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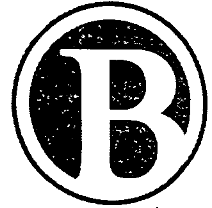

September 11, 2018

VIA U.S. MAIL
Court of Appeals, South Carolina
Clerk of Court
1220 Senate Street
Columbia, SC 29201

RECEIVED
SEP 19 2018
SC Court of Appeals

Re: *State of South Carolina v. Archie M. Hardin*
Case No.: 2015-000516

Dear Sir/Madam:

Enclosed please find a copy of the *Petition For Rehearing* in the above-referenced matter. This was drafted by Mr. Hardin. I have courtesy copied him on this correspondence. Please feel free to correspond directly with him on this matter.

Please call our office if you have any questions or concerns.

Sincerely,

Daniel C. Boles
BOLES LAW FIRM, LLC

Enclosures: Stated
cc: Archie Hardin (via U.S. Mail)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
Maite Murphy, Circuit Court Judge

STATE OF SOUTH CAROLINA, RESPONDENT

Archie M. Hardin, Petitioner

RECEIVED
SEP 19 2018
SC Court of Appeals

AAppealate Case No. 2015-000516

Petitioner For Rehearing

Pursuant To Rule 221 (a)

Archie M. Hardin
Lieber Corr. Inst.
P.O. Box 206
Ridgeville, SC 29472

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ISSUE PRESENTED

Whether the Appeal Court erred in ruling that the Trial Court did not err in denying the suppression of the evidence due to lack of subject matter jusdiction?

STATEMENT

On September 8, 2014, an Orangeburg County Grand Jury indicted Petitioner for three(3) counts of kidnapping, armed robbery, ABHAN, and possession of a weapon during the commission of violent offense. On February 23, 2015 Petitioner proceeded to pretrial to which proceeded into the 25th day of February, 2015 to which was the day Petitioner proceeded to stand trial to which lasted until February 27, 2015. Petitioner was tried before the Honorable Maite Murphy. Breen Stevens and Doug Mellard represented Petitioner. The jury convicted Petitioner. Judge Murphy sentenced Petitioner to thirty(30) years, concurrent and five(5) years consecutive of the thirty(30) years concurrent sentence for possession of a weapon during the commission of a violent offense. On ________________, the Court of Appeals dismissed Petitioner's appeal. Daniel Carson Boles represented Petitioner. This petition follows.

ARGUMENT

The Appeal Court erred in ruling that the Trial Court did not err in denying the suppression of the evidence due to lack of subject matter jusrisdiction.

Factual Background

On May 16, 2014, Respondent through Corporal Cain acted without probable cause by violating Petitioner's Fourth Amendment Right to be secure in Petitioner's person by illegally seizing Petitioner's person via photograph without a warrant in relation to an armed robbery to which Petitioner did not match the description. R.44,2-4,25-R.45,5,R.62,10-13. The apparent deficient performance of both Trial Counsels in failing to object and move the Court to quash the indictment brutally ablates Petitioner's equal protected Due Process Rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. This error is plain and obvious as such it is an error to which creates error of Constitutional dimensions.

On February 25, 2015 Petitioner proceeded to trial for three(3) counts of kidnapping, armed robbery, abhan, and possession of a weapon during the commission of a violent offense. R.142,5-12. Both Trial Counsels were aware of their duty to object and move the Court to quash the indictment before the jury was sworn, nevertheless due to their failure to perform their duties Petitioner was subjected to the malicious prosecution of Respondent and the deceptive unfairness of their witnesses' testimony and also the Trial Court who prejudicially

denied Petitioner of the reasonable possibility of irreparable mistaken identification. R.170,13-R.171,11,R.189,8-R.192,8-15, R.208,20-R.209,23,R.210,13-23,R.212,11-25,R.220,23-R.221,10, R.224,12-17,R.226,19-R.227,24,R.228,7-16. Both Trial Counsels were aware that the Respondent lacked critical key evidence to prove their case, nevertheless they both failed to object to the false evidence just as they both failed to object to the improper jury instruction to which created a prejudicial variance to which was furtively requested by Respondent who plain and obviously misstated material evidence. R.511,8-R.514,16,R.522,1-R.524,11,R.525,1-13,R.526,3-R.527,4,18-R.528, 16,R.530,4-9,R.662,17-20,R.672,20-22,R.673,18-21,R.693,14-R. 695,1. Thereafter both Trial Counsels failed to object to the sentencing. R.716,3-R.717,15.

THE APPEAL COURT'S RULING

Without a warrant entailing the person or things to be seized, Respondent through Corporal Cain illegally seized Petitioner and held Petitioner in custody for two(2) days without a warrant. R.31,14-16. Thereafter the fruit of an apparent illegal search and seizure should have been suppressed but was not due to both Trial Counsels failure to advise Petitioner of his Fifth Amendment Rights not to be a witness against himself The Trial Court abused its discretion by denying the suppression of the evidence based upon Petitioner's testimony and by permitting the jury to convict Petitioner on charges not in the indictment. R.39,14-R.41,21,R.74,21-R.75,15,R.79,9-R.80,9,R. 339,24-R.341,R.693,14-R.695,1

DISCUSSION

The Appeal Court erred in ruling that the Trial Court did not err in granting the suppression of the evidence due to lack of Subject Matter Jurisdiction. First, Corporal Cain had no basis or warrant to take Petitioner's picture, therefore Petitioner had a reasonable expectation of privacy in his person. U.S.C.A. Fourth. State v. Jackson (S.C.2005) 364 S.C. 329,613 S.E.2d374. To constitute unfair prejudice, photographs must create an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. even if evidence is relevant under the theory of res gestae, prior to admission the Trial Judge should determine whether its probative value clearly outweighs any unfair prejudice. Criminal Law Keys 338(7) and 363. In the present case the Court found the identification by the photo illegally taken of Petitioner by Respondent through Corporal Cain unduly suggestive. R.341, 2-6

> "Regarding the next issue is the identification issue. Obviously, the picture was shown to the victim is unduly suggestive. The Court disfavors such type of photo identification in that it is unduly suggestive."

Second, Corporal Cain did not have sufficient evidence to establish probable cause to question Petitioner. R.608,2-R.611. Under the 4th Amend. it unequivocally states that no warrant shall issue, but upon probable cause, support by oath or affirmation, and particularly describing the place to be search, and the person or thing to be seized. The police did not have

probable cause to seize Petitioner's photograph. Therefore, Trial Counsels performed deficiently in failing to object and move the Court to quash the indictment pursuant to the admission of Respondent through Corporal Cain under the 4th Amend. R.62,10-13.

"Before the Defendant was arrested, I took a photo of him with my county phone and sent that photo to Lieutenant

> Shumpert, who then called me back and advised me that the subject had been identified by the victims?"

Trial Counsels deficient performance severely prejudiced Petitioner and their performance does fall below reasonable probability that, but for Counsels unprofessional error, the result would have been different. Cherry v. State, 325,S.C. 115,117-118,386 S.E.2d 624,625(1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Johnson v. State, 325,S.C.182-186,480 S.E.2d 733,735(1997). Corporal Cain and the State's witness was extremely suspect in relation to credibility. Had this evidence been suppressed, the outcome of Petitioner's trial would have been different.

Third, Trial Counsels were aware that if an indictment is challenged as insufficient or defective, a defendant must raise that issue before the jury is sworn and not afterwards. Code 1976,§§ 17-19-20 17-19-90. State v. Young,243 S.C.187,133 S.E. 2d 210(1963) (Challenge directed to the sufficiency of the

indictment rather than the jurisdiction of the Court to try the offense charged need to be raised by motion to quash before the jury was sworn). A direct review of R.615,13-616,10 clearly shows Trial Counsels improperly moving for a direct verdict. see S.C.Code Ann.§ 17-17-90(2003)("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn not afterwards."). However, a defendant may for the first time on appeal raise the issue of the Trial Court's jurisdiction to try the class of case of which the defendant was convicted. State v. Ervin, 333 S.C.351(1998) 510 S.E.2d 220.(Ervin did not object at trial to the amendment of the indictment).

Fourth, Respondent being of a pervertedly wicked mind furtively requested the prejudicial variance hand of one is the hand of all to which the abusive Trial Court charged to the jury. R.662 17-20,R.691 10-R.692,9,R.693,14-R.695,1. A defendant in a criminal case is entitled to be tried only on the charges set forth in the indictment. S.C.Code Ann.§ 17-19-10(1976), State v. Perry, 87 S.C.535,70 S.E.304(1911)(An offense should be so plainly stated in the indictment as to enable the Court looking alone to the indictment and the verdict to impose the sentence prescribed by law"). A direct review of R.273,1-14 reveals the indictment(s) failing sufficiently to apprise Petitioner of the variance intended to be charged. The test of sufficiency of an indictment is whether or not it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be pre-

pared to defend. S.C.Code Ann.§ 17-19-20(1976);State v. Tabory, 262 S.C.136,202 S.E. 2d 852(1974). See Munn,292 S.C. at 499,357 S.E. 2d at 462. The Supreme Court held amendment deprived the Trial Court of subject matter jurisdiction. See also State v. Beachum, 288 S.C.325,342 S.E.2d 597(1986)(Subject to certain minor exceptions, Trial Court lacks subject matter jurisdiiction to convict defendant for offense when there is no indictment charging him with that offense when jury is sworn).

The Fifth Amendment to the United States Constitution provides for a right to indictment by grand jury. U.S.Const.Amend. V; United States v. Fletcher, 74 F.3d 49,53(4th Cir. 1996). ("When a defendant is convicted of charges not included in the indictment, an amendment has occurred which is per se reversible error"). As the record reflect Petitioner had no notice of the intent to charge hand of one is the hand of all or criminal liability. This surprised element incorrectly broaden the charge and hindered Petitioner's preparation of his defense and exposes Petitioner to the danger of a second prosecution for the same offense. See Fletcher, 74 F.3d at 53.(The Supreme Court stated "a variance in the indictment violates a defendant's rights only if it prejudices him. This occurs only when the variance either, surprise[(s) the defendant] at trial and hinder(s) the preparation of his defense, or...expose(s) him to the danger of a second prosecution for the same offense.") Id.(Citations omitted).

Both Trial Counsels were aware that the indictments alleges that Petitioner engaged these crimes by himself according to the language charged and their failure to object and move the

Court to quash the indictment under Petitioner's vaunted due process rights further ablated Petitioner's 4th, 5th, 6th, 8th, and 14th Amendments. Trial Counsels failed to exercise the "skill, judgment, and diligence of a reasonably competent defense attorney." Both Trial Counsels were aware that there was no preparation for a defense against criminal liability or hands of one is the hands of all and their failure to object and move the Court to quash the indictment at this critical stage of trial also falls below reasonable professional norms and there is a reasonable probability that, but for Counsels' unprofessional errors, the result would have been different. Cherry v. State, 300 S.C.115,117-118,386 S.E.2d 624,625(1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C.182,186,480 S.E.2d 733,735(1997).

Type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to Counsel's performance as a whole; specific errors and omissions may be the focus of a claim of ineffective assistance as well. U.S.C.A.Const.Amend.6.

Even when no theory of defense is available, if decision to stand trial has been made, Counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt. R.656,16-22,R.658,2-6,R.672,20-22,R.673,18-21. Generally speaking, only the most egregious misconduct, such as bribery of Judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the Court. Relief is granted for extrinsic fraud on the theory

that because fraud prevented a party from fully exhibiting and trying his case. The subordination of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitutes extrinsic fraud. Trial Counsels was clearly cognizant that Respondent was effectively precluding Petitioner from having his day in court.

Petitioner aver the actions of the Court which includes Trial Counsels and Respondent are the actions which constitutes extrinsic fraud. R.656,16-22,R.658,2-5,R.672,20-22,R.673,18-21.

In McClesky v. Zant, the Court again described the "fundamental miscarriage of justice" exception as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." 499 U.S.at 495,111 S.Ct.,at 1471(quoting State v. Powell, 428 U.S.465,491-492,N.31,96 S.Ct.3037,3051 N.31,49 L.Ed 2d 1067(1976).). Again, had the evidence been suppressed, the outcome of Petitioner's trial would have been different.

Claims of ineffective assistance of counsel are generally not cognizable on direct appeal. See United States v. King,119 F.3d 290,295(4th Cir. 1997). Rather to all for adequate development of the record, a defendant must bring his claim in a 28 U.S.C §2255 (2000) Motion. See id., United v. Hoyle, 33 F.3d 415,418(4th Cir.1994). An exception exists when the record conclusively establishes ineffective assistance. United States v. Richardson,195 F.3d 192,198(4th Cir.1999) King,119 F.3d at 295.

Before an Appellate Court can correct an error not raised

at trial, there must be (1) error, (2) that it is plain, and (3) that it affects substantial rights, and if all three conditions are met, an Appellate Court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of Judicial proceedings. Criminal Law Key 1030(1)."A felony conviction-like-ambition must be made of sterner stuff." Shakespeare, Julius Caesar, Act III, Scene 2.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of vacating or reversing Petitioner's conviction and granting him a new trial.

Respectfully Submitted,

s/ [signature]
Petitioner

This _____ day of ~~August~~, ~~2016~~

PO Box 381
Charleston, SC 29402

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SEP 19 2018

SC Court of Appeals

Court of Appeals, South Carolina
Clerk of Court
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