

State Of South Carolina
In The Supreme Court

Certiorari Sumter County

Honorable George C. James, Circuit Court Judge

Bernard McFadden,

Petitioner,

vs.

State of South Carolina,

Respondent.

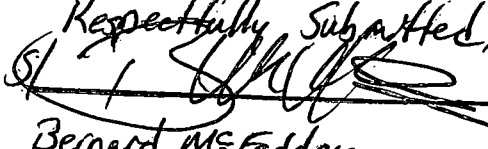
Appellate Case No. 2016-002319

Motion To Supplement Appendix

Petitioner submits the Appendix does not contain the Amended (PCR) Petition dated November 6th, 2012, and without review of it, petitioner contends he will not get a full and fair consideration of this appeal.

Therefore, he moves before this court for an order supplementing the record with the attached amended (PCR) petition. (See Attachment A.)

Wherefore, petitioner prays this Court grants this motion supplementing the Appendix.

Respectfully Submitted,


Bernard McFadden

P.O. Box 1622

Columbia, S.C. 29202

(803) 261-9477

Pro-Se Petitioner

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State of South Carolina
County of Sumter

In The Court of Common Pleas
Case #: 2011-CP-43-1952

Bernard McFadden, 199135,

Applicant-Petitioner,

vs.

State of South Carolina Warden of
Kershaw Correctional Institution,

Amended Petition, Application
With Memorandum of Law,
Affidavit In Support

Respondent.

Petitioner/Applicant's Allegations

Issue # 6: Counsel was ineffective for not filing a motion to hire a photographic/crime scene expert witness to support motion to suppress DNA evidence or explain to jury that photographs did not represent a true and correct position of crime scene evidence, the basic tool for an adequate defense, in violation of U.S. 5th, 6th and 14th Amendment rights.

Issue # 7: Counsel was ineffective for not impeaching Detective Robert Richburg and Derrick McDonald with their prior inconsistent statements or didn't object or appeal trial court's limitation on cross examination, violating 5th, 6th and 14th Amendment rights.

Supporting Facts For Issues

Facts For Issue # 6: See Facts For Issue # 1, Page 2 of 9 with 10 Pictures to original (PCR) application. Detective Irene Culick testimony is false regarding the initial location of a First Aid kit box (Compare photographs

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7, 8 and 9 with 10.) and her alleged finding of a blood droplet on the floor of the Young's convenient store. As previously discussed, drag lines of a cue tip swab on a swab swipped Newport box pack will clearly show in the colored photograph # 4; it's evenly flushed on (1) of (2) sets of lottery tickets in photograph # 3 that appears to have been manually placed there; a blood droplet appearing in photograph # 5 is substantially in the same size or diameter of a cue tip swab and is there at an angle that suggests the person who placed it there was standing on or near the elevated speckled floor, facing the solid floor, when dabbing the cue tip on the solid floor. (Review photograph # 5 with # 2.) The Applicant submits that the (a) pictures attached thereto the original (PCR) application is prima facie evidence that clearly disputes any other evidence that the crime scene wasn't staged, evidence that would have compelled any photographic / crime scene expert to conclude the same had Trial counsel Brunson filed a motion for such services to support motion to suppress DNA evidence or to explain to the Jury that photographs did not represent a true and correct copy of crime scene evidence, after court's erroneous admission.

Additionally, the Applicant directs this Court's attention to Sumter Police Department Evidence Inventory and Chain of Custody form dated 7/3/2009 where Detective Truman Duggin unsealed sealed evidence adding handwritten Item # 7, smudging-out the drag-lines in photograph # 4, altering the swab-swipped Newport box from its original condition. (See attached photograph # 4 and Exhibit D, # 51, supporting issue # 5.) Exhibit D, # 51, Item # 7, is clearly in Det. Duggin handwriting.

Law For Issue # 6:

Chain of custody verification of authentication principle requires that prosecutor seeking to introduce seized evidence must establish chain of

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custody from time items were taken to show that they are substantially the same condition as when they were seized. U.S. vs. Tarpin, 65 Fed. 1207, cert. denied 116 S.Ct. 1324, 517 U.S. 1106, 134 L.Ed2d. 476 (4th Cir. 1995). 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 presumption is operative until defendant makes a minimum showing of ill will, bad faith, other evil motivation, or present some evidence of tampering. Williams vs. Butler, 746 Fed. 431 (8th Cir. 1984). The Newport pack in photograph # 4 is not currently in that same condition because Duggin altered it by obtaining an unnecessary swab from it, rendering this evidence inadmissible that could have been explained by a photographic / crime scene expert witness. The 10th Circuit U.S. Court of Appeals stated;

"... the standard for admission of evidence is that it must be substantially in the same condition as it was when the crime was committed."

Citing United States vs. Coffman, 638 Fed. 192, 195-96 (10th Cir. 1980).

Facts For Issue # 7:

Richburg's Inconsistent Statements

First, Richburg stated while testifying McDonald told other detectives that the Applicant slouched down in his seat and became very nervous, and that all that together, the magistrate signed a warrant [Trial Transcript page 293, lines 16-25]. Trial counsel Brunson did not object to this statement as being hearsay [Trial Tr. pgs. 293-294] and did not attempt to impeach on the grounds this "slouched down" statement was admitted in Richburg's July 7th, 2009, affidavit statement, even though it was part of the reason for getting the warrant (See Exhibit D, # 40,

Applicant also alleges was did Brunson file any appropriate motions to appeal trial court's limitation on cross examination.

Supporting Issue # 5) on cross examination [Trial Tr. p. 311, lines 9 - 23] or object to court's limitation on questioning for appeal purposes. Id.

Second, Richburg's July 7th, 2009, affidavit statement is inconsistent with trial testimony. The order of who approached the crime scene 1st, 2nd and 3rd is rearranged out of the (3) people. Richburg has the store clerk Janice Billips first, Detective Irene Culick second and witness Derrick McDonald third in this affidavit (See attached Exhibit D, # 40.) However, actual trial testimony from Culick indicates Officer Capel, his lieutenant, the store clerk, the couple of people to pressure wash business and Derrick McDonald were all before her [Trial Tr. p. 192, lines 15-22].

Third, this July 7th, 2009, affidavit states witness McDonald was approached. Id. It omits the (3) witnesses Kindra Brown, Shanice Cummings and Teresa Cummings were first approached. Actual trial testimony is that (3) witnesses observed the Applicant from inside the house through the front door after hearing a knock before McDonald got there [Trial Tr. p. 178, lines 12-25; p. 179, lines 1-8].

Fourth, this July 7th, 2009, affidavit states McDonald noticed Applicant had a cut and blood on his leg with blood on his pants and shoe when the Applicant got into the truck. Id. It's inconsistent with trial testimony from McDonald indicating he saw the cut when he went out into his front yard and saw the Applicant laying out there... bleeding, had a laceration on... his right leg [Trial Tr. p. 112, lines 5-16].

Law For Issue # 7:

It is permissible to impeach witness by showing prior statements

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inconsistent with or contradictory to trial testimony. Mays vs. Mays, 229 S2d. 725, 267 S.C. 490 (S.C. 1996); see also U.S. vs. Ince, 21 F3d. 576 (4th Cir. 1994) (One method of attacking credibility of witness is to show that he has previously made statement that is inconsistent with his present testimony.) Richburg omitting the "slouched down, very nervous statement and the (3) female witnesses in his sworn-out July 7th, 2009, affidavit could have been used to impeach Richburg, but was not done by trial counsel Brunson or any objections made to appeal the trial court's limitation on cross examination. See State vs. Beckham, 513 S2d. 606 (S.C. 1999) (Exclusion of impeachment evidence of police investigator's prior inconsistent statement regarding other suspects was error in defendant's murder prosecution); U.S. vs. Stock, 948 F2. 1299, 292 U.S. App D.C. 191 (D.C. 1991) (Prior statement that omit details covered at trial are inconsistent if it would have been natural for witness to include them in earlier statement; naturalness of witness' decision to omit point may depend on nuance of prior statement's context, as well as on witness' own loquacity.) And U.S. vs. Strother, 49 F3d. 869 (2nd Cir. 1995) (Witness' prior silence regarding critical facts may constitute "prior inconsistent statement" admissible to impeach witness' credibility if failure to mention those matters conflict with that which is later recalled.)

Affidavit of Bernard McFadden,
#199135, Supporting Petition /
Application

Personally Appeared Before Me, one Bernard McFadden, 199135, who is being duly sworn, deposes and states:

- 1) That I have subscribed the foregoing petition / application.

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2) That I know the content thereof, alongwith attached (10) pictures and Attachments A and B.

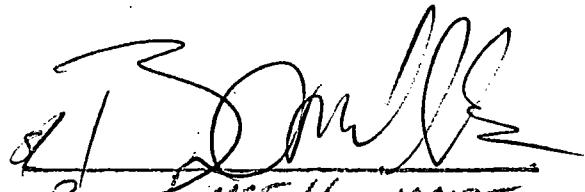
3) That it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attached in this petition / application.

4) And that the matters and allegations therein, with all the attached (10) pictures and Attachments A and B thereto set forth, are true.

Further Affidant, Sayth Not.

Sworn And Subscribed Before Me
This 6 day of November 2012

Catherine A. Arreola
Notary Public For South Carolina



My commission expires My Commission Expires February 22, 2018

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Case #09072555

AFFIDAVIT
STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

3rd person, 2nd person, 1st person on the scene

On 7-02-2009 at approximately 2330hrs Mr. Brian Gibson called Law Enforcement in reference to a possible Burglary at the Young's Food Store that is located at 940 E Liberty Street in the City of Sumter. Gibson stated that when he arrived at the store to pressure wash he noticed that the front door had been broken. When officers arrived on scene it was confirmed that a Burglary had been committed. The manger responded to the scene and told officers that approximately 480 dollars worth of cigarettes and 143 dollars worth of lottery tickets were taken. Detective Culick was notified and responded to the scene for processing. While processing the scene Detective Culick discovered that the person that committed the Burglary had cut themselves and blood was found inside the crime scene both on the floor and on several packs of cigarettes. While on scene officers were approached by a witness that lived in the area of the store and told officers that while he was at his residence he was approached by an unknown black male that asked him for a ride to the "south side" of town. The witness told officers that he took the subject to Olive Street and dropped him off. He also told officers that when the subject got into his truck he noticed that he had a cut on his leg and had blood on his shoes and pants. He stated the when he dropped the subject off on Olive Street that the subject gave him several packs of cigarettes and told him that his name was Bernard and that people called him the cigarette man. The witness was asked to come to the Law Enforcement Center where he gave an oral, recorded, statement to Detective Litaker.

Detective Richburg was assigned the Burglary case and had prior knowledge that Bernard McFadden had been arrested for committing a Burglary at the Corner Pantry that is located at the intersection of Loring Mill Road and Wise Drive. Richburg was able to create a photo lineup which contained a picture of McFadden and five other individuals that contained similar characteristics and facial features.

On 07-07-09 at approximately 0900 hrs. the witness responded to the Law Enforcement center and met with Detective Richburg. The witness was the shown the photo lineup that was made with McFadden's picture in it. The witness then positively identified McFadden as being the person that came to his house and asked for a ride.

Sworn to and Subscribed before me

This 7th day of July, 2009

[Signature]
Signature of Judge (L.S.)

5:02

[Signature]
Affiant

Exhibit D, # 40
Supporting Issue # 5

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Proof of Mailing
Case #: 2011-CP-43-1952

The undersigned hereby certifies that a true copy of the attached matter has been mailed to the person(s) listed below by depositing a properly - addressed - stamped A) envelope in the U.S. Mail this 06th day of November, 2012; such matter being: Letter Enclosing Amended Petition, Application With Memorandum of Law, Affidavit In Support Dated November 1st, 2012, For Filing with Sumter County Clerk of Court and Serving on Assistant Attorney General Megan E. Harrigan:

- i) Charles T. Brooks, III
The Brooks Law Office, LLC
P.O. Box 3512, Sumter, S.C. 29151

A) This date is inconsistent with the 10/25/2012 business date on face of envelope.

Sworn And Subscribed Before Me
This 6 day of November, 2012

Catherine A. Amerer
Notary Public For South Carolina
My commission expires December 22, 2018

[Signature]
Bernard McFadden, 199135
Plaintiff pro se

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Bernard McFadden
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