

THE STATE OF SOUTH CAROLINA

[In The Supreme Court]

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APPEAL FROM THE BEAUFORT COUNTY

Court of Common Pleas

Carmen T. Mullen, Chief Administrative Judge

JUL 20 2015

S.C. SUPREME COURT

Case No. 2013-CP-07-1650

State of South Carolina,Respondent,

v.

Nathaniel Johnson, Jr. #211574,Appellant,

MOTION TO AMEND JUDGMENT

The Appellant, Nathaniel Johnson, Jr. #211574, hereby moves this court to amend the PCR courts judgment. The Appellant alleges that he did not knowingly, intelligently, voluntarialy, nor willfully waive his rights to appeal PCR courts decision. The PCR courts made an unreasonable determination of judgment.

1). A concise non-argumentative statement
of the facts of the case.

On September 21st., 2006, the Beaufort County Grand Jury said to have indicted the Appellant, Nathaniel Johnson Jr.. The indictments were charges of First degree Criminal Sexual Conduct, (CSC 1st.), Kidnapping, Burglary 1st. degree, and possession of a firearm during the commission of a violent crime.

On March 12-14th., 2007, the Appellant, proceeded to trial before the Honorable Howard P. King, and a jury. Appellant was represented by Stephanie Smart-Giddings, Esquire. The jury returned a verdict of guilty on the CSC 1st. degree, and kidnapping. A not guilty verdict on the Burglary 1st. degree, and not guilty of the possession of a firearm during the commission of a violent crime.

The Honorable Judge Howard P. King sentenced the Appellant to thirty years on the CSC 1st., and thirty years on the kidnapping and they are to run concurrent. Appellant's Attorney Stephanie Smart-Giddings, filed a notice of appeal on March 22nd., 2007, that was perfected.

2). An objective statement of the facts in controversy.

Appellant objects to being indicted on September 21st., 2006. Simply because Appellant was arguing whether or not the privilege of receiving an preliminary hearing and violations of due process were in question. Appellant filed an motion to quash warrants while being detained on August 23rd., 2006.

On October 10th., 2006, the Honorable Roger M. Young Sr, Circuit Court Judge, dismissed the motion, holding that the trial court did not err in refusing to quash Appellant's warrants because he was indicted before an preliminary hearing was held. See- Exhibits 1-a, 1, 2, & 3. According to preliminary clerk it is stated that an preliminary hearing was held on Sept. 15th., 2006. Preliminary hearing was held without notice to Appellant. Appellant alleges violations of the "Confrontational Clause", and Due Process. The right to face his accuser's. Former Attorney Thomas James Bell did not have any recollection to such hearing. He was relieved of his duties before the preliminary hearing supposedly had taken place.

Respondent's still alleges that the Appellant was indicted on September 21st., 2006. Appellant's motion to quash warrants was based on the S.C. Criminal Rules and Procedures. Rules # 2(a)-(b) SCRCrimp.

- (a).° If a Appellant makes a timely request for a preliminary hearing, one should be held within ten days.
- (b).° However, the hearing shall not be held if the Appellant is indicted by a grand jury.

CONTINUED:

2). An objective statement of the facts in controversy.

The Appellant attested the fact that the dates of either the preliminary hearing and the grand jury indictments are inconsistent. Appellant alleges that the indictments are invalid.

See- Exhibits P-1, in regards to probable cause statement admitted too by investigator Brian Chapman, dated April 21st., 2006.

See - Exhibit - 6 Circuit Court Judge Howard P. King, ordering the case to be tried within 120 days or the defendant will be released from Beaufort County Detention Center. Jan. 18th 2007

6). Any unusual questions or matters which should be brought
to the attention of the court.

° Whether or not the police were justified in requiring
to submit to the blood test?

° Whether or not the means and procedures employed in the taking
of his blood against his will respected relevant Fourth Amendment
standards of reasonableness? Any intrusions which are not justified
in the circumstances are made in an improper manner?

FOURTH AMENDMENT SEE:

[Gouled v. U.S.], 255, U.S. 298, 41, S.Ct. 261, 65, L.Ed. 647
(1966).

[Mapp v OHIO], 367 US. 25, 69 S.Ct. 1359, 93 L.Ed. 1782

[Boyd v. U.S.], 116, U.S. 616, 6 S.Ct. 524, 29, L.Ed. 746 (1966).

FIFTH AMENDMENT SEE:

Compelling Submission to physical examination to compel person
to submit to testing by reasonable force in which an effort
will be made to determine his guilt or innocence on basis of
physiological responses, whether willed or not, violates privilege
against self-incrimination.

Griswold v State of Connecticut, 381 US. 479, 85 S.Ct. 1678, 14 L.Ed. 2d.

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Counselman v Hitchcock, 142 US. 547, 584-585, 12 S.Ct. 195, 206,
35 L.Ed. 1110 8 Wigmore, Evidence 2252 (McNaughton rev 1961).

CONTINUED:

6). Any unusual questions or matters which should be brought to the attention of the court.

- ° Did trial court abuse it's discretion while denying Appellant's motion for an mistrial twice?
- ° Did the trial court err in ordering the Appellant's blood to be taken by reasonable force if necessary?
- ° Was Appellant's - Constitutional rights violated, claiming Fourth, Fifth, Sixth, Eighth, and Fourteenth?
- ° Did jurors hear things that they should not have heard?
- ° Did trial court err in denying the Appellant an mistrial twice when the evidence of prior bad acts was inadmissible?
- ° Was the evidence obtained illegally by police or investigator?
- ° Was trial counsel ineffective for allowing the prosecutorial misconduct, and not objecting, nor raising issues on direct appeal, to properly perserve for appellate review?
- ° Whether or not trial counsel was ineffective in failing to object to the trial court's curative instruction after the Appellant's character was put into issues twice because the instruction was not sufficient to cure the error?

CONTINUED:

6). Any unusual questions or matters which should be brought
to the attention of the court.

- ° Was trial counsel ineffective for failing to challenge the DNA testing, or failing to properly raise a defense after retaining an DNA expert witness?
- ° Was the court's in violation for the unreasonable search and seizure of Appellant's blood sample by using reasonable force?
- ° Did the PCR court abuse it's discretion in refusing to hear the claims of prosecutorial misconduct, and the due process violations?
- ° Whether or not the PCR court was in err for refusing to hear the violations of Appellant's Constitutional Amendments of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights?
- ° Did the PCR court err in making an unreasonable determination of judgment?
- ° Did a Preliminary hearing take place in defendant's case?
- ° Was the courts ruling in err, by refusing to quash the warrants, by holding that the defendant was indicted before an Preliminary hearing was held?
Ordered by the Honorable Roger M. Young Sr. on Oct. 10th 2006.

3). The legal issues included. This includes the law
applicable to cause of action and the defense.

◦ Court must instruct the jury on all essential elements of the charged offense. Without stipulation by the defense, the court may not inform the jury that an element of the charged crime has been established as a matter of law or is an issue for the court to decide. See- U.S. v. Gaudin, 515, U.S. 506, (1995).

In Keeble v. U.S., 412, U.S. 205, (1973), the Supreme Court stated; Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some elements of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.

◦ Evidence obtained by search and seizure in violation of the Fourth Amendment is inadmissible. See- Mapp v. Ohio, 367, U.S. 643 (1961).

◦ Confrontation Clause of the Sixth Amendment.

◦ Evidence of defendant's sexual character or prior bad acts was irrelevant. See- U.S. v. Crutchfield, 26, F.3d. 1098 (11th. Cir. 1994).

◦ Where defendant has not put his character or reputation in question, it is reversible error for prosecution to question or make statements about defendant's reputation.

See- U.S. v. Tran Trong Cuong, 18, F.3d. 1132 (4th. Cir. 1994).
Mitchell v. State, 298 S.C. 186, 189, 379, S.E.2d. 123, 125, (1989).

CONTINUED:

3). The legal issue included. This includes the law applicable to the cause of action and the defense.

- Exclusion of defendant's expert witness testimony was found to be in error where prosecution was permitted to elaborate its argument on the same issue expert was supposed to testify on. See- U.S. v. Van Dyke, 14, F.3d. 415 (8th. Cir. 1994).

" Ineffective Assistance of Counsel".

- Counsel was ineffective for failure to request competency hearing.
- Improper venue. See- U.S. v. Porter, 821 F.2d. 968, (4th. Cir. 1987).
- Counsel was ineffective for failure to subject prosecution to meaningful adversarial challenge, but help bolster the State's case against their client's. See-Davis v. Alaska, 415 U.S. 308 (1974). See- Florida v. Nixon, 543 U.S. 175, 125, S.Ct. 551, 160, L.Ed.2d. 565, (2004).
- Counsel was ineffective for failure to conduct pre-trial discovery or investigation. See- Goodwine v. Balkcom, 684, F.2d. 794, (11th. Cir. 1982).
- Counsel was ineffective for failing to timely file motion to suppress illegally obtained evidence.
See- Kimmelman v. Morrison, 477, U.S. 365, (1986).
See- Sikes v. State, 323, S.C. 28, 448, S.E.2d. 560, (1994).
- Counsel ineffective for failure to object to erroneous jury instruction. See- Gray v. Lynn, 6, F.3d. 265 (5th. Cir. 1993).

CONTINUED:

3). The legal issues included. This includes the law
applicable to cause of action and the defense.

- Counsel fail to raise claim of prosecutorial misconduct issue on direct appeal where prosecutor made improper statements to the media, indirect reference to defendant's failure to testify, which violated defendant's Fifth Amendment right remain silent during closing argument. See- State v. Reese, 359, S.C. 260, 271, 597, S.E.2d. 169, 175, (Ct. App. 2004). See- Edmond v. State, 341, S.C. 340, 534, S.E.2d. 682, (2000). See- State v. McDaniel, 462, S.E.2d. 882, 884, (Ct. App. 1995).
- Counsel was ineffective for failure to raise issues pertaining to the exclusionary rule. Violations of defendant's Fourth Amendment rights against any unreasonable search and seizures.
- Counsel's failure to introduce lab reports of scientific tests on semen found on the sheets produced into evidence. See- Dorsey v. Kelly, 112, F.2d. 50, (2nd. Cir. 1997). See- Pauling v. State, 503, S.C. 468, 331, S.E.2d. 606, (1998).
- Counsel was ineffective for failing to present an defense.

The Appellant, Nathaniel Johnson, Jr. #211574, a pro-se Appellant, currently at the Lieber Correctional Institution. Hereby is ordered to file his "Notice of intent to Appeal", and make a sufficient showing that there is an arguable basis for asserting that the determination by the lower courts was improper.

The lower court made an unreasonable determination denying several facts of some very important material issues that were considered waived and abandoned on appeals. The question that should be considered is, "Did the *Appellant* knowingly, intelligently, and voluntarily waived his rights to appeal"? The unreasonable determination of judgment arose out of abuse of discretion, discrimination, bias and prejudice, *denied* the right to be heard, based upon prejudging the application and not considering the merits of every issue that was alleged on the PCR application by improperly applying law. The Appellant's rights to an impartial jury and a fair trial included the rights to adequate legal assistance of counsel. The defendant's due process rights were violated from pre-trial detention when the jurors are exposed to potentially prejudicial pre-trial publicity.

The trial courts abused its discretion by allowing extensive questioning of witnesses which tainted the process of the trial, information that the jurors may have heard and its possible effects. Due Process allows the rights procedurally to the following; 1) adequate notice of appeals, 2). adequate opportunity for a hearing, 3). the right to introduce evidence or present a defense, and 4). the right to confront and cross examine witnesses against the accused. "The Due Process Clause"! Trial court erred in ordering the Appellant to be compelled to be a witness against himself. The Honorable Howard P. King, ordered the Appellant to submit to the taking of his blood by unreasonable force. Exhibit-6 Howard P. King, questioned the 14th. Circuit Solicitor's Office, "Why haven't this defendant been indicted? Judge King, ordered that this case be tried within 120 days or defendant will be released.

Appellant filed an pre-trial motion to quash the warrants claiming insufficient evidence to convict and violations of the S.C. Criminal Rules and Procedures Rule #2 (a),(b),and (c). The court erred in refusing to quash or failing to grant the Appellant an preliminary hearing. See-exhibit-Y, that of the Honorable Roger M. Young,Sr., denying and dismissing the motion holding that the Appellant does not have the rights to an preliminary hearing because the Appellant was indicted before an preliminary hearing was held. Appellant denies such allegation by clear and convincing evidence that a preliminary hearing was conducted without notice of the hearing on said date Sept.15th,2006. See-exhibit-2 that of Marta Cherena, jury trial/ preliminary hearing clerk. See-exhibit-X that of the defendant's *motion* dated Aug.23rd,2006, filed on Aug.25th,2006, and denied by the Honorable Roger M. Young,Sr.,Circuit Court Judge, on Oct.10th,2006. See-exhibit-Y. Exhibit-2 Based upon the Clerk of preliminary courts, clerk noted that an preliminary hearing was held on Sept.15th,2006, before the Appellant was supposedly indicted on said date Sept.21st,2006. Appellant was denied the due process right to face his accusers. ~~The~~ Due Process Clause. See-exhibits-1-24, A-Z, PCR application of Appellant filed on March 9th,2009, Amended application filed on June 25th,2013, an Docket sheet from the District Courts. All exhibits ~~will be~~ sent separately.

Exhibit-P1 is an Supplemental report by reporting officer CPL J.Merrill and the investigating officer LCPL Brian Chapman, of the Beaufort County Sheriff Dept. discussing the facts of this case. This officer was advised on 04-21-2006, that at this point there was not enough probable cause to keep defendant detained or to conducted an Schmerber hearing to collect DNA from defendant Nathaniel Johnson,Jr.

See- exhibit-K Notice of right to Preliminary Hearing where defendant requested that he wishes to be present at hearing. Both trial counsel and Appellate counsel were inadequate. Trial counsel failed to properly prepare for trial, failed to properly investigate, failed to prepare an defense, failed to suppress illegally obtained evidence, failed to properly raise or perserve issues for Appellate review. **Appellate** counsel was ineffective for failing to raise the issue of ineffective assistance of trial counsel, as seen in [Gray v. Greer], 778 F.2d. 350 (CA7 1985), and [Evitt v. Lucey], 469 U.S. 392, 105, S.Ct. 830, 83, L.Ed.2d. 821 (1985). Appellate counsel's failure to raise significant and obvious issues on direct appeal is viewed as deficient performance and is held liable for the claim of inadequate legal assistance of Appellant counsel. Direct appeal is known as an defendant's critical stage in his appeal. Due diligence allows the Appellant to exercise and protect his legal and constitutional rights. Appellate was ineffective for failing to raise the issues of abuse of discretion, prosecutorial misconduct, and three improper comments made during trial, during prosecutor's closing statements, and on Johnson's excercise of his Fifth Amendment rights to remain silent; 1) the first comments by the testifying officer, 2) the second testifying officer and the victim's inconsistencies of testimonies, and 3) the prosecutor's closing statements violating the "Golden Rule ".

In Appellant's case during trial, the improper comment was expressingly objected to in the trial counsel's motion for ~~Mistrial~~. Trial counsel's failure to raise the Fifth Amendment rights on direct appeal caused her performance to fall below that wide range of competence required of an Attorney in criminal cases. The improper statements were obvious on the record. See-[Doyle v. Ohio], 426 U.S. 610, 96, S.Ct. 2240 49, L.Ed.2d. 91 (1976).

Appellate counsel failed to raise the Sixth Amendment rights of the Appellant, the rights to the "Confrontational Clause", and the right to have adequate legal assistance of counsel. Appellant's 4th, 5th, 6th, and 14th Amendment rights to the S.C. State Constitution and the U.S. Constitution were indeed violated. "Materially", is the substance challenged. Appellate counsel's failure to raise the ineffective assistance of trial counsel created a ripple effect which amounted to all court appointed counsels being ineffective. Appellate counsel failed to raise the issue of prosecutorial misconduct on direct appeal. The Supreme Court has held that the Fifth Amendment prohibits a prosecutor from referring to a defendant's refusal to testify or their rights to remain silent during their closing arguments. Using an direct statement to the jury that the defendant did not testify, this type of reference at issue is clearly a constitutional violation. See-[Wainwright v. Sykes], 433 U.S. 72, 87, 97, S.Ct. 2497, 2586, 53, L.Ed.2d. 594 (1977).

Cause is established by inadequate legal assistance of counsel to properly raise and perserve issues, federal constitutional amendment issues which is the central issue of this case. Prejudice is established because the point abandonment by counsel or all court appointed counsels is a meritorious claim. Appellate counsel filed a brief which did not assert any arguable errors, and therefore, prejudice is presumed. An state law or practice that betrays a fundamental principle of justice offends the "Due Process Clause". SC. State Constitutiona violations of Article #1 section #10.

Trial counsel's failure to request an competency hearing for her client and the trial court also erred when it failed to sua sponte conduct a competency hearing. Therefore, Appellant's constitutional rights were violated both procedurally and substantively. Newly Discovered evidence dicovered in this case were discovered after fully investigating.

The ineffective assistance claim of Appellate counsel arised after fully investigating the cause for the procedural default, and the failure to raise a defective jury instruction on appeal. Trial also failed to raise the defective jury instruction issue nor did trial counsel properly ~~pre~~serve for Appellate review.

Newly Discovered evidence and Due diligence has determined that the professional misconduct of all the court appointed counsels for the Appellant in this case amounted to egregious behavior and created an extraordinary circumstance beyond the Appellant's control and may warrant equitable tolling. Counsel's ineffectiveness in failing to raise or properly p~~re~~serve issues for review, the claim of abandonment in state court should be sufficient for cause of Appellant's default.

The state court decision rested on a finding of fact that is "objectively unreasonable". The PCR court never considered the claim of the one bite of the apple by refusing to all allegation of the application. Appellant was denied the right to a full and fair hearing. Therefore, Appellant needed not to show cause and prejudice as a prerequisite for obtaining an evidentiary hearing.

Trial counsel's failure to request an cautionary instruction that such failure was highly prejudicial to her client, to the extent that the fundamental fairness of the proceedings and the conviction and sentence of the Appellant was undermined, and that had the jury been properly instructed, there may have been a strong probability that the results of the trial would have been different. Refusal to ~~consider~~ this claim will constitute an miscarriage of justice !

The Appellant was hereby scheduled for his first PCR hearing to be held on Aug.30th,2011, before the Honorable Perry M.Buckner. Appellant proceeded pro-se, but denied the right to self-representation and ~~insist that Appellant receive~~ appointment of counsel. See-exhibit-24 ordered appointed counsel Timothy M.Wogan,Esquire. There was an rescheduled hearing. See-exhibit-C along with letter of correspondence attached.

PCR counsel Timothy M. Wogan, was ineffective, deficient, and inadequate. Counsel misrepresented abandoned his client. Counsel is also being held liable for misconduct. The disciplinary counsel is currently conducting an review panel with the Commission on lawyer's conduct for violations of the SCACR Rule# 8.4. Counsel's performance fell below the standards of reasonableness. Counsel failed to seek DNA testing, failed to file an Rule #59(e), motion to alter or amend PCR application. Counsel's failure to raise the procedurally barred claim of issues being waived and abandoned, prejudice is presumed. In [Austin v. State], 305, S.C. 453, 409, S.E.2d. 395, (1991), Austin recognizes a general exception to rule of barring claims of ineffective assistance of counsel, where prior PCR counsel fails to appear or file an Rule #59(e), motion when requested, to make sure that all issues on the application is presented in the proceeding. See-[Lambert v. Blackwell], 387 F.3d. 210, 247 (3rd.Cir. 2004), only allows an otherwise procedurally defaulted or barred claim to be considered by this Court if the PCR trial counsel was inadequate for failing to raise that barred claim in the state PCR action. See[Lanier v. Lanier], 612, S.E.2d. 456, 364, S.C. 211, (2005).See-[Dennison v. State], 371, S.C. 221, 639, S.E.2d. 35, (2005). Crim.Law 1585. See[Bennett v. State], 371, S.C. 198, 638, S.E.2d. 673 (2006). Crim.Law 1178. See-[Case v. State], 277, S.C. 474, 289, S.E.2d. 413, (1982). See-[Leamon v. State], 363, S.C. 432, 434, 611, S.E.2d. 494, 495, (2005) citing S.C. Code Ann§ 17-27-80.

Miscarriage of justice exceptions! See-[Murray v. Carrier], 477 U.S. 478 (1986), thus recognized a narrow exception to the cause requirement where a constitutional violation "probably resulted, in the conviction and sentence of one who is actually innocent of the substantive offenses.

State court failed to address the Appellant's constitutional violations. But, the Appellant didn't fail to redress. Judge Brown, abused his discretion by prejudging the PCR application before the hearing ever got started by denying and dismissing the issues on the application of prosecutorial misconduct, and violations of Appellant's due process. There is clear and convincing evidence that PCR's counsel failure to file an Rule #59(e) motion to make sure that all the issues on the application are addressed in that proceedings of the PCR action. Newly Discovered evidence of the Consent to DNA testing would support actual innocence. There were no exculpatory scientific evidence by the defense that were presented at trial on the behalf of the Appellant.

The PCR court's judgment was based on an unreasonable determination of the facts in light of the evidence that were never presented as a defense and never given the opportunity to heard. Finally, for all the reasons stated, the Appellant files this notice of appeal and sufficient reasons why the Court erred in finding that Appellant's testimony at the PCR hearing was not creditable after being told by PCR counsel to only answer the questions that are being asked, while taking the witness stand. Appellant was denied the right to be heard. Court found trial counsel's testimony was creditable in err.

Respectfully submitted,
/s/ Nathaniel Johnson, Jr. #211574
NATHANIEL JOHNSON, JR. #211574