State of South Carolina

In the Supreme Court

Appeal from Richland County

Robert E Hood, Circuit Court Judge

Eric Marsh Petitioner

Vs.

State of South Carolina Respondent

Appellate Case No. 2014-002325

Pro Se Brief of Appellant

Eric Marsh # 354716

BRCI

4460 Broad River Rd.

Columbia, SC 29210

Pro Se Appellant

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Statement of Issues on Appeal

I. In petitioner's original application, the petitioner alleges he is being held in custody unlawfully for the following reason:
   1. Ineffective assistance of counsel's.
      a. Counsel's fail to give effective assistance of critical stage of the trial proceeding including protection of rights to due process of law.

II. In petitioners amended application, the petitioner alleges he is being held in custody unlawfully for the following reason:

   1. Ineffective assistance of counsel's.
      a. Trial counsel's failed to properly investigate the case.
      b. Trail counsel's misadvised clients as to sentencing for the plea.

III. The petitioner states that the improper measures of performance of the Attorney's was in the range of incompetence and not the standards required in criminal cases. This will show that there professional judgement was inadequate and deficient under the prone the court measure's an attorney's performance by its reasonableness under professional norms.

IV. 1. Petitioner's counsel's deficient performance was prejudiced to petitioner in such a way that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. With respect to guilty plea counsel's, there is a reasonable probability that but for counsel's error's petitioner would not have plead guilty and would have insist on going to trail.

V. 1. Whether petitioner plea's was knowingly intelligently and voluntarily made where he plead guilty due to plea counsel's promise and advice and failure to inform petitioner of the changes made as well as enhancement if petitioner would not have plead. The show of fear is what made the petitioner plead guilty instead of proceeding to trail.

Statement of the Case's

A Richland County Grand Jury indicted petitioner on May 2011 term of General Sessions for CSC second degree. App. 122-123. Petitioner plead guilty pursuant to North Carolina V. Alford 400 U.S. 25 Cooper: App.1. Assistant Solicitor Margaret Fent Bodman appeared on behalf of the State for Lexington as well as Richland County, and Theodore N. Lupton as well as Bennett E. Casto, represented Petitioner. App.1. Petitioner was not indicted on Lexington charge. App.1. Petitioner was sentenced by Judge Thomas Cooper to fifteen years imprisonment ran concurrent. He was also ordered to register as a sex offender. App. 38,11.17-23.

The South Carolina Court of Appeals dismissed Petitioner's direct appeal for failure to provide a sufficient explanation as required by Rule 203 (d)(1)(B)(IV), SCACR. App.47; App.111

On October 18, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 41-46. The state filed a return to this application dated February 24, 2014 raising the issue's argued in this petition. App. 52. The matter proceed to an evidentiary hearing on September 2, 2014 before the Honorable Robert E. Hood. App. 53. Assistant Attorney General Asheigh Wilson represented the state and Anna Good represented Petitioner. App.53 by order dated October 6, 2014, Judge Hood denied Petitioner relief. App 110-112. Petitioner also plead guilty on this date of March 20, 2013 to a closely related CSC minor second degree charge that was pending in Lexington but heard in Richland County. Petitioner waived jurisdiction and venue and agreed to plea guilty to the Lexington and Richland County charge in Richland County. Petitioner was represented on Lexington charges by both Theodore Lupton and Bennett E. Casto. App 3.11.7-20. The (PCR) Case concerns only Petitioner's Richland County conviction even though post-conviction relief contain both Richland and Lexington County case numbers and Attorneys. App. 41-44.

I. Petitioner believes under the following fact that counsels have acted under all statement of issue on Appeal. Counsel Mr. Theodore Lupton represented petitioner on both Richland and Lexington County Cases. Case No. 2011-GS-40-01996 Richland County and Case No. 2013-GS-32-00965, Lexington County, heard within Richland County Jurisdictional Court Authority. Because these two case's was consolidated under the one plea agreement, if contain both trail Attorney's. By both proceeding falling under the Richland County Jurisdiction, petitioner was denied his one full bite of the apple, by being deprive of the right to full address the Lexington County Case that was address by Attorney: Theodore Lupton in trail and (PCR). This also will show ineffectiveness of counsel's.

Facts

Attorney (Ted) Lupton has been practicing law about (19) years (pg. 77 of App.) (18-25) Mr. Lupton was appointed to represent Petitioner. Also (pg. 78 of App. 1-3) the law states in Criminal Law 641.3(2) The Sixth Amendment safe guards to an accused who faces incarceration the right to counsel at (all) critical stages of the criminal process. U.S.C.A. Const. Amend 6. Criminal Law 641.3(4) the entry of a guilty plea whether to a misdemeanor or a felony charge, ranks as a critical stage at which the Sixth Amendment right to counsel's adheres. U.S.C.A Const. Amend. 6 Criminal Law 273.3 Guilty Plea is more than a confession which admits that the accused did various acts, it is an admission that he committed the crime charge against him.

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel's acting in the rule of an advocate". Anders v. California, 87 s. ct 1396(1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted even if the defense counsel's may have made demonstrable errors the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. CRONIC, 466 U.S. At 656-57, 104 S. Ct. at 2045-46. In further contends that a criminal defendant is also protected from unfairness in the criminal process by the due process requirement that his guilt be proved beyond a reasonable doubt.

Argument

As stated in (App. 3.16-19) before the Honorable G. Thomas Cooper, Judge on March 20, 2013, in Columbia, South Carolina, Petitioner stated that he was represented by Theodore Lupton of the private bar, for the Richland County charge and represented by Bennett Cato for the Lexington County charge with Mr. Lupton. On (App. 7.4-7) the courts asked did petitioner understand by entering these pleas that petitioner was giving up the right to remain silent. On (App. 8.13-15). Petitioner was asked did he understand those rights and if he wish to still enter those plea. The answer was (yes). In regards to Criminal Law 273.3. The court address petitioner on (App.17.2-12) was statements made by Solicitor Margaret Bodman about all of the incidents in 2010, and did petitioner understand what she was saying. Petitioner stated (yes). Then the court asked are those facts (true and correct) on those dates as to what happened? Petitioner stated (no, you Honor) when asked what was not true by the courts. Petition, stated (just about everything). On (App. 17.18.) the courts address the petitioner asking if he had any contact with the allege victim. The Petitioner stated, he had admitted before that he never denied on 10/25/2010, he had been around the allege victim on this day. (App.17.23-25) and (App.18.1-2) Attorney Lupton stop the petitioner from addressing the court of the allege allegations and Mr. Lupton address the court that the petitioner report is that the Richland County charge is under Alford. He also stated that petitioner does acknowledge that as far as substantially--- the petitioner disputes some of the allegations. North Carolina v. Alford 400 U.S. 25 Judgement of conviction rest upon a plea of guilt is justified by the defendants' admission that he committed the crime charge against him and his consent that Judgement be entered without a trial of any kind. In addition, most plea's of guilty consist of both a waiver of trial and an express admission of guilt. Counsels deprive petitioner of clarifying and addressing the issue of answering the state that counsels should have fully address properly in clarification. Once petitioner gives up his right to remain silent, and the courts addresses him. He should have been able to address the courts in full, given meaning of his admission. This was denied at the critical stage of petitioner's trial. By Att. Lupton's statement on (App. 18.4-5). The allegations with Richland County or Lexington County case. He admitted that he would say that some of the allegations he did not find in the discovery. Petitioner Attorney's here by requested disclosure of all information available to the petitioner pursuant to Rule 5, SCRCrimP. Failure to disclose, if either party fails to comply with the requirement of this rule, the court may exclude the testimony of any undisclosed witness offered by either party. Nothing in this rule shall limit the right of the defendant testify on his own behalf. The failure to address this information doing the plea at a critical stage may have changed the outcome of these cases. (App. 18.8.)

Mr. Lupton stated that, it was his understanding that petitioner acknowledges that there was sufficient basis for the Lexington plea as well, without admitting to all of the gory details. But if you go back to (App. 17.20) petitioner tried to clarify his involvement but was stopped by Attorney when the courts stated that they are not gory, they are what the state plans to offer and that Mr. Lupton understood that would be the State's evidence and what the state would use and should have not move forward with the plea acknowledging that he did not fine some of the allegations in the discovery. Rule 5, SCRCrimP states that this Rule5 if prior or during trial, the defendant discovers additional evidence or materials previously requested or ordered, which is subject to discovery or inspection under Rule 5, the defendant shall promptly notify the State or it's Attorney or the court of the existence of the additional evidence or materials as required by subdivision © of Rule 5,. As to state, Mr. Lupton acknowledge his surprise (App. 92.21-24) and (App. 93 4-9). In Brady V. Maryland 373 U.S.83 (1963) the Supreme Court held that due process require the prosecutions to disclose evidence favorable to an accused upon his request when such evidence is material to guilt or punishment. It has also been established that the government's duty under (Brady) arises whether or not the defendant, specifically request the favorable evidence. Tardy disclosure of (Brady) material is not reversible error unless the defendant can show that delay denied him a fair trial. Circuit Court have found due process violations when the government fails to disclose other impeachment evidence. (App.92.10) Mr. Lupton stated neither of us were aware of what the report said. (App.97.8-14) Mr. Lupton admitted that the receipt of this report came in after the time of the guilty plea. Mr. Lupton relied solely on the solicitor statement that she told him about the evidence and must have forgotten to get them back to him. (App.25. 919-22) 116.S ct 1581 (1996), U.S.V. Hanna 55.F.3d 1456, 1460-61 (9th CIT 1995) due process violated by failure to disclose witnesses prior inconsistent statement because credibility of issue. Moreover, failure to disclose (all) material evidence favorable to an accused violates due process whether or not prosecutor acted in good faith. The government obligation to disclose favorable evidence is limited to evidence that is material to defendant's guilt or punishment. In United States V. Bagley, the court held that evidence in material if there is a reasonable probability that disclosure of the evidence would have change the outcome of the proceeding. (1121) Brady, 373 U.S. at 87 compare U.S.V. Udechukwn 11.F.3d 1101, 1106 (1st Cir 1993) Brady violated where prosecutor appeared to have deliberately suppress evidence corroborating defense, court found that even if one believed that nondisclosure unintentional, carelessness denied defendant, must critical aspect of defense. Failure to disclose DNA report, location of all edge crime and first test done by Sled. All critical evidence within both cases. (App 9.4-9) when the court asked did counsel's fully discussed the facts of this case with petitioner and have shown petitioner the evidence--- or told petitioner about the evidence that the state would offer if petitioner went to trial. Is that correct. Petitioner stated. (Yes) But if we go back to (App.18.4.5) Mr. Lupton stated that some of the allegations he did not find in the discovery either. (App.82.2-4) Mr. Lupton admits that there was no physical evidence, no forensic evidence to substantiate the Richland

County charge. There was also conduct on allege victim part that could arguably be inconsistent with the allegations. Then Mr. Lupton stated (App.82.9-10) that however, the biggest problem counsels had was not Richland County but Lexington County charge. Even thou Mr. Lupton was the attorney for Richland, the courts address him mostly on the Lexington County charge for investigation, evidence, and CODIS match. Petitioner had concerns about the rape kit, there was a second man D.N.A. sample profile that was on the rape kit, not just one. (App.25.11-15) to be known to the courts, that on November 13, 2012, the D.N.A. profiles developed from this kit was from an unidentified male. This individual was enter into combined D.N.A. Index System (CODIS). D.N.A. was not attributable to the unidentified male individual in the fraction of these samples. The DNA profile developed from this kit had not just one but at least two individuals' mixtures. The major contributor of all three DNA profile is the allege victim. Mr. Lupton stated on (App.25.16-18) to his understanding is that the swabs have not come back from Sled yet, that those are still being tested. But Mr. Lupton stated (App.25.23-24) that he do acknowledge that CODIS from Connecticut is a match. Mr. Lupton admits that there was a Schmerber Motion, his guess, in December of 2012, where the DNA was taken from petitioner. Petitioner was before the Honorable James R. Barber, III, Judge and Jury. Appearance by Margaret Bodman, attorney for the state and Theodore Lupton, attorney for petitioner. Court Reporter Mrs. Daphne D. Helms. At the time of questioning, Officer Courtey Dennis was being examine by Ms. Bodman on (pg. 10 line 3-5) of this transcript, Ms. Bodman asked Mr. Dennis, did they identify any semen as a result of analyzing that rape kit? Mr. Dennis answer was (yes). Then on (pg. 10 line 16-19) Ms. Bodman asked; and the findings that they've been able to make so far, is there one—has somebody absolutely been identified? Has a person been identified? Mr. Dennis answer was (no) then Ms. Bodman asked; Is there more than one unidentified person or just one unidentified person? Mr. Dennis answered, the results conclude that the DNA profile that was developed from there four items that were submitted is from and unidentified individual. This on (pg. 10 line 20-24) after this direct exam by Ms. Bodman, Mr. Dennis was cross exam by Mr. Lupton. Mr. Lupton asked Mr. Dennis on (pg. 11 line 15-20) are you involved or were you involved in any way with the investigation of the October 25th, 2010 incident? Mr. Dennis answer was (No) Mr. Lupton then asked, so you didn't interview anybody related to that? Mr. Dennis answer (No), Mr. Lupton asked him if he collected any rape kits? Mr. Dennis answer was (No) Mr. Lupton asked Officer Dennis, was he aware of whether or not Petitioner is in what's called CODIS and did he know what CODIS is? Mr. Dennis answer was (Yes he do) (pg. 13 line 6-20). Mr. Lupton then asked so it's obviously a DNA database. Mr. Dennis answer was (That's correct). Then Mr. Lupton asked Mr. Dennis. The DNA sample in this case was checked against CODIS to see if it was – if they were able to make any identification correct. Mr. Dennis answer was (That's correct) Mr. Lupton then asked if he was aware of whether or not petitioner was in CODIS? Mr. Dennis answer that (your client is not in the system). Note: Petitioner has been in the system over 12 years before this case out of Connecticut which is a nationwide system. Mr. Lupton then ask Mr. Dennis on (pg. 14 line 1-2) but CODIS is a national database is it not? Mr. Dennis answer was (Yes) Note: This is where Petitioner was under the understanding of he was no match to the DNA profile. (pg. 14 line 10-14) Mr. Lupton

asked Mr. Dennis; so you haven't checked to see if you've got evidence of whether or not petitioner's in CODIS and thus, whether or not he has already been tested against this evidence of whatever the chain of custody is correct? Mr. Dennis answer was (No .....) Note: If petitioner give DNA and was put into CODIS and when the rape kit semen was without saying (App. 82 9-10) Mr. Lupton states that; the biggest problem we had was not the Richland charge but the Lexington charge. (App.87.2-6) Attorney General Wilson asked Mr. Lupton; do he believe that ultimately it was Mr. Marsh's decision to plea guilty? Mr. Lupton stated (Yes, in fact during the plea it almost broke down because the judge would not accept on Alford on the Lexington charge because of the DNA evidence). Note: evidence that petitioner or counsel's had. (App.79.6-10) Mr. Lupton stated that there was DNA evidence. In the beginning, there was the DNA had a CODIS hit based on conviction from Connecticut where he—Petitioner's DNA was in CODIS from that. Ultimately, a Schmerber Hearing was held which (he) (not my attorney) fought vigorously, but Judge Kinard granted the order. Petitioner fault that if he was already in the CODIS System he should not have to give a new sample. (App.92.6-10) Att. Good asked Mr. Lupton; so it's fair to say that at the time of the plea Mr. Marsh was not aware of any DNA consequences or results as a result of the test that he gave in the Schmerber hearing? Mr. Lupton answer was; (neither of us were aware of what the report said) notwithstanding, Petitioner went into court under the understanding that he was no match and from his counsel's word, that if DNA was not back the state could not use the second test. Mr. Lupton admitted neither of us had. Only the word of the solicitor. (Assumption) Neither was aware what the report said (App.92.14-19) Att: Good asked Mr. Lupton at the time the DNA was mentioned during the plea did he have a conversation with Petitioner (Mr. Marsh) about it? Did Mr. Marsh say anything to you about it? Mr. Lupton answered; we talked about the DNA extensively I don't recall anything specific that he had that day that in particular. Then Att. Good asked Mr. Lupton App.40.21-24. I guess what she (Ms. Good) was asking was during the actual plea, when DNA was brought up, did Mr. Marsh lean over and say anything to you? Mr. Lupton answered, it's very possible. Note here is Petitioner addressing his counsel's in regard to DNA allegations and Att. Lupton on states. (It's very possible) He also states on (App. Pg. 93.1) we did talk about that a great deal. This is doing the plea, where petitioner admitted he was very concerned. (App. 65 5-8) (App.93.4-9) Ms. Good asked Mr. Lupton were he caught by surprise by the DNA on the record, which is why you (Mr. Lupton) said something about not having the results. Correct Att. Lupton answered (Yes). It's very possible that I did say something about that, I didn't have the report at that point. I was not aware that the report was finished. (App. 97.8-14) After being question by Ms. Good Att. General, Ms. Wilson asked Mr. Lupton; and di you (Mr. Lupton) receipt of this DNA Report from the solicitor (Ms. Bodman) after the time of the guilty plea affect your advice to Mr. Marsh regarding whether or not he should plead guilty. Mr. Lupton answered It – had I had that prior to the plea, it would have only made the recommendation stronger, although I knew it was coming. Note: Att. Lupton admitted that the court would not take an offer on Lexington but the sheet was changed on Richland. The negotiated plea was change to recommendation and he would not have done this without explaining to petitioner the difference (app.96, 97, 21-25, 1-3) Petitioner testified on (App.59) that on

the day of the Schmerber hearing that he was going to trial. When asked did he talk with Att. Lupton before going into court, Petitioner stated he went straight into court. When Att. Lupton spoke with him, he told Mr. Marsh that this is a reprocessing of the DNA evidence. Petitioner then stated that it was already processed once. Petitioner stated on (App. 60) that Mr. Lupton acknowledged to him that if petitioner had to retake the DNA, he was going to file motions and whatever paperwork that petitioner needed to exclude various evidence (App. 60.8-10) Petitioner admitted that he and Mr. Lupton get into an argument about this. (App. 60.18-20) (App. 92, 93, 31-25,1) This argument was stated also by Mr. Lupton as (we did talk about a great deal.) (App. 60.21-25) Ms. Good asked Petitioner what was that argument? Petitioner answer: We got in a few arguments. The arguments because Mr. Lupton told petitioner that --- prior to this, he said since petitioner already done the DNA, Petitioner wouldn't have to give up any other DNA. If Petitioner had to, he would fight against it. When they finally got to grant the DNA, we went in the back room. Petitioner and Mr. Lupton had a little disagreement about that to, because the detective took Petitioner's DNA the first time. He took it, put it in an open box, put it in his top pocket and began to walk out. Petitioner addressed Mr. Lupton about it, Mr. Lupton called the detective back and he retook the second swab again. Petitioner asked Officer Dennis was he going to seal it and put Petitioner name on it. Det. Dennis put it again in an open box and put Petitioner's name on it. Mr. Dennis then walked out. Petitioner addressed Mr. Lupton about this, Mr. Lupton said; (Don't worry about it) when Mr. Lupton get to court, we'll address it in the proper way that the detective collected the evidence. (This was not address at trial as promise.) Then Petitioner stated, but he walked out with both sets of DNA. Note: After plea, Mr. Lupton did not send full discovery to Petitioner's case. Upon looking through the discovery given to by Att. Good. There was no recording of confusion from Det. Jill Beza who was initially assigned to his case that is no longer a part of Irmo P. D. That was taken at Alvin S. Glenn Detention Center. Upon further investigation. Petitioner learn that Inv. John Hendricks of the Irmo P.D., turn over DNA taken from Petitioner by Inv. Dennis given to Inv. Hendricks where a sealed pouch containing Buccal swab described as petitioner's Date of submission is 12/19/12 (13:54 p.m.) This is the start of chain of custody. Chain No. L12-15732 The end date on which returned to agency in person is 4/9/13. This was the second test done. There is a nine day gap between December 10, 2012 and December 19, 2012. Chain was completed on first test 11/29/12, a month before the Schmerber Hearing. On December 7, 2012. Ms. Margaret Bodman stated that chain is not final until all evidence is analyzed. As stated before. Test came back 11/29/12. Solicitor Margaret Bodman from {Mail to: bodman@regov.us} stated the box has some chain, C.P.D. has some chain and Sled has some chain. Dated_____. The first test done on DNA chain of custody Case No. L12-07683. It was submitted by Inv. Wayne Montgomery of the Columbia Police Department at (16:03 p.m.) 6/27/12. I was return to agency in person on 11/29/12, (9:36 a.m.) to Donna Martin, Columbia P.D. This is the case that came back that the solicitor and Mr. Lupton knows nothing about. This was before Petitioner's Schmerber Hearing. There are documents stating that the sister should have no contact with each other until this investigation is completed and until they believe such contact to be in the victims' best interest. This is one of the main witnesses to clarify this hold

case. DNA, crime scene, etc... This is the same person Mr. Lupton stated he could not find. ARC Interview Report Form, Allege Victim Case No 10214165. Petitioner wishes to show Strickland V. Washington 466 U.S.682 cite as 104 S. Ct. 2052 (1984) If there is more than one plausible line of defense investigate each line substantially before making a strategic choice about which line to rely on at trial and or plea. If counsel's conducts such substantial investigations the strategic choices made as a result will seldom if ever be found wanting. Because advocacy is an art and not a science and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgement Id. at 1254. If counsel's does not conduct a substantial investigation into each of several plausible line of defense, assistance may nonetheless be effective. Counsels may not exclude certain lines of defense for other than strategic reason. Id. at 1257-1258. Counsel's strategic reasons was to offer plea under a promise without knowledge of truth to petitioner. And if this did not work, add fear. Petitioner wishes to show particular errors of counsel's were unreasonable, therefore, the petitioner must show that they actually had an adverse effect on the defense. The failure of counsels assistants influenced the outcome undermines the reliability of the result of the proceeding. (App.83.10-25, App.84. 1-2) Mr. Lupton admitted that petitioner gave him a number of witnesses that petitioner wanted Mr. Lupton to talk to, Mr. Lupton said he made contact and was able to reach some of them. The ones Mr. Lupton did reach did not provide anything and based on his investigation of the case he could not reach others. (App.93.94. 19-25, 1-10) basically, petitioner wanted him (Mr. Lupton) to talk to the people involved. The allege victim sister employer and at least one friend, he said he spoke to. Attorney Ms. Good asked Mr. Lupton was he aware of the process of getting an investigator, a way to go through that's through the court, correct? Mr. Lupton stated that he was aware. There are no statement of any kind of this investigation and there was no investigator assigned. There is no record of any of this being done. But Richland County has over 8 subpoenas delivered to Richland and Lexington County Court by Petitioner mother. All sign with name, address and phone number. (App.83.21-25) Mr. Lupton stated that he did extensive work with getting the information out of the solicitor's office, reviewing that information, coordinating with the Lexington Solicitor's Office to try to get information concerning the Lexington charge. As stated once before, Mr. Lupton handled both Richland County and Lexington County charges. Mr. Casto was mainly ride along. Mr. Lupton stated the cases are too inextricably linked to go forward on the Richland Case until the evidence in the Lexington Case is fully developed. Letter to Mayes Suzanne and Margaret Bodman date July 5, 2012, (letter enclosed) (App.28.1-2) Mr. Casto stated like he (Mr. Lupton) said these cases are intertwined, (App.15.20-21) Ms. Bodman stated that Inv. Beza want to go interview him (Petitioner) and essentially he admits to a lewd act upon the allege victim. Court asked on which occasion? Ms. Bodman stated, it's really unclear. Petitioner was charge with the same charge CSC w/minor 2nd degree within Lexington County. Petitioner stated to both Attorneys that he went to his job in Lexington County on the day of 10/25/10. Petitioner never made statement that a crime was committed there. The allege victim stated that the allege Lexington crime was committed 2 hours way off the highway. She thought she was going to Seabrook, South Carolina in Beauford, her grandmother house.

Afterward the Petitioner drove to his job then his friend Kenny's home where she recant her story to the investigator. This evidence was first seen in May of 2015 by Petitioner even after he admitted that there was no crime in Lexington. Mr. Lupton stated that he didn't have them at the time of the plea. Petitioner's Lexington Warrant No. M-302915 states: Petitioner took the allege victim to an address in the area of Garden Valley Lane, which is the Columbia Area of Lexington County. After the allege victim was taken from a bus stop in Columbia area of 2306 Bentley Ct. in Richland County, where the allege victim was to have said she was kidnapped etc... Note: How can Richland use an allege kidnapping in Richland to force Petitioner to plea because Lexington would charge him with kidnapping? But on the interview give to the state. The allege victim stated that she was in the middle of her apartment complex when everyone was going to school. On (App. 12.22-23) The Solicitor stated that Petitioner began driving around, went to an abandon house. The allege victim stated that she had never been to where the allege crime took place, but it was an abandoned house with a shed right behind this home. Note: There is no abandoned homes on Garden Valley Lane. (App. 13.18-21) Ms. Bodman stated that the abandoned home, based on the investigation, we determined that to be a location in Lexington County. (App.84.3-6) Mr. Lupton stated: I did a lot of investigation in that sense, but there wasn't much to do in terms of – the crime scene on the Lexington charge was unknown. It wasn't like I could have gone to the crime scene. If Petitioner, allege victim, and Attorneys' mention there is no crime scene within Lexington, there no picture of a crime scene, no evidence in proof from Richland or Lexington, only the word of the Solicitor. Richland County determined this fact. The warrant state Petitioner took the allege victim to an address with no address in the area of. In a transcript before the Honorable Roger couch, Judge, Ms. Margaret Bodman (Fent) the Solicitor and Mr. Theodore Lupton (Ted) Attorney for Defense. Court Reporter Karen Ambroziak on August 30, 2012 Gen. Sessions Case No 2011-GS-40-01996. (Pg. 3.12-13) Mr. Lupton stated warrants were issued in both Richland and Lexington. Petitioner was served with only Richland County Warrant. (pg. 4.3) The courts stated, well its coming up on about two years. (pg. 4.4-9) Mr. Lupton states, it's almost two years. The Lexington charge the – there is discussion of evidence. There is potential DNA evidence. (pg. 4.12-13) court states what is the bond on the Lexington charge? Mr. Lupton states, that's the problem you honor, Lexington isn't moving forward on their case. (pg. 5.6-16) Mr. Lupton states, it has never been served. (Courts) so he's never been served with a warrant? (Lupton) right, we've asked that to be done. (Courts) so there is no hold on him from Lexington? (Lupton) No. They have a hold on him, they place a hold on him to serve the warrant so that's – (Court's) wait a second! So let me ask this part; what do they have a hold on him for? If they don't have a warrant, they don't have a charge. Why are they hold him? (pg. 5. 17-19) (Courts) I have never seen a situation where somebody hasn't served the warrant. (pg.12.22-25) (Courts) If you want to file a writ of habeas corpus in Lexington against their hold him, I think you probably have got a right to do that because they can't hold him with a charge. (Pg. 13. 1-13) Mr. Lupton states: Would the court consider ordering the Lexington warrants be served. (Courts) No, sir! (Pg.13.17-19) (Courts) I've never seen – you know, I know you can put a hold on somebody for a day or two to get the paperwork ready, but you're telling me it's gone one three years. (Pg.

13.22-24) (Courts) I mean, they may have a warrant, but he has no knowledge of notice of it. He hasn't been arrested. (App.28.2-3) Mr. Casto stated that these cases are very much intertwined. (App.28.5-7) (Casto) I am somewhat late to this. And as the solicitor outlined they (Richland County) made the discovery that this one allegation happened in Lexington County. (1889) U.S. V. Young.470 U.S. 1, 7-11, 1985) Although the line between acceptable and improper advocacy is not always clear courts have consistently found certain types of prosecutorial conduct improper. The prosecutor may not knowingly presented false testimony and has a duty to correct testimony that she knows is false. Furthermore the prosecutor may not attempt to introduce inadmissible evidence and must be disclose evidence favorable to the defendant if the defendant request it. Note: Like the first test of DNA in CODIS on a no match and the second DNA was not back before plea and the fact that it was tamper with, having the state produce a Lexington charge with no crime scene from allege victim or petitioner. Prosecutors should confine her opening statement to evidence she intend to offer then she believe will be admissible and closing argument to evidence on record and permissible inferences there from repeated misstatements that go uncorrected maybe grounds for ordering a new trial or for reverse on appeal. Floyd V. Meachum 907 F. 2d 347, 353 (2d Cir. 1990) Prosecutor's repeated and escalating misconduct reversible. U.S. V Murrah 888 F. 2d. 24, 27-28 (5th Cir. 1989) Prosecutor's may not vouch for the credibility of government witnesses or allude to her own oath of office to bolster the government's case. In following up on investigations on both cases especially any investigation that would establish the location, where allege victim reports the 10/25/10 assault took place. Like Solicitor stated, that there was considerable confusion over which county this was in and that it was eventually determine to have been in Lexington County. (There was statements said to be taken in both cases. But there was no statements included in the discovery, other than the narrative given in the sane interview) There should be police statements (multiple in some cases) from the victim her mother and father, Marguetta and Tienna Hawkins and Kenny Alford of 1208 Bush River Rd., along with the Steve Ware of 1019 Garden Valley Lane. The person Mr. Marsh was working for. The allege victim says they were with him (Petitioner) for a period during the 10/25/10 incident, as well as Petitioner made the same statement. There should be records, especially needed recorded or written statements of defendant admitting to having done the allege crime on these dates. In State V. Douglas 302 S.C. 508, 397 S.E. 2d 98 1990 the South Carolina Supreme Court reversed a conviction where there was not a sufficient connection between the crime charged and the prior bad act alleged. The fact that the court of Richland stated that they determined the crime scene was Lexington County and also fact, that counsels did not verify the location. There is no evidence of location other than from witnesses' mention of petitions job. But know further mention other than from the solicitor. There is no knowledge of the crime scene, allege in Lexington County. There is no statements in Richland or Lexington relating a crime was committed with in Lexington on 10/25/10. There is no connection or relation between the two incidents with location on where the crime scene was, other than solicitor's statement. There is no location established in Lexington for Richland County use. Furthermore, the prejudicial effect of admitting the bad act evidence was compounded by the fact that his evidence formed a substantial portion of the State's

case. The prejudicial effect of admitting this evidence substantially outweighed its probative valve thereby raising a legally spurious presumption of guilt in the mind of the court. State V. Wilson 274 S.C. 534, 266 S.E. 2d 426 (1980) The charge of CSC where the state tried to introduce evidence that the defendant had be positively identified in other related charges, to show identity and common scheme. The Supreme Court held the connection between the acts, the accused is to be give the benefit of the doubt and the evidence should not be admitted. Id at 427 in State V. Peake, 302 S.C. 378, 396, S.E. 2d 362 (1990) The trial court improperly admitted testimony of that the defendant kidnapped and assaulted the allege victim. The state claimed this testimony showed how the defendant lured the allege victim into car in Lexington, to establish the modus operandi of the crime leading to DNA. The court should show connections between the defendant with the allege victim with in the circumstances of the allege victim statement. The mere offer that the crime was identified in Lexington to establish defendant's guilt of the offense charged. The prejudicial weight of the testimony exceeded its probative valve and should have been excluded.

Argument

In Rule 5, if prior or during trial, the defendant discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under Rule 5, the defendant shall promptly notify the State or it's attorney or the court of the existence of the additional evidence or material as required by subdivision (c) of Rule 5, as to State: Under Strickland V. Washington 466 U.S. 668 (1996) an applicant for post-conviction relief must show that his counsel's failed to render reasonably effective assistance under the prevailing professional norms and that he was prejudiced by the deficient performance. Judge V. State, 321 S.C. 554, 471 S.E. 2d 146 (1996) The duty of a prosecutor is to see that justice is done rather than merely obtain a conviction. State V Linder 276. S.C. 304, 278 S.E. 2d 335 (1981) The solicitors arguments must not be calculated to arouse the passion and prejudices of the court. State V. Copeland 321 S.C. 318, 468, S.E. 2d 620 (1996). In this case the assistant solicitor became overzealous in her argument in order to obtain a conviction. Mincey V. State 314 S.C. 355, 444 S.E. 2d 510 (1994) Failure to object to improper solicitor argument held ineffective assistance of counsel's. Mr. Lupton and Mr. Casto was aware of the information of no crime scene, tampering of evidence, the allege kidnapping was said to have happen in Bentley Court in Richland County, so Lexington could not use this to force a plea, as well as the allege victim stated that the allege crime happen two hours outside the Columbia and Lexington area. Furthermore, the solicitor used the LWOP to force a plea from Petitioner. (App.38.13.14) The courts stated: I can give him 20 years on the Lexington County Case. Mrs. Margaret sent fax to Mr. Lupton that stated: If he rejects our offer he risk that Suzanne Mayes will DPCSC first and kidnapping charges for what occurred in Lexington. Each of those carry 0-30 and are MS. Note: This is the statement of the Richland County Solicitor. There is no paperwork from Lexington to show truth, and Mr. Lupton stated he was working closely with Lexington Solicitors Office. But Mr. Lupton admitted on (App.85.16-24) stating: I mean, that was one of the big driving factors in this where we talked about that it was to his benefit to resolve them together, and that the Lexington Solicitor had reviewed the case and had

intend to indict a CSC first and a kidnapping as well as the CSC with a minor. Let record show that the solicitor fax the paperwork from Richland County. Nothing came from Lexington but the warrant. (App.72.20) Petitioner admitted he wanted to go to trial. (App.75.2, 5.) Question by Ms. Wilson: Now today you're saying that had you know more about the DNA evidence that you would have wanted to go to trial; is that correct? Petitioner answered: (Yes) among other things. Mr. Lupton stated he knew nothing about the DNA when Petitioner asked before court. But doing court, Mr. Lupton admitted that they had made a match. (App.65.20-25) and (App.66.1-11) "acknowledgement" (App.25.23-24) After the plea Petitioner admitted talking to Mr. Lupton and Mr. Lupton admitted to him that he was not going against his friend and he thought he told me that she was asking for 15 years (App. 67.1-8) (App.67.13-21) Petitioner was asked was he aware what 15 years meant? Petitioner stated (No) he was not aware. As said before, Petitioner tried to address the Solicitor's open statement but was stop by Mr. Lupton. (App. 17.20-23) Petitioner also admitted to the court on (App.35.4-6) He states I ask the courts that they please have leniency with me, because there is a lot of things I still do not understand. Petitioner admitted on (App.67.22-25) and (App.68.1-5) mainly what Petitioner used to make his decision for the plea is the fact that while he was in court, he tried to back out of the plea because he wanted to go to trial. Petitioner explained to counsel's, he really didn't want to take a plea for something he didn't do. This is when Mr. Lupton turned from Petitioner. He turned around and when Petitioner address Mr. Lupton, the Solicitor answered, got upset and yelled at Petitioner. Stating: OH! If you don't take this plea, I'm going to make sure you get life without parole, enhancements and the kidnapping. (App.85.7-12) Mr. Lupton admitted that ultimately, we got this plea. He was not exactly happy with it, but the Lexington P. Defender and I talked to Petitioner at length, and he ultimately agreed that it was his best chance in this case. We made it clear to him that he was the one who had to accept or reject any plea. Petitioner wanted to go to trial. Petitioner mention to Mr. Lupton that he rejected the common law AB/Han (App.84.13) and he had filed a speedy trial motion. (App. 90.20-25) and (App.91.1-9) The statement made was (Lupton) I did file a speedy trial motion (Att. Good) and that was granted? (Lupton) (Yes) (Good) and when it was granted, was there a particular time period that was put on that and any consequences if the trial did not happen in that time period? (Lupton) I believe it was 120 days for the speedy trial, but there was no consequences place on it. (Good) so if it – by the time December came around had the 120 days run? (Lupton) (No) I believe the 120 days was getting pretty close at the time this plea happen. Petitioner found out that the end of the 120 days ended on March 22, 2013. Petitioner also acknowledge that the first speedy trial was 90 days. At that time, the court's asked for an extension because they needed to take DNA. This is why the addition of the 90 days. If these cases did not go before a Judge by this time, the trial would have been dismissed.

Rule 11(d) requires the court to ensure that the guilty plea is not the result of force, threats, or promises, apart from the plea agreement. Also prosecutorial misconduct may render a defendant plea void for involuntariness. The Petitioner hope to show that fear of the possible consequences of not pleaing guilty destroyed his ability to balance the

risks and benefits of going to trial. Counsel's provided ineffective assistance by unreasonably failing to preserve the issues for direct review and that this failure prejudiced the outcome of the case. Counsel's was ineffective for failing to properly preserve the arguments concerning the effect that the evidence could have had on petitioner's sentence. The newly discovered evidence of material facts not previously presented and heard should require vacation of the conviction of sentence. Counsel's was ineffective for improperly advising the Petitioner. Counsel's failed to adequately investigate the facts and circumstances surrounding these cases. The counsel's failure to conduct such an investigation, deprived the State's Judge of Critical information relevant to an accurate assessment of Petitioner's guilt or innocence. The Alford's guilty plea was involuntary because its principal motivation was fear of upgrading of the charges and addition of new charges with the results ending in LWOP. The Petitioner was so gripped by fear of LWOP and addition of new charges, that his decision to plea was not voluntary but was the product of threat as much so as choice reflecting physical constraint or force. If counsels has promise and not just predicted a particular sentence, the failure to receive that particular sentence should render the guilty plea involuntary. Petitioner understand that a plea is not involuntary merely because a prediction that a guilty plea will result in a light sentence does not come true. But because of this prediction as well as fear, should render Petitioner's plea involuntary. Petitioner's failure to understand the charge or maybe the penalty of the plea and knowingly not understanding that intent was an element of the crime. Petitioner maintain his innocents and because he did not possess an understanding of the law in relations to the facts. Petitioner could only rely on counsels. There was no full admission to the factual basis within Petitioners court hearing, and failure of the Petitioner to admit to the factual basis of my plea is the equivalents of a plea of not guilty, and should not have been accepted. Failure of counsel's to acknowledge the DNA first test prior to trial constituted ineffective assistance of counsel's. Counsel's decision not to speak of the DNA Testing prior to trial was unreasonable because he state used the DNA as circumstantial evidence of guilt. Trial Counsel's has a duty to conduct a reasonable investigation or to make a reasonable decision that makes investigation unnecessary, but this is not the case. Investigation should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgement. The failure to have all information given to Petitioner prior to trial was prejudicial. West Federal Practice Digest 4th 40A Evi 53 to 427 C.A.8 (1984) Trial Courts are entitled to assume that public officials who had custody of evidence properly discharged their duties and did not tamper with it, such assumptions is operative until defendant make minimum showing of ill will bad faith, other evil motivation or present some evidence of tampering. William V Butler 746 F. 2d 431, City of Little Rock V. Williams, 106 S. Ct. 1508,475 U.S. 1105, 89 L. Ed. 2d 909.

Conclusion

Petitioner is concern with my PCR Appeal. I was appointed Attorney Anna Good to represent me with my Richland County PCR Case. Case No. 2013-CP-40-6380. I was told by my PCR Attorney Mrs. Anna Good, that she did not represent me on my Lexington County Case, and it could not be brought up in my Richland County PCR. But to my new understanding and information given to me by the court of appeal, both General Session Courts Lexington and Richland County agreed to have the two case's Richland County Case No: 2011-GS-40-01996 and Lexington County Case No. 2013-GS-32-00965 heard within Richland County Jurisdictional Court authority. Assistant Solicitor Margaret Fent Bodman of Richland County and Assistant Solicitor Suzanna Mayes of Lexington County both agreed to dispose of my criminal cases in one proceeding in Richland County in front of Judge Thomas Cooper. When I filed my PCR with Richland County, (filed on October 18, 2013) it contained both case numbers of both Richland and Lexington County. Because these two criminal cases were consolidated under the plea agreement, it contain both trial Attorneys for ineffective assistance of counsel against Mr. Theodore Lupton and Mr. Bennett E. Casto. As of October 23, 2014. I was told by the Court of Appeal; that because the Lexington County Case was disposed of in Richland County in one proceeding, it falls under the Richland County Jurisdiction. Case No: 2013-000642 with the Appellate Court. By this being said, I was denied my one bite at the apple by being deprived of the right to address both Lexington and Richland County Attorneys ineffectiveness on my PCR Application I had before Judge Robert E. Hood's on September 2, 2014 for the PCR Case No. 2013-CP-40-6380. I ask that your court please provide me with assistance with remanding or overturning of my PCR Dismissal so it will contain both Richland and Lexington County Cases. Please allow me my full bite of the apple to address the full scope of the Criminal Cases from both Richland and Lexington County, which were encompassed by my plea agreement and to allow me to examine Attorney Casto as well as Mr. Theodore Lupton about his ineffective assistance to give the PCR Court the opportunity to issue a fair and impartial ruling in these matters. I would like to show the courts that the DNA for my case, which Richland County address in my PCR was not with truth. (In the Summary of the Testimony) Mr. Theodore Lupton was this Richland County PCR Case No.2013-CP-40-6380, testified that DNA evidence taken from the victim after the assault initially matched me (Eric Marsh) from a prior Connecticut convictions found in CODIS. He testified we had a Schmerber hearing and fought against me giving a DNA sample to confirm the CODIS Hit. I wish to provide to you pages from the Schmerber Hearing transcript that show otherwise on the test result and that his testimony is without truth. I was under the impression by my PCR Attorney: Mrs. Anne Good that this information could only be brought up with my Lexington County hearing and I should write to your office and address my issue because it was (my case) turnover to your office so that you can make a sound decision to remand or overturn Judge Robert E Hood's

decision. Mr. Lupton also testified that the DNA results confirmed the CODIS Hit, made his recommendation to me to plead guilty stronger. He also testified that there was no problems in the collection of my DNA the second time. But I have a letter from him stating otherwise. All are which containing to my Lexington Case but was done by Mr. Lupton my Richland County Attorney, which Richland County used within their case. I ask that you look at the evidence that should have been with both cases done together. I want to bring in both attorneys for ineffectiveness under the one PCR, and I address this with m attorney Ms. Anna Good. She was told by Mrs. Megan Harrigan {mharrigan@scag.gov} on 6/13/2014 that they will only be dealing with my Richland County charges, not his Lexington County ones. So my Attorney Mrs. Anna Good did not request a hearing on this matter. But if you review my transcripts of both plea agreement and PCR, both Richland County and Lexington County was intertwine together and you can't define which from which. If you review my PCR Application, you will see that it contain both case numbers. Case No. 2011-GS-40-01996 Richland County and Lexington County Case No. 13-GS-32-00965. I ask that you please look closely at this matter for the reason stated with this Pro SE Brief as well as writ of certiorari Johnson Petition, I ask this court to grant this petitioner before your court.

Respectfully Submitted,

Eric D. Marsh

Eric D. Marsh # 354716
BRCI
4460 Broad River Road
Columbia, SC 29210
Pro Se Appellant

6/30/15

To: The Supreme Court of South Carolina
Re: My Appeal
To: Mrs. Daniele E. Shearouse, Clerk of Court

I would like a copy of everything that has been sent to you with a court stamp and date that this written memorandum (Pro Se Brief) has been file on my behalf.

Sincerely,
Eric D. Marsh
Eric D. Marsh
Appellate

Legal Mail
Eric Marsh #354716
BRCI
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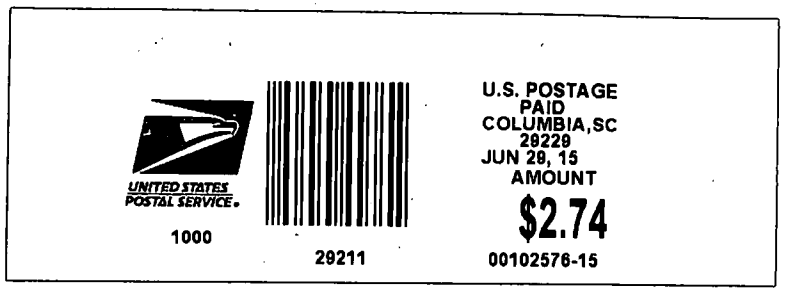

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