly, Petitioner prays that the Writ be granted and that his judgment and sentence be reversed and his case is remanded to the Williamsburg County Court of General Sessions for a new trial. Alternatively, he asks that the Writ be granted and that he be afforded the opportunity to file a brief more fully presenting each of the issues addressed herein.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

This 18th day of March, 2015.

ARREST WARRANT

M-170251

STATE OF SOUTH CAROLINA
County/ [X] Municipality of KINGSTREE

THE STATE

against

KEVIN BRADLEY

Address: KINGSTREE SC
Phone: SSN:
Sex: M Race: B Height: 5-7 Weight: 160
DL State: SC DL#:
DOB: 07/17/1989 Agency OR#: SC0450200
Prosecuting Agency: KINGSTREE POLICE DEPT.
Prosecuting Officer: CHIEF FORD / CPL. W. HAMLET
Offense: CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE Offense Code: 0396
Code/Ordinance Sec: 16-03-0655 (B) (1), 0656

This warrant is CERTIFIED FOR SERVICE in the
County/ [] Municipality of

The accused
is to be arrested and brought before me to be
dealt with according to law.

Date: (L.S.)
Signature of Judge

RETURN

A copy of this arrest warrant was delivered to
defendant KEVIN BRADLEY

on 10-08-09
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA
County/ [X] Municipality of KINGSTREE

Personally appeared before me the affiant CHIEF ROBERT K. FORD / CPL. W. HAMLET
being duly sworn deposes and says that defendant KEVIN BRADLEY
did within this county and state on 10/01/2006 to 10/01/2007
State of South Carolina (or ordinance of [] County/ [X] Municipality of KINGSTREE
in the following particulars:

DESCRIPTION OF OFFENSE: 16-03-0655 (B) (1), 0656 / CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

THAT BETWEEN 2006 AND 2007, ONE KEVIN BRADLEY DID COMMIT THE OFFENSE OF CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE SECOND DEGREE BY HAVING SEXUAL INTERCOURSE WITH A MINOR UNDER THE AGE OF 14 PER 11 TANG IN THE PREGNANCY OF THE MINOR ONE BRADLEY WAS IDENTIFIED BY BOTH THE MINOR AND HER MOTHER LULA DAVIS AS THE PERSON BELIEVED TO BE THE FATHER OF THE BABY. CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE IS IN VIOLATION OF THE SC CODE OF LAWS ACCORDING TO SECTION CODE 16-03-0655(B)(1)

Signature of Affiant

STATE OF SOUTH CAROLINA
County/ [X] Municipality of KINGSTREE

Affiant's Address 401 NORTH LONGSTREET STREET
KINGSTREE SC 29556
Affiant's Telephone (843) 355-5435

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 10/01/2006 defendant KEVIN BRADLEY
did violate the criminal laws of the State of South Carolina (or ordinance of
County/ [X] Municipality of KINGSTREE) as set forth below:

DESCRIPTION OF OFFENSE: SEX / CRIMINAL SEXUAL CONDUCT WITH MINOR, OR ATTEMPT
VICTIM 11 TO 14 YRS OF AGE INCLUSIVE - SECOND DEG.

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn and subscribed before me
on October 8, 2009
Signature of Issuing Judge

Judge's Address C/O 401 N. LONGSTREET STREET
KINGSTREE SC

Judge's Telephone
Issuing Court: [] Magistrate [X] Municipal [] Circuit

ORIGINAL

Case: 09-