THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No.: 2018-000646

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Lewis Chisolm #196380,..... Appellant,

vs.

State of South Carolina, .....Respondent.

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BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
PURSUANT TO WHITE V. STATE

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**STATEMENT OF THE CASE**

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Court of General Sessions. Petitioner was indicted during the September 2015 term, the Beaufort County Grand Jury indicated Applicant for criminal sexual conduct with a minor, second-degree. (2015-GS-07-1529). Jared Newman, Esq. represented Petitioner. Assistant Solicitor Julie Kate Keeney prosecuted the case. Applicant plead guilty as indicted before the Honorable Eugene C. Griffith, Jr. On November 9, 2015, Judge Griffith sentenced Petitioner to imprisonment for ten years.

A timely Notice of Appeal was filed. The South Carolina Court of Appeals affirmed Petitioner's conviction on June 6, 2016.

## STATEMENT OF FACTS

Petitioner filed a Post-Conviction Relief Application on July 11, 2016 and later amended his application on May 30, 2017, alleging that trial Counsel was ineffective for the following additional reasons:

a. Failure to adequately investigate the case.

b. Failure to adequately explain the State's evidence against Applicant.

c. Failure to investigate and/or use the fact that the Police threatened to take his son away from him unless he admitted to the crime.

d. Failure to adequately investigate and use inconsistent descriptions by the victim of the alleged incident.

e. Failure to adequately present and argue the Motion to suppress the statements at pre-trial hearing. However, there is no evidence that a Pretrial Motion to Suppress was ever held.

3. That the Applicant is informed and believes that his guilty plea was not freely, voluntarily.

4. That the Applicant is informed and believes that he lacked sufficient knowledge to enter the plea knowingly or intelligently.

A Jackson v. Denno, 378 U.S. 368 (1964) hearing was held prior to trial. At issue was a written statement taken after the Petitioner had contacted an attorney. (App. p. 13, lines 8-11) The investigator, John Kelleher, testified at the hearing. He testified that Petitioner was read his Miranda rights (App. p. 16, lines 5-9) Investigator Kelleher testified that he

remembers the Petitioner saying that he was going to contact Bruce Marshall, an attorney. On the 18th of September, 2013, he was contacted by Mr. Marshall, via telephone. Investigator Kelleher stated that he was informed that Mr. Marshall was not representing Petitioner, but that he was requesting a meeting with the Detective and Petitioner. He did in fact meet with Mr. Marshall and the Petitioner. (App. p. 24, lines 1-23)

Detective Kelleher testified that he later went to the Petitioner's residence and at that time, the Petitioner gave him a description of what happened and confessed to the crime. (App. p. 30, lines 1-25, p. 31, lines 1-6)

Counsel makes his argument that Petitioner did invoke his right to Counsel when he brought counsel to the second interview. That Officer Kelleher did initiate the investigative conversation on September 19, 2013 which produced the written statement that implicated the Petitioner. (App. p. 55, lines 11-24)

The Court finds that the first two statements were given freely and voluntarily after warning and that the Petitioner waived his rights (App. p. 57, lines 13-15) The Court denies the Motion to Quash the statement. (App. p. 76, lines 1-4) This is based upon the fact that he was not in custody at any time. That there were no warrants at the time of the questioning therefore there was no threat to be carried out regarding arresting the Petitioner. That the Detective stated that he was not going to try to take the son and that he didn't want to get DSS involved and that the Detective never threatened the Petitioner with anything. (App. p. 77, lines 8-24)

## ARGUMENT

**Did the Lower Court err in not granting Petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974)?**

The Court found that the record established that Petitioner did receive a full Appellate review of his guilty plea conviction. The Court found that the Petitioner was not deprived of his

right to a Direct Appeal and that Plea Counsel was not ineffective in his representation on Appeal. (App. p. 201, 202)

Plea counsel states that he did speak with Petitioner after the plea about an Appeal (App. p. 158, lines 16-18) Plea Counsel did state that he filed an Appeal for the Petitioner and that he did it as *pro se*. That his contractual relationship with the Petitioner did not include an Appeal. (App. p. 159, lines 11-17) He also indicated that he filled out an Affidavit of Indigency, had is signed and filed with the Clerk of Court and the Court of Appeals sent a copy to Appellate Defense. (App. p. 159, lines 16-23)

Plea Counsel testified that he received a letter from the Court requiring an explanation pursuant to Rule 203. (App. p. 160, lines 1-11) It was his understanding that the Appeal was dismissed for failure to provide an explanation pursuant to the Rule (App. p. 160, lines 12-19) Counsel does admit that he had difficulty understanding the form so it was his guess that the Petitioner, out of frustration never sent this form in. (App. p. 161, lines 8-12)

The Petitioner would assert that the court erred in not granting a belated Appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974). The issue being that the Petition had asserted his Sixth Amendment right to counsel during the second interview. That Detective Kelleher knew that he had asserted this right and that the third interview was in violation of the Sixth Amendment rights.

Prior to trial, a Jackson v. Denno was held. There were three different statements given by the Petitioner in this case. The third was basically a confession to the crime. Before the second interview, there is testimony at the Jackson v. Denno hearing by Detective Kelleher, that he was contacted by an attorney Bruce Marshall and it appears that Mr. Marshall requested a "sit down" at a meeting that the Detective was having with the Petitioner. (App. p. 24, lines 8-10)

The Detective does admit that he met with Mr. Marshall at 2:00 p.m. and that the Petitioner was present and came in voluntarily (App. p. 24, lines 19-23) The detective also indicates that he was told by Mr. Marshall that he was not representing Petitioner at that time, but was there inquiring and gathering information. (App. p. 24, lines 13-14) On cross examination by Plea Counsel, Detective Kelleher testified that Petitioner indicated that he was inquiring about Attorney Marshall. That he didn't know their arrangements nor their discussion. (App. p. 33, lines 9-16)

At issue in this case, is an oral and written statement taken after the Petitioner had contacted an attorney. This is the third statement and the only statement in which the Petitioner implicated himself in the crime. Counsel argues that the oral statement with the contemporaneous written statement on September 19, 2013 is inadmissible as an Edward's violation. Counsel argues that Edwards v. Arizona,, 451 U.S. 477 (1981) while it invokes custodial statement would stand for the proposition that once counsel is requested, that any further contact by law enforcement or questions by law enforcement would have to cease.

Plea Counsel also argues the implications of State v. Corns, 426 S.E.2d 324 (1992) during the interview the officer informed that Petitioner that he had a warrant for his wife and that his wife would be arrested and that the Department of Social Services could take his children. (App.p. 74, lines 9-13)

The Court finds that the Edward's case, since he was not in custody does not apply. That the case of Carnes is a different situation. That there was no warrant in the case at hand and therefore denies Counsel's Motion to Quash. (App. p. 75, lines 1-25 p. 76, lines 1-4)

Plea Counsel testifies "to me it was very clear that Mr. Chisolm had clearly to the Sheriff's Department to Kelleher, had asserted his Sixth Amendment right to counsel, whether in

custody or not." (App. p. 157, lines 20-25 p. 158, lines 1-2) Counsel further states when asked if he believed that this was an appealable issue, he stated yes. (App. p. 158, lines 10-12)

The Petitioner would assert that continued questioning initiated by law enforcement was a violation of the Petitioner's right to counsel.

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December 17, 2018

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Secretary to Tommy A. Thomas, Esq., certify that I have served a copy of a Petition for Writ of Certiorari, Petition for Writ of Certiorari pursuant to White v. State, and Brief in Support of Petition for Writ of Certiorari pursuant to White v. State by depositing a copy of it in the United States Mail, postage prepaid and the return address clearly shown on said envelope to:

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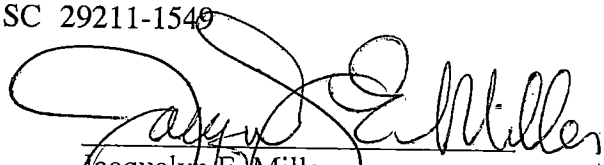

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