THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-002362

Joseph J. Magni, Jr., SCDC #345848 ..... Petitioner,

v.

State of South Carolina ..... Respondent.

PETITIONER'S PRO SE RESPONSE TO COUNSEL'S JOHNSON PETITION FOR WRIT OF CERTIORARI

November 24, 2015

Joseph J. Magni, Jr., #345848, MB-43
Kershaw Correctional Institution
4848 Goldmine Hwy
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Petitioner pro se

cc: Daniel Gourley, Esq
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Attorney for Respondent

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PROOF OF SERVICE

I certify that I have served the *Petitioner's Pro Se Response To Counsel's Johnson Petition For Writ of Certiorari* on the Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on November 24, 2015, addressed to the attorney of record, Daniel Gourley, Esq., Assistant Attorney General, S.C. Office of the Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

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STATEMENT

The Petitioner hereby adopts and incorporates herein the statement of facts presented by Counsel Lara Mary Caudy, Esq., as stated in the Johnson Petition for Writ of Certiorari, as if fully stated here.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel improperly coerced Petitioner into pleading guilty because he thought it was in Petitioner's best interest despite Petitioner's unambiguous desire to proceed to trial, forensic evidence tending to exculpate Petitioner, and impeachment evidence regarding the victim's statement.

STANDARD OF REVIEW

Petitioner must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Petitioner had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).

A Petitioner who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the Petitioner would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

1. Petitioner's Testimony at PCR

Petitioner was questioned by his PCR attorney, Lance Boozer, Esq., about the DNA (App. 143, lns. 16-19). Petitioner stated that Counsel Kendrick should have argued that victim's ...

DNA was not on the article of clothing that was alleged to be hers. Petitioner further stated that Counsel Kendrick told him they had his DNA (App. 143, lns. 22-23). Counsel Boozer asked Petitioner if he "wished" Counsel Kendrick would have pursued that angle and Petitioner said he believed it should have been pursued and he thought the DNA evidence would have been suppressed based on that fact (App. 143, ln. 24—App. 144, ln. 5).

During cross-examination, Assistant Attorney General, Daniel Gourley, asked if the Honorable Judge R. Know McMahon ruled on Counsel Kendrick's motion to suppress the dress, and Petitioner responded by stating, "no, he didn't," and that "he wouldn't rule on it and he said he would wait until trial" (App. 166, lns. 21-23). Petitioner stated he was put under the impression that it would be admissible (App. 166, ln. 25—App. 167, ln. 1). Assistant Attorney General Gourley asked if anyone told Petitioner if it was admissible, and Petitioner replied "no, [Kendrick] kept telling [Petitioner] we don't have any defense for the DNA so you don't have to tell somebody that something is admissible when you tell them that you don't have any defense for it. That's kind of saying it without saying it" (App. 167, lns. 2-7).

2. James Marcus Whitlark's Testimony at PCR

During examination by Assistant Attorney General Gourley, Counsel Whitlark testified their trial strategy was to cast aspersions on the forensic evidence proffered by the State (App. 170, lns. 3-4). Counsel Whitlark then testified they hired a DNA expert who confirmed the findings of the State (App. 170, lns. 18-19). Assistant Attorney General Gourley asked Counsel Whitlark if the dress was the victim's or not and he said "yeah, it was" (App. 171, ln. 13). Counsel Whitlark further clarified that, "Not according to the information I looked at, it was—it was her dress. We had it examined, of course" (App. 171, lns. 15-16).

Counsel Whitlark also testified the Honorable Judge R. Knox McMahon "did give an inclination as to what he, what his feeling was about it" concerning the DNA evidence (App. 172, lns. 1-2). During cross-examination, Counsel Boozer asked Counsel Whitlark if he recalled another woman's DNA on the dress that was not the victim's. Counsel Whitlark replied, "I do not recall that" (App. 180, lns. 19-21). When asked whether having another set of DNA on the dress would have made for another motion on the reliability of the dress before the Court, Counsel Whitlark replied "anything that casts aspersions on the certainty or not of the resulting tests certainly would have had an impact on it" (App. 181, lns. 2-8).

When Counsel Whitlark was asked directly if he saw "any basis to challenge the victim's statement" (App. 178, lns. 24-25), he replied, "[n]o" (App. 179, ln. 1).

3. Joshua Snow Kendrick's Testimony at PCR

During direct examination by Assistant Attorney General Gourley, Counsel Kendrick admitted there was a mixture of the DNA on the dress, and that victim and her mother were both excluded as contributors to the DNA mixture (App. 188, lns. 21-24). Counsel Kendrick then testified his expert did not have a good explanation for it (App. 189, lns. 1-2).

During cross-examination by Counsel Boozer, Counsel Kendrick was asked if there was any reason to argue having another person's DNA on the dress for a suppressive-motion-type setting (App. 208, lns. 11-13). Counsel Kendrick testified he did not think having another person's DNA on the dress "would have had anything to do with the suppression of it" (App. 208, lns. 15-16). He testified further that he "thought it would have been something to cross-examine their people on" (App. 208, lns. 16-17). Counsel Kendrick admitted he didn't know if he was going to use the DNA during cross-examination (App. 208, lns. 17-18).

4. Facts Supporting Petitioner's Claims at PCR

a) SLED Forensic Services Laboratory Report (June 30, 2010)

SLED produced a Forensic Services Laboratory Report DNA analysis dated June 30, 2010 in which a serology analysis was conducted. Petitioner would show this report states "buccal swabs were taken from victim. Four cuttings were also taken from a dress belonging to the victim. Cuttings are labeled 1.1 (hem area, right arm), 1.2 (near elbow area, right arm), 1.3 (bottom of neck area, front), and 1.4 (right half of skirt area, front)" (Report, pg. 1)

The results of this analysis concluded the DNA profile from the semen on items 1.1, 1.2, 1.3, and 1.4 are from an unidentified male. The DNA profile from the non-sperm fractions of items 1.1, 1.2, and 1.4 are also from an unidentified male (Report, pg. 2).

The DNA profile from the non-sperm fractions of item 1.3 is a mixture of at least two individuals. The DNA profile from the major contributor to this mixture is consistent with the unidentified male individual from the semen on item 1.3. victim is excluded as a possible minor contributor to this mixture (Report, pg. 2)

This points to (a) the DNA analysis is incorrect, (b) somebody else was wearing the dress at the time the semen was deposited or (c) victim was able to obtain unidentified male's semen through nefarious methods and deposit it on the dress. The fact that the dress did not contain victim DNA demonstrates the dress should not have been admitted into evidence and points to innocence of unidentified male.

b) SLED Forensic Services Laboratory Report (August 5, 2010)

SLED produced another Forensic Services Laboratory Report DNA analysis dated August 5, 2010 in which a serology analysis was conducted. Petitioner would show this report states "buccal

swabs were taken from victim and Petitioner. Four cuttings were also taken from the same dress allegedly belonging to the victim. Cuttings are labeled 1.1 (hem area, right arm), 1.2 (near elbow area, right arm), 1.3 (bottom of neck area, front), and 1.4 (right half of skirt area, front)" (Report, pg. 1).

The results of the analysis concluded that the DNA profile from the semen on items 1.1, 1.2, 1.3, and 1.4 are from Petitioner. The DNA profile from the non-sperm fractions of items 1.1, 1.2, and 1.4 are also from Petitioner (Report, pg. 2).

The DNA profile from the non-sperm fractions of item 1.3 is a mixture of at least two individuals. The DNA profile from the major contributor to this mixture is consistent with Petitioner from the semen on item 1.3. victim is excluded as a possible minor contributor to this mixture (Report, pg. 2).

This points to (a) the DNA analysis is incorrect, (b) somebody else was wearing the dress at the time the semen was deposited or (c) victim.....I was able to obtain Petitioner's semen through nefarious methods and deposit it on the dress. The fact that the dress did not contain the victim's DNA demonstrates the dress should not have been admitted into evidence and points to innocence of Petitioner.

c) SLED Forensic Services Laboratory Report (October 5, 2010)

SLED produced another Forensic Services Laboratory Report DNA analysis dated October 5, 2010 in which a serology analysis was conducted. Petitioner would show this report states "buccal swabs were taken from victim Jacquelyn Barnwell ("victim's mother), and Petitioner. One cutting was also taken from the same dress allegedly belonging to the victim. The cutting is labeled 1.3 (bottom of neck area, front)" (Report, pg. 1).

The results of the analysis concluded that the DNA profile from the semen of item 1.3 matches the DNA profile of Petitioner (Report, pg. 2).

The DNA obtained from the non-sperm fraction of item 1.3 is a mixture of at least two individuals. The DNA profile from the major contributor to this mixture also matches the DNA profile of Petitioner. Victim and Jacquelyn Barnwell (Victim's 's mother) are excluded as possible minor contributors to this mixture (Report, pg. 2)

All three reports were signed by the SLED Forensic Scientist, Catherine Leisy.

This points to (a) the DNA analysis is incorrect, (b) somebody else was wearing the dress at the time the semen was deposited or (c) Victim I was able to obtain Petitioner's semen through nefarious methods and deposit it on the dress. The fact that the dress did not contain the Victim's DNA demonstrates the dress should not have been admitted into evidence and points to innocence of Petitioner.

It is, therefore, the position of Petitioner that Counsel Kendrick should have pursued a final ruling on the motion to suppress the dress and DNA evidence obtained based upon the fact the State failed to prove Petitioner had sexual relations with Victim. . The existence of the DNA mixture of Petitioner and at least one other individual on the dress allegedly owned by the Victim, despite repeated forensic evidence that clearly excluded Victim as a contributor of the mixture, demonstrates Petitioner's actual innocence of the charged offenses.

The South Carolina Rules of Professional Conduct, Rule 407, SCACR, make it relatively clear it is the job of the attorney to search for all possible defenses and to use them in defense of their client. Counsel Kendrick certainly should have filed a motion to suppress the DNA evidence based on the very fact that Victim's 's DNA as well as her mother's was not on the dress, but another person's DNA was mixed with Petitioner.

5. Victim's **Statement**

Victim gave statements September 23, 2009 which can be verified as false by Petitioner's medical paperwork from Veteran's Affairs. Investigator Mauldin asked the following question, "Can you describe the instances where you performed oral sex on Mr. Magni?" the Victim answered as follows. "The first time was at a movie theater in Aiken. I also did it to him almost every other day at school. I would go to his room and we would kiss. I would perform oral sex on him and he would finger me" (Victim Statement, pg. 2). Investigator Mauldin asked the following question. "Is there anything unusual or unique about Mr. Magni's body?" Victim answers as follows. "He says that he has a scar on one of his hips but I never noticed it" (Victim Statement, pg. 5)

6. Medical Facts Disputing Victim's **'s Statements**

The reason those two statements are so vital to Petitioner's case is that if Victim had performed oral sex almost every other day like she said then she would have performed oral sex roughly 15 times if it lasted for a month. This means Victim would have been well acquainted with Petitioner's groin area. Therefore, she would have noticed a large scar approximately 6 cm in length medially to laterally from the base of Petitioner's penis where Petitioner was opened up.(Discharge Summaries, Pg 86). She would not have said Petitioner said he had a scar on one of his hips. Petitioner stated at PCR he did not have surgery on his hip. Petitioner had MRSA and had to have emergency surgery done. Petitioner further stated the surgery was right above his private area and there was a hole afterwards for an extended period of time and he had to wait for a month to go back to work. There was still a hole directly above Petitioner's penis upon returning to work. Petitioner told all of his students he had surgery on his hip (App. 147, lns. 5-25)

Victim's claims do not coincide with the medical evidence

Petitioner asked to return to work when he did due to financial reasons. Petitioner did not want to tell them he had emergency surgery directly above his penis to save his life. Petitioner understood that to definitely be inappropriate. This was when Victim heard Petitioner say he had surgery on one of his hips. If, in fact, Victim had performed oral sex on him the number of times she said she did, surely she would have noticed the scar directly above his penis. Petitioner had a picture taken of the area directly above his penis April 16, 2011 which was more than two years after his surgery and the scar still was very visible.

In light of this evidence, Counsel Kendrick certainly should have motioned to have the charges dropped against Petitioner due to the facts that if Victim did indeed have carnal knowledge of Petitioner and his private area she would have seen and reported a scar 6 cm (2.5 inches) in length from the base of his penis medially to laterally (Surgical Information, pg. 86) and her DNA would have been mixed with Petitioner's instead of another individual on a dress she says she wore.

Petitioner argues the record before this Court is clear that Petitioner "did not want to plead guilty" (App. 174, lns. 12-13). Furthermore, Counsel Whitlark testified "That was clear" (App. 174, ln. 13). Petitioner further argues the record reveals Counsel Kendrick's admission that he became "irritated" with Petitioner (App. 207, lns. 24-25). Counsel Kendrick also admitted to getting mad at Petitioner and being "pretty harsh with him" and saying to Petitioner "you need to plead guilty to this" (App. 208, lns. 8-13). Counsel Kendrick's conduct was unprofessional and unreasonable given the forensic evidence supporting Petitioner's actual innocence. Counsel Kendrick's threatening behavior reasonable induced Petitioner to change his mind about proceeding to trial, and thereby renders Petitioner's guilty plea involuntary. cf. Heiser v. Ryan, 951 F.2d 559

(3rd Cir. 1991) (An attorney who threatens to withdraw to prevent defendant from changing his mind about pleading guilty and backing out of a plea bargain, the plea could be rendered involuntary). Once Petitioner informed Counsel Kendrick that he "was ready to prove myself innocent" (App. 140, ln. 4), and that, after picking a jury, "I thought we were going to trial" (App. 139, lns. 8-9), it is improper to coerce Petitioner to plead guilty (App. 208, lns. 8-13).

The record before this Court demonstrates Petitioner's decision to plead guilty was made under the duress of Counsel Kendrick, and, therefore, Petitioner's guilty plea was involuntarily and unknowingly entered. cf. U.S. v. Marenghi, 893 F.Supp. 85 (D.Me. 1995)(Once the defendant has produced sufficient evidence to support a finding of duress, the government must demonstrate beyond a reasonable doubt defendant's actions were not the product of coercion or duress).

CONCLUSION

Based on the foregoing, Petitioner prays this Court will deny Counsel Caudy's Johnson Petition For Writ of Certiorari, and grants certiorari based upon Petitioner's Response to Counsel Caudy's Johnson Petition For Writ of Certiorari, and for any and all other relief deemed just and proper.

November 24, 2015

Kershaw, South Carolina

Joseph J. Magni, Jr., #345848, MB-43
Kershaw Correctional Institution
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Petitioner pro se

November 24, 2015

The Honorable Daniel E. Shearouse
Clerk, S. C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Joseph J. Magni, Jr., #345848, Petitioner,
v. State of South Carolina, Respondent.
Case No. 2014-002362

Dear Mr. Shearouse,

Enclosed for filing is one (1) original and three (3) copies of *Petitioner's Pro Se Response to Counsel's Johnson Petition For Writ of Certiorari.*

Please stamp clock and file these matters, and kindly return one (1) copy to me for my records. Your attention to these matters will be greatly appreciated

Thank you. Sincerely, I am,

Joseph J. Magni, Jr., #345848, MB-43
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Kershaw, S.C. 29067

Petitioner pro se

Enc: As stated above

/jjm

cc: Daniel Gourley
File

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INTER-AGENCY MAIL
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