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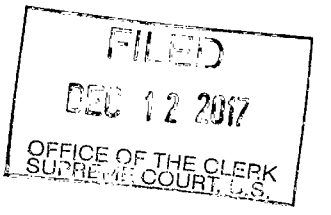

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TYRELL DRANE,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

By: James T. Drane, #632699
Petitioner, In Pro-Per
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STATEMENT OF JURISDICTION

Petitioner Drane seeks the review of the July 18, 2016 plea withdrawal opinion of the Michigan Circuit Court which was upheld by the Michigan Supreme Court. On September 12, 2017, the Michigan Supreme Court issued an order denying Petitioner's motion for rehearing. People v. Drane, 910 N.W.2d 104 (2017). The Michigan Supreme Court is the state court of last resort and has decided an important federal question in a way that conflicts with another state court of last resort or of a United States Court of Appeals. Rule 10(b).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

REFERENCE TO OPINION BELOW

The Michigan Supreme Court and Michigan Court of Appeals ORDERS have been reproduced as Appendix A and B, respectively, and neither contain an opinion.

The 17-page opinion of the Michigan Circuit Court appears at **Appendix E Plea Withdrawal Hearing** held on July 18, 2016. (emphasis added)

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the **assistance of counsel** for his defense. (emphasis added)

Michigan Const. 1963, Article 1, § 20

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than one year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor; to have **assistance of counsel** for his or her favor; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal. (emphasis added)

INTRODUCTION

This case is about a man who -- while going through custody and divorce cases -- was accused of sexual assault by the opposing parties to those family court cases. Although these related facts do not directly relate to the ineffective-assistance-of-counsel issue presented, they are being presented to provide insight to the Petitioner's state of mind and support the rationale to proceed to trial in spite of the alleged inpenetrable evidence.

STATEMENT OF THE CASE

Conviction and sentence

On September 3, 2015, Petitioner James Tyrell Drane pled guilty to one count of first-degree criminal sexual conduct (CSC) for case no. 14-9496-01-FC and one count of third-degree CSC for case no. 15-7208-01-FC in Wayne County Circuit Court before Honorable Megan Maher Brennan. On September 28, 2015, Judge Brennan sentenced Mr. Drane to concurrent sentences of 14 to 25 years and 10 to 15 years, respectively, in the Michigan Department of Corrections pursuant to a sentence agreement.

This case consists of two seperate alleged incidents. First, the 2008 CSC first-degree involving the mother of his child where charges were filed over six years later in 2014. Second, the CSC third-degree involving an alleged stranger who, as it was revealed during the plea withdrawal hearing, is the friend and coworker of Mr. Drane's exwife (Plea Withdrawal Hearing, 7/18/2016, p. 16 line 1-7). This case was alleged to have occurred in 1999 but charges were not filed until 2015. Both cases were filed following alleged DNA cold-case hits.

2008 CSC 1st with his child's mother

A. Defense and Background

The record reveals that Mr. Drane would have proceeded with a consent defense with respect to the 2008 case involving the mother of his child, Brittani Brooks (404b Motion Hearing, 2/27/2015, p. 9 lines 16-19). The charges arose when Mr. Drane met Ms. Brooks outside a night club. Ms. Brooks was pregnant and living with another man at the time. She got into Mr. Drane's car, and had what Mr. Drane has always maintained was consensual intercourse. Ms. Brooks told her live-in boyfriend that Mr. Drane raped her and he called police. Neither Ms. Brooks or police made Mr. Drane, or his family, aware of the rape allegation. Instead, per Ms. Brooks the two coparented their child together for five to seven years, until his arrest. According to Ms. Brooks, Mr. Drane was active in his son's life and she and Mr. Drane worked out their own child support arrangements, without the need for a court order (See Pre-sentencing Investigation Report hereafter PSIR).

Mr. Drane clearly explained a defense of consent with respect to Ms. Brooks in his description of the incident:

> The defendant reported he recalled having sex with the victime and her having concern with him getting semen on her clothing as she was in a relationship with another man and did not what her clothes to smell. The defendant stated he and the alleged victim has had a constant sexual relationship which extended to 2012. Mr. Drane stated their sex would always be initiated by the alleged victim and always started with her performing fellatio on him. The defendant stated he does not understand Ms. Brooks allegations especially since after 2008 they continued to have contact with each other outside of the realm of raising their son and these allegations were never made known to him or his family by her, her family, or law enforcement.
> (See PSIR, 9/24/2015, p. 6, ¶ 3, 4)

B. Timing issues with Ms. Brooks's 2008 claim

Although Mr. Drane's defense to Ms. Brooks's claim was consent there were three facts that conflict with the timing of Ms. Brooks's accusation.

First, Ms. Brooks indicated two times on the record that Mr. Drane raped her on August 7, 2008, in his gold Honda Accord (Prelim Exam, 10/31/2014, pp. 6.24-25 and 20.12-13), however this vehicle was not purchased and registered by Mr. Drane until November 21, 2011 (Vehicle Registration Report, Apx. H).

Second, Ms. Brooks requested a personal protection order, 12-105037-PP, on April 16, 2012, against Mr. Drane where she mentions three seperate false allegations. The oldest claim was that in 2006 Mr. Drane hit her with his car, but there was no mention of a 2008 rape claim. Notably, Ms. Brooks testified falsely that Mr. Drane would contact her during the period before the hearing, however Mr. Drane provided an audio recording showing that Ms. Brooks would use their child to contact Mr. Drane, then insist on talking to Mr. Drane.

Third, Mr. Drane initiated custody case 12-108213-DC against Ms. Brooks and divorce/custody case 13-113356-DM against Mrs. Drane on July 3, 2012, and November 3, 2012, respectively, for withholding his children from him. In response, Ms. Brooks and Mrs. Drane made a joint police report and child protective services complaint alleging: (1) that Mr. Drane oldest child raped the child of Mr. Drane and Ms. Brooks a year prior asserting Mrs. Drane was not home, and (2) that Mr. Drane sexually assaulted Mr. and Mrs. Drane's 2-year-old daughter for a two year period (See Police and CPS Reports, 6/11/2013). Both accusations were dismissed and attributed to the on going custody disputes. But again, there was no mention of the 2008 rape of Ms. Brooks, even amongst other rape claims, and like the 2008 rape claims the rapes of Mr. Drane's children had no history of the claims. They were sudden claims of long ago, with no history.

Instead, per Ms. Brooks the two coparented their child together for five to seven years, until his arrest. According to Ms. Brooks, Mr. Drane was active in his son's life and she and Mr. Drane worked out their own child support arrangements, without the need for a court order (See PSIR).

1993 CSC 3rd -- Exwife's coworker and friend

A. Background and defense

The record shows that Mr. Drane would have asserted a complete innocence, mistaken identity, and alibi defense with respect to Ms. Milas. The CSC 3rd case arose when Ms. Milas accepted a ride from a stranger while she was walking to high school, and that stranger sexually assaulted her inside a vehicle. When asked whether Mr. Drane was the assailant at the preliminary examination, Ms. Milas stated "he looks drastically different" (Prelim Exam, 8/28/2015, p. 8 line 1).

Mr. Drane's statements to the presentence report investigator make clear his continued assertions of mistaken identity and alibi with respect to Ms. Milas:

> The defendant denied the possibility that he was available to commit the assault against victim, Kortos Milas. He stated he was at school at Michigan Technological University in Houghton, MI. He stated he was celebrating an anniversity of his fraternity, Phi Beta Sigma. The defendant also stated there is something wrong with the DNA testing as he does not understand how his DNA is associated with sexual assaults. (PSIR, p. 6)

B. 1999 CSC 3rd DNA Weaknesses and Gaps

Although defense counsel stipulated to lab reports regarding DNA evidence, there were some weaknesses.

First, Mr. Drane's DNA was only found on Ms. Milas's panties (Sorenson DNA Report, 11/17/2014), which were washed after the sexual assault and prior to

evidence collection per Preliminary Complaint Report (Prelim. Report, 3/1/99). Apx. G

Second, the report shows "a **minimum** of three contributors, **at least** one ... male," for both the panties and **vaginal** swab. But the vaginal swab show an **inconclusive** result, and the panties do show Mr. Drane's DNA but states "Korto Milas is an **assumed contributor** to this mixture." (Sorenson DNA Lab Report, 11/17/2014, pp. 2-3, emphasis added). (Apx. F)

Last, there was no population-match statistical data in the report.

C. Summary Timeline

- Jan 2012 - Mrs. Drane files divorce (12-101012-DM). (Apx. N)
- Apr 2012 - Friend of Court recommends equal parenting time, $200 per month.
- Apr 2012 - Mrs. Drane and Ms. Brooks both allege that Mr. Drane physically abuses his children.
- Apr 2012 - Ms. Milas's rape kit sent for analysis/match (Sorenson Report). (Apx. F)
- Jul 2012 - Mr. Drane files custody case against Ms. Brooks (12-108213-DC) Apx. O)
- Mar 2013 - Mrs. Drane requests to move out-of-state with daughter (See Text Mesg. with Christina Drane, 3/10/2013, pp. 24, 25). (Apx. R)
- Mar 2013 - Ms. Brooks's rape kit sent for analysis/match.
- Jun 2013 - Mrs. Drane requests friend of Court and Mr. Drane to take daughter out-of-state for her training at her new job (CPS report, 6/12/13 Apx L)
- Jun 2013 - Mrs. Drane and Ms. Brooks make rape-of-children allegation (See Police Report and CPS Report, 6/11/2013). (Apx. K and L)
- Jul 2013 - Mrs. Drane violates court ordered parenting time, takes daughter out-of-town without permission, and abandons divorce.
- Aug 2013 - Mrs. Drane completes training and moves to California with daughter.
- Nov 2013 - Mr. Drane files for divorce (13-113356-DM) gets full custody. (Apx P)
- Jul 2014 - Mrs. Drane order by family court to allow Mr. Drane to get child from California.
- Aug 2014 - Brooks-rape-case warrant issued 2days before scheduled pick up.
- Aug 2015 - Milas-rape-case warrent issued 1month before scheduled pick up.

Plea Pressure and involuntariness

On September 2, 2015, the court went through the guidelines indicating the minimum sentence is over 23 years, but Judge Brennan stated she does not have to follow those guidelines:

> The Court: Okay. That's 23 years and nine months as the top of the minimum. And the maximum could be 23 and a half - well, these are advisory guidelines, you know, they're not required anymore. He should know that too as well. There's new case law that says that guidelines are not - you know, I don't have to made a compelling reason to deviate, they're just advisory.
>
> Prosecutor: And it's a life offense.
>
> Defense: Your Honor, I'v indicated to Mr. Drane -
>
> The Court: And I'm not trying to - I'm just telling him the law. He needs to know.
>
> (Pretrial Hearing, 9/2/2015, p. 5 12-24)

Plea Acceptance

The following day Mr. Drane accepted the plea offer, but he had some difficulty when entering his guilty plea; at one point during the factual basis he asked the trial court "what am I supposed to say?" (Plea Transcript, 9/3/2015, p. 14). Mr. Drane did enter guilty pleas in both cases. By the time of sentencing real problems emerged due to Mr. Drane's continued assertions of innocence.

At the sentencing hearing, Mr. Drane asserted that his incarceration had kept him from being able to adequately participate in researching his case, and he insisted that the statements that he had provided to the probation agent in the PSIR were true. But he explained to the court that he was only pleading guilty because trial counsel advised him that the DNA evidence was so strong that the jury would disbelieve his defense in both cases:

> I have to plead guilty because I'm being told that the case against me is not something I can possibly win. So yes, I pled guilty. But the statements that I made were - I mean, I don't want to spend the rest of my life in jail.
>
> (Sentencing Transcript, 9/28/2015, pp. 12-13)

The trial court was concerned enough about the assertions of innocence contained in the PSIR, as well as Mr. Drane's in court statements, indicating that he felt he had no choice but to plead guilty, that it briefly adjourned the proceedings and offered plea withdrawal at that time. Mr. Drane declined plea withdrawal. (Sentence Trans., at 14-15)

Plea withdrawal efforts

Appellate counsel filed a motion for plea withdrawal at Mr. Drane's request, asserting that trial counsel had rendered ineffective assistance by failing to consult an expert to review the lab reports such that she could not adequately understand or advise Mr. Drane regarding the possible defenses at trial thereby rendering his plea involuntary and unknowing, and failing to obtain the data underlying the opinions and conclusions contained within the lab reports. Appellate counsel advised the trial court that an initial review of the case already raised a number of concerns with respect to the DNA in Ms. Milas's case, including: (1) complex mixture DNA, (2) touch DNA, (3) sperm fraction DNA, and (4) an unidentified DNA donor. These concerns were exacerbated by the fact that the discovery provided by trial counsel has not contained the data underlying the DNA conclusions and opinions contained in the lab report. Appellate counsel requested and received the lab reports from the state police. However, when it was discovered that those lab reports were incomplete and did not contain the underlying data, appellate counsel made a second request. That request was denied, and the state police refused to identify the unidentified DNA contributor.

Plea withdrawal denial

The trial court denied the motion for plea withdrawal, holding that Mr. Drane had planned to present a consent defense for the Milas case, rendering the DNA evidence irrelevant for three reasons.

First, the trial judge indicated that Mr. Drane, in the February 27, 2015 motion hearing, proceeded with a consent defense in the Brooks case and that somehow covered the Milas case. But the Milas case was not filed until August 5, 2015, six month prior to this motion hearing (Plea Withdrawal Hearing, p. 15 lines 15-21).

Second, the trial judge indicated that consent was "reasonable" because Ms. Milas works with the "exgirlfriend and mother of his child" (Plea Withdrawal Hearing, p. 14 lines 1-7). A current working relationship has no relevance to a 1999 sexual assault.

Third, the judge indicated that defense counsel stipulated to the DNA (PWH, p. 14 lines 7-9), however per the August 28, 2015 preliminary examination, defense counsel stated, "Your Honor, as to the stipulation, I'll agree to the stipulation **for exam purposes**" (Prelim Exam, 8/28/2015, p. 47 line 12, 13)

Additionally, Mr. Drane was charged with Criminal Sexual Conduct in the third-degree (person 13-15) due to Ms. Milas being 15 years old on March 1, 1999. Because of her age, consent was not an available defense.

Current request

Petitioner Drane seeks a Writ of Certiorari and now asks this Honorable Court to grant plea withdrawal, or at a minimum, remand for an evidentiary hearing on the ineffective assistance of counsel (to include testimony of a DNA expert and trial counsel) so that a record may be made as to whether trial counsel had investigated the DNA evidence well enough to determine that it could not be challenged, as trial strategy.

ARGUMENT

I. PETITIONER DRANE HAS A DUE PROCESS RIGHT TO PLEA WITHDRAWAL BECAUSE HIS PLEA WAS UNKNOWING AND INVOLUNTARY, AND ENTERED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Issue Preservation

Appellate counsel preserved this issue through a timely filed motion for plea withdrawal, or at a minimum, a Ginther hearing, which was denied by the trial court. In order to preserve the issue of ineffective assistance of counsel for appellate review, a defendant may request an evidentiary hearing on the issue in a post conviction motion. People v. Ginther, 212 N.W.2d 922 (1973).

Standard of Review

This Court reviews a trial court's ruling on whether to grant plea withdrawal for an abuse of discretion. People v. Martinez, 861 N.W.2d 905 (2014). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while trial courts findings are reviewed for clear error." Id. at 646-47.

Whether a defendant has been denied effective assistance of counsel presents a mixed question of fact and constitutional law. People v. Leblanc, 640 N.W.2d 246 (2002). A judge first must find facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. Id. On appeal, this Court reviews the lower court's findings of fact for clear error. Id. Questions of constitutional law are reviewed de novo. Id.

Where defendant asserts that he was denied the effective assistance of counsel with regard to his decision to plead guilty, the dispositive issue is whether defendant tendered the plea voluntarily and understandingly. People v. Armisted, 811 N.W.2d 47 (2011).

Argument Summary

Mr. Drane could not enter a knowing plea where neither he nor trial counsel understood the inherent weaknesses in the DNA evidence that the prosecutor intended to use a trial, rendering trial counsel unable to advise him of the relevant issues and chances of success at trial. Additionally, trial counsel's failure to investigate the DNA evidence deprived Mr. Drane of his constitutional right to present a defense. The record reflects that Mr. Drane would have presented a mistaken identity and alibi defense with respect to Ms. Milas. As a result, the trial court clearly erred when it denied the request for a Ginther hearing on the basis that trial counsel lack of understanding of the DNA evidence was inconsequential because Mr. Drane would have asserted a consent defense.

Applicable legal standards and frameworks

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Mich. Const. 1963, art. 1, § 20; U.S. Const., Am. VI. This right to the effective assistance of counsel extends to defendants convicted by plea. Lafler v. Cooper, 132 S.Ct. 1376, 1387; 187 L.Ed.2d 398 (2012).

The test for ineffectiveness consists of two prongs, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable

probability that the outcome would have been different. People v. Trakhtenburg, 826 N.W.2d 136, 143 (2012).

A defendant must also overcome a presumption that the actions of trial counsel were attributable to trial strategy, but " '... a court cannot insulate the review of counsel's performance by calling it trial strategy.' Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." People v. Chapo, 770 N.W.2d 68 (2009). The failure to reasonably investigate a possible defense can constitute ineffective assistance of counsel. People v. McGhee, 709 N.W.2d 595 (2005).

In order "[t]o make a reasoned judgment about whether evidence is worth presenting, one must know what it says." People v. Ackly, 870 N.W.2d 858 (2015) quoting Couch v. Booker, 632 F.3d 241, 246 (CA 6, 2011). Thus, part of a court's finding of trial strategy must be a determination whether the "strategic choices [were] made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support limitations on investigation. Counsel always retains the duty to make particular investigations unnecessary." People v. Strickland, 466 U.S. 668, 690-91, 104 S.Ct. 2052 (1984).

While reasonable strategic choices made by counsel are "virtually unchallengable," where counsel "fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy." Workmand v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992) (citations omitted); see also, O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994) (failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was no warranted); Miller v. Anderson, 255 F.3d 455, 457-59 (7th Cir. 2001) (vacated by 268 F.3d

485 as a result of settlement and withdrawal of request for rehearing by the state) (where defendant claimed not to have been at the scene of the crime, counsel's failure to consult with a DNA expert, to explore whether through DNA evidence defendant could prove his theory, constituted ineffective assistance); Demarest v. Price, 905 F.Supp 1432, 1447-50 (D.Colo. 1995) (counsel's "failure to investigate the state's case against [the defendant] or consider various defense theories rendered his representation deficient within the meaning of Strickland"). Because an understanding of the evidence is necessary, in some instances, especially where an expert's assistance is critical to the defense. Ackley, 497 Mich. at 393. See also, Harrington v. Richter, 562 U.S. 86; 131 S. Ct. 770, 788; 178 L.Ed.2d 624 (2011) ("criminal cases will arise where the only reasonable and available defense strategy requires consulation with experts or introduction of expert evidence, whether pretrial, at trial, or both"); People v. Kelly, 186 Mich. App. 524, 526 (1990) ("A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses.")

In Michigan, a trial counsel's failure to consult an expert witness constitutes ineffective assistance when it deprives a defendant of a substantial defense. People v. Payne, 285 Mich. App. 181, 190 (2009).

In Trakhtenburg, supra, the Michigan Supreme Court found that trial counsel had rendered deficient performance when she failed to perform adequate investigation to support a defense, including the failure to interview a witness in the credibility contest. 493 Mich. at 54.

Application of legal standards to the case at bar

Miller v. Anderson, supra, consisted of a factually similar situation to the case at bar. The defendant claimed that he had not been present at the scene of a sexual assault and murder. The state presented an expert witness who

testified that pubic hair found on the victim's thigh almost certainly was Miller's. Miller's lawyer did not consult with a hair expert, but simply cross-examined the state's expert. However, in post-conviction proceedings, appellate counsel for Miller retained a far more experienced hair expert than the state's and this expert testified that the hair was like the victim's hair and unlike Miller's hair. The prosecution in Miller's trial had also presented DNA evidence that it admitted was inconclusive. The seventh circuit found that had Miller's lawyer called his own DNA expert and other experts, they would have testified not that the evidence was inconclusive but that it provided absolutely no basis for supposing Miller was present at the scene of the crime. The court explained that while in some cases cross-examination alone of the government's expert might be sufficient, it simply was not sufficient where cross-examination alone could weaken the prosecution's expert evidence, but not to the point of denying it the essential corroborative value for which the prosecutor was using it. The court explained that a trial counsel's assertion of "tactic [or strategy] will not prevent it from being used as evidence of ineffective assistance of counsel."

While Petitioner Drane's case did not go to trial, he raises the same issues as those in Miller, of ineffectiveness in trial counsel's failure to investigate and properly prepare a defense, such that he felt pressured into entering a guilty plea dispite his continuous assertions of innocense. Like the defendant in Miller, he maintained his innocence. As was the case in Miller, the government was preparing to use the DNA evidence which, at least in part, the government acknowledged through the lab report was "inconclusive." As was the case in Miller, the government was preparing to use the DNA evidence to bolster the testimony of Ms. Milas, who had already admitted under oath that Mr. Drane "look[ed] drastically different" from the person who sexually

assaulted her. Like the ineffective trial counsel in Miller, here trial counsel apparently failed to consult with any independant defense expert in the area of DNA. Because trial counsel failed to consult an independent DNA expert, she advised Mr. Drane that the DNA evidence against him was strong, when it was infact (at least in some part) inconclusive while other parts were "assumed." However, unlike the case in Miller, here the trial court refuses to grant Mr. Drane a Ginther hearing on the issue of ineffective assistance of counsel, at which he would have been able to question trial counsel regarding investigation evidence through an expert, as it related to strategy.

The prosecutor argues that a guilty plea waives all claims related to the government's ability to prove factual guilt. But this misses the point. Only a knowing and voluntary plea is valid and thus only a knowing and voluntary plea can waive those issues related solely to factual guilt. Mr. Drane's assertion is not that the plea is flawed because the government's evidence is but that the plea is flawed because he was never advised of the flaws in the government's evidence, and thus could not know his possible defenses for trial. As a result, Mr. Drane's plea was unknowing and involuntary.

Defendants are entitled to the effective assistance of counsel through the plea process. And where a defendant continuously asserts his innocence to all who will listen, part of that effective assistance must be to understand the evidence, an attorney cannot possibly advise his client regarding the defenses possible at a trial. As was the case here, a lack of understanding of the evidence might cause counsel to advise his client that a particular line of defense is foreclosed by the evidence, when in fact the evidence leaves that defense open. That is what happened here. Mr. Drane should be allowed to proceed to trial, or at least to determine whether or not to enter a plea with full knowledge and understanding that an attack on the DNA evidence could be a

part of his defense. Mistaken identity is a defense that Mr. Drane should have been advised that he could raise, in spite of the DNA evidence. But, because of a lack of understanding of DNA evidence, trial counsel never advised Mr. Drane that it was a defense that he could raise.

Here, the age of the DNA evidence, references to DNA mixture, references to touch DNA, references to sperm fraction evidence, and that the evidence was washed after the alleged assault but prior to evidence collection, all indicate the need for further investigation and consultation with an independant DNA expert. Mr. Drane's decision to plead guilty was not motived out of actual guilt, but instead out of trial counsel's advice that the evidence against him was so strong that he could not win at trial. (Sentencing Transcript). Ms. Milas stated Mr. Drane "look[ed] drastically different," when asked to identify him as her rapist at the preliminary examination. This left DNA evidence the strongest evidence of a link between her and Mr. Drane. Mr. Drane was told that a jury would not believe his consent defense related to Ms. Brooks, because it would determine he was lying in the case against Ms. Milas, because the DNA evidence was so strong. Thus, the mischaracterization and lack of understanding of the DNA evidence in Ms. Milas's case, impacted the knowingness and voluntariness of the pleas in both cases.

The trial court made a factual error in denying Mr. Drane's request for a Ginther hearing when it held that the DNA evidence would be irrelevant because the proposed trial defense was consent. Mr. Drane planned to raise a consent defense in the CSC 1st-degree case. He was led to believe by trial counsel that a defense of mistaken identity was foreclosed in the CSC 3rd-degree case, but had he known such a defense could be raised, he would have raised it. Instead, he was led by trial counsel to believe that there was no chance of success at trial because of the DNA evidence.

Mr. Drane requests a Ginther hearing on his claim of ineffective assistance of counsel, so that the testimony of counsel may be taken regarding why trial counsel did not consult an independant DNA expert in this case and so that the opinion of a DNA expert and as to her advise regarding a mistaken-identity defense.

CONCLUSION

For these reasons, Petitioner Drane asks this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

By: _____

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Date: December 11, 2017